*CoA # 31574-6-III*



No. 89468-0

**IN THE SUPREME COURT**

**OF THE STATE OF WASHINGTON**

---



Dan Barrett, Jr. *Respondent*

*vs*

Dan Barrett, Sr., *Appellant*

---

# PETITION FOR REVIEW

---

Dan Barrett, Sr.
*Petitioner, pro se*
P.O. Box 361
South Prairie WA 98385
253-273-1110

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

### Cases



### Statutes and Rules

## *A. Identity of Petitioner*

Daniel Barrett, Sr. asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

## *B. Court of Appeals Decision*

The decision of the Court of Appeals for which review is requested is entitled "Order Denying Motion to Modify Commissioner's Ruling. It was filed on 16 September 2013. A copy of the Commissioner's Ruling is attached **[appendix A]**; a copy of the denial is also attached **[appendix B]**.

## *C. Issues Presented for Review*

> Did the Kittitas County superior court properly have jurisdiction over the subject matter of this cause when the cause was active & pending in Pierce County Superior Court at the time of initial filing in Kittitas County?
>
> Is the jurisdiction determination affected when, prior to the filing in Kittitas County Superior Court, Respondent had sought to be awarded intervenor status in the Pierce County cause number and that intervenor status was granted? Does that constitute an express admission that any interest Respondent might have in the custody matter would be encompassed by intervenor status?

## *D. Statement of the Case*

This case has been before the appellate courts multiple times. The initial appeal decision was entered on 4/29/08 under appeal # 25303-1-III **[appendix C]**. This decision was a split decision, affirming the custody

decisions and reversing the fee awards. Inexplicably, the opinion ordered Barrett Sr. to pay appellate attorney fees of Barrett Jr.

The remand resulted in a second appeal. The appeal was resolved on a commissioner's ruling of a motion to affirm which was entered on 9/19/11 under appeal # 29045-0-III **[appendix D]**.

The remand resulted in the instant (third) appeal. Barrett Sr. sought direct review in the Supreme Court which transferred the appeal to Division Three. At the time of transfer, Respondent Barrett Jr. had filed a motion to affirm in the Supreme Court. Division Three treated it as an active motion of that court and scheduled it before a commissioner. The ruling was entered on 7/16/13. A motion to modify was denied on 9/16/13.

### *E. Argument Why Review Should be Accepted*

#### General Introduction

In a nutshell, review should be accepted because the results in this case are disrespectful to the Supreme Court as an institution. Its strong unambiguous precedent is apparently being disregarded in favor of a policy of finality. The results of this case carry a significant threat of being used as a template to undermine the reforms of the 1987 Parenting Act.

This Court should preserve and protect its authority by accepting review and rendering a just result.

## Authority & Conditions Governing Petition for Review

RAP 13.4(b) states:

> **Considerations Governing Acceptance of Review.** A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

These standards are alternative. Fulfillment of any single one qualifies the petition for review for acceptance. The instant case fulfills elements (1) and (4) and thus qualifies for review by this court.

## Arguments re Jurisdiction

Jurisdiction is a word that covers many types of legal concepts. There is subject matter jurisdiction, personal jurisdiction, in rem jurisdiction, to name just a few. Closely related to those terms is authority to act, which describes the limits of courts or tribunals, and standing, which describes the limits of persons to be parties in a particular legal cause.

## Argument re Subject Matter Jurisdiction

Subject matter jurisdiction is generally understood to mean the scope of the tribunal, expressed as the authority of a tribunal to act. Precedent on this point is well-defined and has sharp edges:

> Under the priority of action rule, the trial court that first obtains jurisdiction is the court in which this

> matter will normally proceed. [cite omitted]. SSI contends the court that acquires jurisdiction is the court in the county in which both filing and service are first completed. We disagree. *The applicable court rule and statute are unambiguous. Both provide that a civil action is commenced by filing or by service of the summons and complaint*. CR 3; RCW 4.28.020. Once an action is commenced, "the court is deemed to have acquired jurisdiction and to have control of all subsequent proceedings." RCW 4.28.020.
>
> "CR 3 clearly and unmistakably provides that an action is commenced today by service of a summons or by the filing of a complaint." [cite omitted]. RCW 4.28.020 clearly provides that the court is deemed to have acquired jurisdiction from the time an action is commenced. Therefore, the King County court acquired jurisdiction over this matter when the County filed its complaint. The fact that SSI completed both service and filing first does not confer jurisdiction on the Kittitas County court. [cite omitted]. [emphasis added]
>
> **Seattle Seahawks v. King County, 128 Wn.2d 915, 916-917, 913 P.2d 375 (1996)**

Whether one takes the view that the original petition submitted for dissolution of the marriage or the documents submitted by Barretts Junior seeking intervenor status is the determining act, the result is the same -- Pierce County Superior Court long ago acquired jurisdiction over the case.

Barretts Junior implicitly acknowledged this by seeking intervenor status in Pierce County as well as also seeking affirmative relief under that cause number. Nonetheless, less than a month later they commenced an action in Kittitas County Superior Court. Appellant Barrett Senior challenged the court's jurisdiction but was rebuffed. The court accepted Barrett Junior's view that it was a mere venue issue and that the Pierce County action was abandoned.

**Seattle Seahawks** clearly holds that this fact situation in this appeal is ***not*** a venue issue, despite the court's reasoning and Barrett Junior's assertion to the contrary:

> First, a determination of proper venue would require this court to consider disputed issues of fact that have not been presented to a trial court. Second, the underlying purpose of the priority of action rule is to determine which trial court has jurisdiction to control the proceedings. *A motion for a change of venue must be brought before the King County court*. [cite omitted]. *Finally, our consideration of the venue issue on an appeal from Kittitas County would encourage future litigants who are unhappy with their adversary's chosen forum to file an action in a different county and bring their venue arguments directly to this court*. [emphasis added]
>
> **Seattle Seahawks, at 917-918**.

The proper view is to follow the priority of action rule. The trial court was clearly wrong and the Kittitas County Superior Court activity is ultra vires. Lest the point be lost, it must be emphasized that **Seattle Seahawks** followed and clarified existing precedent on this issue:

> In Washington, cases may be consolidated pursuant to CR 42(a), which provides in part:
>
> > When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the action; it may order all the actions consolidated;
>
> This rule provides the procedure for consolidation of cases "pending before the court." Only if the various counties' superior courts are viewed as a single superior court of the State of Washington would cases pending in superior courts of different counties be "pending before *the* court," thus authorizing consolidation under CR 42(a). Neither the state constitution nor the statutes creating the superior courts support such a

> characterization. Both the constitutional provisions and the statutes pertaining to superior courts refer to multiple courts. See Const. art. 4, §§ 1, 5 ("The judicial power of the state shall be vested in . . . superior courts . . .. There shall be in *each* of the organized counties of this state a superior court . . ."). (Italics ours.) See also, e.g., RCW 2.08.030 ("The superior courts are courts of record . . .."). (Italics ours.) Under the language of the constitution and the statutes, there is no single superior court. Actions pending before the superior courts of different counties are not "pending before *the* court."
>
> **American Mobile Homes v. Seattle-First, 115 Wn.2d 307, 312-313, 796 P.2d 1276 (1990)**.

Further in the same opinion, it states:

> We agree with the federal courts that have considered this question that *to permit a court to divest another court of jurisdiction over a case pending in the second court has the potential to create chaos in our court system*. This is because to allow one superior court this much control would ignore the practical considerations venue brings to a lawsuit. It would also ignore the principles of venue determination recognized in our statutes, court rules, and case law. Therefore, *we hold that a superior court may not transfer to itself a case which is pending in another county*. [emphasis added]
>
> **American Mobile Homes, supra, at 316**.
>
> *[T]he court which first gains jurisdiction of a cause retains the exclusive authority to deal with the action until the controversy is resolved*. The reason for the doctrine is that it tends to prevent unseemly, expensive, and dangerous conflicts of jurisdiction and of process. [cite omitted] [emphasis added]
>
> **American Mobile Homes, supra, at 317**.

Clearly, the Kittitas County Superior Court never had authority to assume plenary jurisdiction under this precedent by "transfer[ing] venue to itself" regardless of the manner in which it accomplished this.

## Argument re Statutory Jurisdiction & Standing

Standing to pursue a third party custody action is provided by RCW 26.10.030, which states in subsection (1):

> Except as authorized for proceedings brought under chapter 13.34 RCW, or chapter 26.50 RCW in district or municipal courts, a child custody proceeding is commenced in the superior court by a person other than a parent, by filing a petition seeking custody of the child in the county where the child is permanently resident or where the child is found, *but only if the child is not in the physical custody of one of its parents or if the petitioner alleges that neither parent is a suitable custodian*. In proceedings in which the juvenile court has not exercised concurrent jurisdiction and prior to a child custody hearing, the court shall determine if the child is the subject of a pending dependency action. [emphasis added].

Petitioner Barrett Jr. knew at the time of filing the petition that the named children were not authorized to be any place other than with their father. The petition did not allege that the father abandoned the children nor did it allege that both parents were unfit. It did not cite to any statute that could permit him to keep children to which he had no legal claim of custody. Instead, the petition merely alleged that father had committed multiple crimes of violence against the children over an extended time period but with no police reports or medical records for injuries allegedly sustained by the children due to the supposed actions of the father.

Petitioner knew at the time of the filing of this matter in Kittitqas County that the matter was properly in the venue of Pierce County Superior Court and that the Pierce County Superior Court had entered a parenting plan governing the children who are named in this action.

Thus, at the time that Petitioner filed in Kittitas County, he knew that another superior court had already taken cognizance of the parenting of the children. In fact, Petitioner had sought intervenor status in the Pierce County action, and the request was granted. For some reason known only to Barrett Jr., he decided to forum shop in Kittitas County.

It is important to note that Petitioner provided false and misleading information to the Kittitas court in the initial pleadings. Petitioner failed to inform the court that he had voluntarily submitted himself to the jurisdiction and authority of the Pierce County Superior Court for the purposes of litigating a claim regarding his siblings. He falsely claimed that the Pierce County action was not active when he knew that to be a false statement.

Most importantly, Petitioner knew that if Pierce County had ceased being a proper or convenient venue, the sole proper method of moving the subject matter to Kittitas County was to file a request to change venue in Pierce County under the existing cause number in that venue.

Nothing in chapter 26.10 RCW authorizes a filing of a third party custody action when the children are being concealed from the legal custodian and are under the authority of another court. Petitioner never had standing to bring this action. Because Barrett Jr. lacked standing, which is a condition precedent, the Kittitas County Superior Court could not properly take cognizance of the matter irrespective of general plenary or statutory authority.

The precedent and caselaw of this Court have been ignored by the Kittitas County Superior Court under a view of the law specifically dis-

credited and deconstructed in **Seattle Seahawks**, as quoted earlier herein, and bafflingly allowed to stand by Division Three.

This Court should send a strong message that its opinions are neither advisory nor optional by granting review.

## Argument re Application of Troxel to this Matter

In 1998, this Court issued its opinion in **Custody of Smith**.[1] The case was appealed to the U.S. Supreme Court under the title of **Troxel v Granville**[2] and that Court affirmed this Court. Germane to this case is the following language from **Troxel**:

> The liberty interest at issue in this case — the interest of parents in the care, custody, and control of their children — is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, . . . we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own."
>
> . . .
>
> [T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.
>
> . . .
>
> Section 26.10.160(3), as applied to Granville and her family in this case, unconstitutionally infringes on that fundamental parental right. The Washington nonparental visitation statute is breathtakingly broad. According to the statute's text, "[a]ny person may petition the court for visitation rights at any time," and the court may grant such visitation rights whenever "visitation may serve the best interest of the child."

---

[1] 137 Wn.2d 1
[2] 530 U.S. 57 (2000)

> §26.10.160(3) (emphases added). That language effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review. Once the visitation petition has been filed in court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference. Section 26.10.160(3) contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests. The Washington Supreme Court had the opportunity to give § 26.10.160(3) a narrower reading, but it declined to do so.
>
> **Troxel v Granville, 530 U.S. 57, 65, 66-67, (2000)**.

Arguably, that failure to give a narrower reading is a crack through which this case has fallen. Barrett Sr. asserts that Barrett Jr.'s non-parental custody petition to wrest custody of his siblings from their father could not have prevailed under **Troxel** if had it been styled as a visitation petition. It is absurd to consider that it can succeed as a custody petition under the **Troxel** standards.

## Argument re Custodial Interference Aspect of This Matter

There is another aspect that has been actively hidden in plain sight by the actions using non-parental custody statutes. Barrett Jr. enticed and concealed his siblings from their father with the active approval of their mother or vice versa. ***This is a crime in Washington***:

> (1) A relative of a child under the age of eighteen or of an incompetent person is guilty of custodial interference in the first degree if, with the intent to deny access to the child or incompetent person by a parent, guardian, institution, agency, or other person having a lawful right to physical custody of such person, the relative takes, entices, retains, detains, or conceals the child or incompetent person from a parent, guardian, institution, agency, or other person having a lawful right to physical custody of such person and:
>
> (a) Intends to hold the child or incompetent person permanently or for a protracted period; or
>
> . . .
>
> (2) A parent of a child is guilty of custodial interference in the first degree if the parent takes, entices, retains, detains, or conceals the child, with the intent to deny access, from the other parent having the lawful right to time with the child pursuant to a court-ordered parenting plan, and:
>
> (a) Intends to hold the child permanently or for a protracted period; or
>
> . . .
>
> (4) Custodial interference in the first degree is a class C felony.
>
> **RCW 9A.40.060**

It is obvious that Respondent's own statements in his initial pleadings are a voluntary admission that he committed the crime of custodial interference. Not to put too fine of a point on it but Barrett Sr. is fairly certain that the civil courts do not exist to create a judicial endorsed alibi for criminal activity.

Had **Troxel** been obeyed, the improper result obtained by Barrett Jr. herein would have been impossible to pull off. While it is doubtful that anyone could have foreseen the use of the statute to cover up a crime, the

reality now is that the published opinion (appeal # 25303-1-III) implicitly provides apparent authority to any person who desires to interfere with the proper custody of a relative's children. The current posture of this matter clearly condones keeping children concealed for an extended period and then to petition a court for a custody order based on that time period.

This Court can, and should, end that possibility by accepting review and reversing all of the Division Three rulings which make it possible.

### *F. Conclusion*

As described and argued herein, this Court should accept the Petition for Review, and reverse all of the decisions of the Court of Appeals.

***Respectfully submitted:***

10/16/13 Dan Barrett

date Dan Barrett Sr., *Petitioner pro se*

# *Appendix A*

The Court of Appeals
of the
State of Washington
Division III



| | | |
|---|---|---|
| In re the custody of: | ) | |
| | ) | |
| B.J.B. and B.N.B., | ) | COMMISSIONER'S RULING |
| | ) | NO. 31574-6-III |
| DANIEL BARRETT, JR., and CARRIE BARRETT, | ) | |
| | ) | |
| Respondents, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| DANIEL BARRETT, SR., | ) | |
| | ) | |
| Appellant. | ) | |

Daniel Barrett, Sr. appeals a Kittitas County Superior Court order and judgment entered after remand. He contends: (1) the Kittitas Superior Court did not have jurisdiction in this matter because a custody action was still pending in Pierce County and Daniel Barrett Jr. and Carrie Barrett had intervened in the Pierce County cause of action; (2) the court abused its discretion by imposing a child support obligation solely upon one parent when there was no evidence that the other parent had her parental

rights terminated; and (3) the court erred by awarding attorney fees when there was no evidence of need or ability to pay. The decision of the trial court is affirmed.

The facts and procedural posture of this matter are set forth as follows. Daniel Sr. and Carmelita Barrett were married in 1979 and they had seven children. In 1997, they filed for divorce in Pierce County. Carmelita was awarded custody of the children. In 2001, Daniel Sr. moved to modify the parenting plan. Since Carmelita was late to the hearing a default order was entered which awarded Daniel Sr. custody of the minor children. After the order was entered, Daniel Sr. went to Carmelita's residence to take custody of the minor children. While there, there was an altercation and Daniel Sr. shot Carmelita's boyfriend. Daniel Sr. was arrested and charged, but eventually acquitted of any crime arising from the shooting. However, a permanent restraining order was entered that prohibited him from having contact with Carmelita and any of their minor children.

In May of 2003, BJB and BNB moved in with their brother Daniel Jr. and his wife Carrie. As set forth in the undersigned's September 19, 2011 ruling in Cause No. 29045-0-III, on January 27, 2005, the Puyallup Tribal Court granted Daniel Barrett Jr. guardianship of BJB and BNB. One month later, Daniel Sr., the father of BJB and BNB, received by default proceedings in a Pierce County dissolution action a parenting plan over BJB and BNB. Daniel Jr.'s moved to intervene in the Pierce County action; that motion was granted and he petitioned for non-parental custody. However, shortly thereafter, he abandoned this non-parental custody.

On September 26, 2005, Daniel Jr. filed another non-parental custody petition in Kittitas County where the children resided with him. On October 24, 2005, an adequate cause hearing was held in Kittitas County on the matter. During this hearing, Daniel Sr. challenged the jurisdiction of the Kittitas County Superior Court, but the challenge was denied.

After trial in Kittitas County, Daniel Jr. was granted non-parental custody of BJB and BNB. Daniel Sr. appealed this decision. (Court of Appeals Case No. 25303-1-III). On appeal, Daniel Sr. did not assign error to the Kittitas Court's decision on the issue of jurisdiction or venue. On April 29, 2008, this Court affirmed the trial court's determination of custody and mandated the case.

On March 5, 2010, Daniel Sr. moved to vacate the Kittitas County order arguing Kittitas was barred from assuming subject matter jurisdiction in this matter, and thus any and all orders entered should be void pursuant to CR 60(b)(5) and the Kittitas County action dismissed with prejudice. The Kittitas County Superior Court denied the motion stating that it was frivolous because:

> RCW 26.10.030 requires that non-parental custody actions be brought in the Superior Court where the child(ren) are permanently resided or where they are found. At the time of the filing of the non-parental custody Petition in Kittitas County, the children were residents of Kittitas County. In addition, Respondent challenged venue of the Kittitas County Superior Court at the initial Hearings held in regards to the Adequate Cause hearing held on October 24, 2005.

CP 57-58.

Daniel Sr. then appealed (Appeal Cause No. 29045-0-III) the Kittitas court's refusal to vacate all prior orders, contending that the court erred in holding that the change of county courts was a mere venue issue rather than a jurisdictional issue. On September 19, 2011, the undersigned issued a ruling, affirming the trial court, concluding that the Kittitas County Superior Court properly had venue and jurisdiction to decide the matter. Daniel Barrett Sr. did not move to modify that decision.

On January 30, 2012, Kittitas County Superior Court entered a decision awarding Daniel Jr. and Carrie Barrett reasonable attorney fees and ordered Daniel Sr. to pay $850 per month child support. Daniel Sr. appealed this January 2012 order directly to the Washington State Supreme Court, which transferred the matter to this Court for disposition.[1]

Daniel Sr. contends that the Kittitas County Superior Court could not "take cognizance of a matter that was already pending in Pierce County Superior Court" as it did not have jurisdiction. This contention is without merit for several reasons. First, this issue was not raised in Daniel Sr.'s first appeal even though he had raised the issue in the trial court. Second, this issue was raised and decided by the undersigned in Daniel Sr.'s second appeal, Appeal Cause No. 29045-0-III. Daniel Sr. did not move to modify that decision and thus it became the law of the case. *Seattle v. McCready*, 131 Wn.2d 266, 271, 931 P.2d 156 (1997) provides that this Court will not consider issues that

[1] This Court will treat the Daniel Jr. and Carrie Barrett's Motion for Additional Time to File Respondent's Opening Brief/Motion on the Merits as their motion on the merits.

were raised, or could have been raised, in prior appeals. Third, since the children have reached the age of majority (CP 2, calculating from the age of the two children in September of 2005) there really is no relief this Court, or for that matter any court, can provide Daniel, Sr. on this issue.

Daniel Sr. also contends that the court abused its discretion by awarding the respondents their reasonable attorney fees.

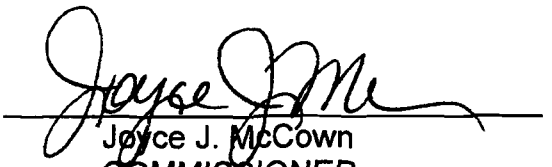
An award of attorney fees is a discretionary decision. *See* RAP 18.14(e)(1)(c). RCW 26.09.140 gives the trial court discretion to award attorney fees in domestic relations cases. *In re Marriage of Pollard*, 99 Wn. App. 48, 56, 991 P.2d 1201 (2000). Under RCW 26.09.140, the court may award reasonable attorney fees after considering the financial resources of both parties. Here, the trial court found that "[t]he Petitioners Daniel Barrett, Jr. and Carrie Barrett have sufficient need and the Respondent Daniel Barrett, Sr. has sufficient ability to pay attorney's fees for the previous matter . . . ." (CP 317) That finding is unchallenged and directly supports the court's award of attorney fees. The court did not abuse its discretion when it awarded Daniel Jr.and Carrie Barrett attorney fees.

Finally, Daniel Jr. and Carrie Barrett request an award of attorney fees be made to them. RAP 18.9 (a) provides that this Court may order that a person who files a frivolous appeal "to pay terms or compensatory damages to any other party who has been harmed." There is no merit to this appeal since the main issue Daniel Sr. raises has already been decided in a previous appeal. Daniel Jr. and Carrie Barrett have

incurred attorney fees in responding to this appeal and thus they have been harmed. Therefore, they are entitled to their reasonable attorney fees.

The motion on the merits is granted and the decision of the trial court is affirmed.

July 16, 2013.



Joyce J. McCown
COMMISSIONER

# *Appendix B*

**COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III**

| | |
|---|---|
| **In re the custody of:**<br><br>**B.J.B. and B.N.B.**<br><br>**DANIEL BARRETT, JR., and CARRIE BARRETT,**<br><br>**Respondents,**<br><br>**v.**<br><br>**DANIEL BARRETT, SR.,**<br><br>**Appellant.** | **No. 31574-6-III**<br><br>**ORDER DENYING MOTION TO MODIFY COMMISSIONER'S RULING** |

THE COURT has considered appellant's motion to modify the Commissioner's Ruling of July 16, 2013, and having considered the records and files herein, is of the opinion the motion should be denied except to vacate the sanctions imposed under RAP 18.9(a). Therefore,

IT IS ORDERED, the motion to modify the Commissioner's Ruling of July 16, 2013 is hereby granted in part and denied in part, and the sanctions imposed are vacated.

PANEL: Jj. Brown, Kulik, Fearing
DATED: 9/16/13
BY A MAJORITY:

**KEVIN M. KORSMO**
**CHIEF JUDGE**

# *Appendix C*

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

| | | |
|---|---|---|
| **In re the custody of:** | ) | **No. 25303-1-III** |
| | ) | |
| **BJB and BNB,** | ) | |
| | ) | |
| **DANIEL BARRETT, JR., and CARRIE BARRETT,** | ) | |
| | ) | |
| **Respondents,** | ) | |
| | ) | |
| **v.** | ) | **Division Three** |
| | ) | |
| **DANIEL BARRETT, SR.,** | ) | |
| | ) | |
| **Appellant,** | ) | |
| | ) | |
| **CARMELITA BARRETT,** | ) | |
| | ) | |
| **Respondent.** | ) | **PUBLISHED OPINION** |

Stephens, J.* — Dan Jr. and Carrie Barrett filed a petition for nonparental custody of BJB and BNB, Dan Jr.'s siblings. Dan Barrett Sr. opposed the petition. The court entered a finding of adequate cause and set the matter for hearing. After a hearing, the court granted the petition and limited Dan. Sr.'s visitation until specified conditions were met. The court also imposed a child support obligation and attorney fees. Claiming the court erred in all these matters, Dan Sr. appeals. We affirm custody and visitation. We

---

* Justice Debra L. Stephens was a member of the Court of Appeals at the time oral argument was heard on this matter. She is now serving as a judge pro tempore of the court pursuant to RCW 2.06.150.

reverse the court's fee award and remand for a redetermination of child support, federal tax exemptions and attorney fees.

FACTS

Dan Sr. and Carmelita Barrett were married in 1979. They had seven children. Two of their children who are still minors at this time, BJB and BNB, are the subject of this third-party custody action.

In 1997, Dan Sr. and Carmelita filed for dissolution of their marriage. Initially, Carmelita was the custodial parent. That action was filed in Pierce County.

In 2001, Dan Sr. filed a motion to modify the parenting plan. Carmelita was late to the hearing and a default order awarding Dan Sr. custody of the couple's then minor children was entered. BJB and BNB were at the courthouse with Dan Sr. at the time the order was entered. He left the courthouse and Carmelita next saw him at her residence where he went to take custody of their other three minor children.

Carmelita had called her home to tell the children what had happened. She and her boyfriend then proceeded to the residence. When her boyfriend approached Dan Sr., there was an altercation and Dan Sr. shot the boyfriend. Dan Sr. was arrested. This was the last time he had any contact with BJB and BNB.

After the shooting, the children lived with a family friend and then their mother.

In May of 2003, they moved in with their brother Dan Jr., and his wife, Carrie.

Dan Sr. was eventually acquitted of any crime arising from the shooting. However, a permanent restraining order was entered prohibiting him from contact with Carmelita or any of their minor children.

In September 2005, Dan Jr. and Carrie filed a petition for third-party nonparental custody. The petition alleged the children were not in the physical custody of either parent and would be detrimentally affected if they were to return to the custody of their parents. Carmelita did not oppose the petition, but Dan Sr. did. Dan Jr. and Carrie also requested that Dan Sr.'s visitation be limited.

The court found there was adequate cause supporting the petition and appointed a Guardian ad Litem (GAL). This matter proceeded to trial in April 2006. Dan Sr. represented himself. After hearing testimony from several witnesses, the court entered findings of fact and conclusions of law awarding Dan Jr. and Carrie nonparental custody. The court also limited Dan Sr.'s visitation: he was not to have any contact with BJB and BNB until he completed a domestic violence perpetrator treatment program and sought the advice of counselors. The court also entered a child support order and awarded Dan Jr. and Carrie $2,000 in attorney fees. Dan Sr. appeals.

## ANALYSIS

RCW 26.10.030(1) permits a nonparent to petition for custody of a child. *In re Custody of Shields*, 157 Wn.2d 126, 137, 136 P.3d 117 (2006). However, a nonparent is only permitted to make such a petition in two situations: (1) if the child is not in the physical custody of one of its parents, or (2) if neither parent is a suitable custodian. RCW 26.10.030(1). RCW 26.10.032(1) sets forth the procedure for a nonparent to seek custody. That statute provides:

> A party seeking a custody order shall submit, along with his or her motion, an affidavit declaring that the child is not in the physical custody of one of its parents or that neither parent is a suitable custodian and setting forth facts supporting the requested order. The party seeking custody shall give notice, along with a copy of the affidavit, to other parties to the proceedings, who may file opposing affidavits.

RCW 26.10.032(1). The court must deny the motion unless it finds adequate cause exists from the affidavits submitted to require a hearing. RCW 26.10.032(2). If the court finds adequate cause, then the motion is set as an order to show cause why the requested order should not be granted. *Id.*

Dan Sr. claims the court erred by determining adequate cause existed. First he asserts there was no basis for the ruling finding adequate cause. He relies on cases interpreting RCW 26.09.260 to argue the affidavits lacked the requisite support. However, RCW 26.09.260 relates to modifications of parenting plans between parents. The courts have stated in such cases that there is a presumption favoring custodial

continuity and against modification. *In re Marriage of Roorda,* 25 Wn. App. 849, 851, 611 P.2d 794 (1980), *overruled on other grounds by In re Parentage of Jannot*, 149 Wn.2d 123, 125-27, 65 P.3d 664 (2003). The purpose of these statutes is to impose a heavy burden on the noncustodial parent so that he or she will not file this type of motion to harass the custodial parent. *Id.* Adequate cause in these cases thus requires something more than prima facie allegations. *Id.* at 852.

Adequate cause here is governed by RCW 26.10.032. This statute does not contain the same requirements or test that the nonparental custody petition statutes require. We rely on the tools of statutory construction to determine what RCW 26.10.032 requires.

The purpose of statutory construction is to discern and give effect to legislative intent. *In re Custody of Smith*, 137 Wn.2d 1, 8, 969 P.2d 21 (1998), *aff'd sub nom., Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). Intent is derived primarily from the language itself. *Id.* We presume the legislature means what it says. *Id.* Adequate cause under RCW 26.10.032 exists if the affidavits supporting the motion show the child is not in the custody of either parent or that one or both parents is not a suitable custodian. The use of the term "or" suggests the phrases separated by the "or" are alternatives. *In re Marriage of Caven*, 136 Wn.2d 800, 807, 966 P.2d 1247

(1998). The term "or" is a coordinating particle which signifies an alternative. *Id.* Thus, the court can enter a finding of adequate cause if the affidavits establish either alternative.

The petition indicated that the children were not in the physical custody of either parent. It also alleged placement with Dan Sr. would be detrimental to the children. Dan Sr.'s response to the petition admitted the children were not in his custody. However, he denied he was detrimental to their growth and development. The fact that the parties agreed the children were not in the custody of either parent gave rise to an undisputed basis to find adequate cause under the statute.

Dan Sr. argues that if adequate cause is based upon the fact the children were not in his physical custody, this prevents him from asserting his fitness or suitableness as a parent at the full hearing. This argument has no merit. Under RCW 26.10.032(2), once adequate cause has been established, a show cause hearing is held to determine if the motion should be granted. It is then that the nonparent must show the parent is unfit, or that placement with an otherwise fit parent would detrimentally affect the child's growth and development. *See Shields*, 157 Wn.2d at 142-43. Once adequate cause is established, then the court must use this heightened standard to determine if awarding custody to a nonparent is proper.

The court properly determined there was adequate cause to proceed to the show

cause hearing. There was no error.

RCW 26.10.030(1) permits a nonparent to file a petition for custody. The court may grant such a petition. This court reviews custody decisions for an abuse of discretion. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993).

A custody dispute between a parent and a nonparent requires this court "to apply a heightened legal standard; more than the 'best interests of the child' standard is required." *See Shields,* 157 Wn.2d at 140. A parent's rights may be outweighed in two situations: (1) if the parent is unfit or (2) "when actual detriment to the child's growth and development would result from placement with an otherwise fit parent." *Shields,* 157 Wn.2d at 142-43.

Here, the court set forth several facts to support its findings that BJB's and BNB's growth and development would be detrimentally affected by placement with Dan Sr. Among other facts, the court noted the father's significant history of physical and emotional abuse against his children. It found Dan Sr. dragged BJB to her room by her hair when she was a small child because she had not vacuumed properly. The father also controlled these two children by fear.

These facts support the finding that it would be detrimental to the growth and development of BJB and BNB to be placed with their father.

Dan Sr. does not attack the factual basis for the court's findings; rather he claims that because these events occurred in the past, they cannot form the basis for the present finding of detriment. The test for custody should be the present condition of the parent, he asserts, not any future or past conduct. *In re Marriage of Nordby*, 41 Wn. App. 531, 534, 705 P.2d 277 (1985).

However, Dan Sr. had had no contact with his children for five years at the time of the hearing. The court noted he appeared emotionless when the children were upset while testifying. The GAL reported the children were still very fearful of their father. BNB reported to the GAL that he does not feel safe with his dad. The GAL noted the children had not had any contact with their dad since 2001. They were currently living in a stable, happy and nurturing environment. The GAL noted Dan Sr.'s parenting style in general was detrimental to the children.

Given the facts present in this case, the court did not abuse its discretion in granting custody to Dan Jr. and Carrie. The facts established that returning BJB and BNB to Dan Sr. would have a detrimental affect on their growth and development.

Dan Sr. also claims the court should not have been permitted to consider any past pattern of abuse because it was not alleged in the petition. This is not so. The petition clearly states placement with Dan Sr. would detrimentally affect the children because of

his violent nature.

He further argues it was error for the court to enter a continuing restraining order when no limitations under RCW 26.10.160(2)(a) were pleaded. This is not so. The petition requested visitation be limited based upon the permanent restraining order entered in Pierce County. Furthermore, the restraining order entered in this case is redundant because the Pierce County restraining order is still in effect and prohibits Dan Sr. from contacting his children.

The court properly found placing BJB and BNB with Dan Sr. would be detrimental to their growth and development. The court thus properly granted Dan Jr. and Carrie's petition for nonparental custody.

Dan Sr. complains the court applied the wrong standard. The best interests of the child standard is the appropriate standard when deciding custody between parents. *Shields*, 157 Wn.2d at 142. It is also the proper standard when determining custody between nonparents. But between a nonparent and a parent, a more stringent balancing test is required. *Id.* This test requires a finding of parental unfitness, or that placement with an otherwise fit parent would be detrimental to the growth and development of the child. *Id.* at 142-43. Here the court referenced the best interests of the children, but the findings and conclusions clearly indicate the court applied the more stringent test

required. This is not a basis for reversal.

Dan Sr. next argues the court erred by not providing a manner by which he could seek visitation. A parent that is not granted custody is entitled to reasonable visitation. RCW 26.10.160(1). However the court may limit visitation if it finds the parent engaged in the following conduct:

> (i) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (ii) physical, sexual, or a pattern of emotional abuse of a child; (iii) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault that causes grievous bodily harm or the fear of such harm; or (iv) the parent had been convicted as an adult of a sex offense.

RCW 26.10.160(2)(a)(i-iv). The court limited Dan Sr.'s visits based upon the second and third types of conduct.

Dan Sr. first argues the court did not make appropriate findings as required to limit his visitation. RCW 26.10.160(2)(m) does require the court to enter findings setting forth the reasons why visits are limited. The court did so here. The court also set forth what Dan Sr. could do to obtain visitation. The court indicated that visitation could begin after input from counselors and after Dan Sr. completed a domestic violence perpetrator treatment program. The court is permitted to make such requirements as a condition for visitation. *In re Interest of Mahaney,* 146 Wn.2d 878, 887, 51 P.3d 776 (2002). An

avenue for visitation exists.

Dan Sr. further claims the court erred because despite the fact the court imposed conditions in the findings, the nonparent custody decree prohibited him from having any contact with the children. The decree does state he is not to have any contact with the children. The conditions imposed that once satisfied could permit visitation are not contained in the decree.

The decree indicates it is based upon the findings. We read the documents together, and will not engage in artificial parsing of the language. Reading the findings in conjunction with the decree, there is an avenue through which Dan Sr. can obtain visitation.

Moreover, to the extent there is an actual conflict, the decree can be amended nunc pro tunc so that it reflects what actually was ordered at trial. *See In re Marriage of Hardt,* 39 Wn. App. 493, 498-99, 693 P.2d 1386 (1985).

On May 1, 2006, the parties appeared to present the findings and conclusions and the nonparent custody decree. At this hearing, Dan Jr. and Carrie also presented a child support worksheet, and an order of child support. The documents listed Dan Sr.'s gross income as $3,520 a month. Counsel indicated the child support worksheet was based upon income as verified by Dan Sr.'s exhibits at trial. The mother had income of $800 a

month imputed to her because she was voluntarily unemployed.

At this hearing, Dan Sr. asked for financial documents from the mother. The mother was present at the hearing and told the court she was currently unemployed. She was placed under oath and questioned by the court. She said she had not worked for two and one-half years, and suffered from Post Traumatic Stress Disorder (PTSD). Despite this condition, she was willing to have income of $800 a month imputed to her. The court did not order her to provide any documentation. The court further stated there was no information available to give to Dan Sr. The court entered the child support orders based upon these figures. Dan Sr. claims the court erred in the manner in which it imputed income to the mother. He also takes issue with the amount imputed to her.

In a nonparental custody action, the court makes child support provisions. RCW 26.10.040(1)(a). The determination of child support is based upon the schedule and standards set forth in chapter 26.19 RCW. RCW 26.10.045 (also see Reviser's note to this statute). A child support award is reviewed for abuse of discretion. *In re Marriage of Peterson*, 80 Wn. App. 148, 152-53, 906 P.2d 1009 (1995), *review denied*, 129 Wn.2d 1014 (1996).

Dan Sr. first claims the court erred in its child support order because it failed to require the mother to provide income verification. "All income and resources of each

parent's household shall be disclosed and considered by the court" for the basis of determining each parent's child support obligation. RCW 26.19.071(1). Current pay stubs and tax returns for the previous two years are to be provided to verify income. RCW 26.19.071(2). Income and deductions that do not appear on tax returns or pay stubs shall be proved by "other sufficient verification." *Id.*

Dan Sr. takes issue with the manner in which the court imputed income for the mother. The court is required to impute income to a voluntarily underemployed parent. RCW 26.19.071(6); *In re Marriage of Schumacher*, 100 Wn. App. 208, 213, 997 P.2d 399 (2000). Whether a parent is voluntarily underemployed for purposes of the statute is determined based on work history, education, health, age, and other relevant factors. *Peterson*, 80 Wn. App. at 153. "In the absence of information to the contrary, a parent's imputed income shall be based on the median income of year-round, full-time workers as derived from the United States bureau of census, current populations reports, or such replacement report as published by the bureau of census." RCW 26.19.071(6).

The court based its imputation of income for the mother solely upon her testimony. There was nothing verifying her income. The record shows the court accepted her testimony that she suffered from PTSD and imputed $800 of monthly income to her without any documentation; however, the court did not follow the statutory mandate for

setting child support and imputing income. Remand is therefore appropriate. *In re Marriage of Sievers*, 78 Wn. App. 287, 306, 897 P.2d 388 (1995) (remand appropriate where trial court failed to include child support worksheet as required by statute).

RCW 26.10.040(1)(b) requires the court to make an allocation of the children for purposes of the federal tax exemption. It did not do so. The court must also consider this issue on remand.

Finally, Dan Sr. appeals the court's order requiring him to pay $2,000 in attorney fees. RCW 26.10.080 grants the court power to award fees at the trial level based on the financial resources of the parties. *Smith*, 137 Wn.2d at 21; *In re Custody of S.H.B.*, 118 Wn. App. 71, 91-92, 74 P.3d 674 (2003), *aff'd*, 153 Wn.2d 646, 105 P.3d 991 (2005). In deciding whether to award fees and costs, the court must balance the needs of the party requesting fees against the other parties' ability to pay. *Smith*, 137 Wn.2d at 22.

There is nothing in the record regarding the financial situation of Dan Jr. and Carrie. Thus, the court could not have considered their need in making this award. Consequently, we reverse the court's fee award. On remand, the court retains discretion to award fees if it makes the requisite findings under RCW 26.10.080.

Both parties have requested fees on appeal. An appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal

and attorneys' fees in addition to statutory costs. *Smith*, 137 Wn.2d at 21 (citing RCW 26.10.080). Again, in deciding whether to award fees and costs, the court must balance the needs of the party requesting fees against the other parties' ability to pay. *Id.* at 22.

Pursuant to RAP 18.1(c), both parties must file an affidavit of financial need with this court in support of their respective requests for an award of fees and costs on appeal. Based on the affidavits filed, we award fees to Dan Jr. and Carrie Barrett, in an amount to be determined by a commissioner of this court.

CONCLUSION

We affirm the trial court's determination of custody and visitation. We reverse the court's fee award and remand for a redetermination of child support, federal tax exemptions and attorney fees. We award Dan Jr. and Carrie Barrett fees on appeal.

Stephens, J. Pro Tem.

WE CONCUR:

Schultheis, C.J. Sweeney, J.

# *Appendix D*

The Court of Appeals
of the
State of Washington
Division III



| | | |
|---|---|---|
| In re the Custody of: | ) | COMMISSIONER'S RULING |
| | ) | NO. 29045-0-III |
| BJB and BNB. | ) | |

Daniel Barrett Sr. appeals a Kittitas County Superior Court decision denying his motion to vacate all prior orders by that court regarding the custody of BJB and BNB. He contends that the Kittitas Court lacked jurisdiction to enter those orders. Daniel Barrett, Jr.'s motion on the merits is granted.

On January 27, 2005, the Puyallup Tribal Court granted Daniel Barrett Jr. guardianship of BJB and BNB. One month later, Daniel Barrett Sr., the appellant here and father of BJB and BNB, received by default proceedings in a Pierce County dissolution action a parenting plan over BJB and BNB.

Daniel Barrett Jr.'s motion to intervene in the Pierce County action was granted and he petitioned for non-parental custody. However, shortly thereafter, he abandoned

this Non-Parental Custody Petition. Daniel Barrett Jr. declared that he did not fill out a summons, and did not serve Daniel Barrett Sr. with this Non-Parental Custody Petition.[1] Rather, on September 26, 2005 Daniel Barrett Jr. filed another Non-Parental Custody Petition in Kittitas County where the children resided with him.

On October 24, 2005, an adequate cause hearing was held in Kittitas County on the matter. During this hearing, Daniel Barrett Sr. challenged the jurisdiction of the Kittitas County Superior Court, but the challenge was denied.

After trial in Kittitas County, Daniel Barrett Jr. was granted non-parental custody of BJB and BNB. Daniel Barrett Sr. appealed this decision. (Court of Appeals Case No. 25303-1-III). On appeal, Daniel Barrett Sr. did not assign error to the Kittitas Court's decision on jurisdiction or venue. This Court affirmed the trial court's determination of custody and mandated the case.

On March 5, 2010, Daniel Barrett Sr. moved to vacate. The Kittitas County Superior Court denied the motion stating that it was frivolous because:

> RCW 26.10.030 requires that non-parental custody actions be brought in the Superior Court where the child(ren) are permanently resided or where they are found. At the time of the filing of the non-parental custody Petition in Kittitas County, the children were residents of Kittitas County. In addition, Respondent challenged venue of the Kittitas County Superior Court at the initial Hearings held in regards to the Adequate Cause hearing held on October 24, 2005.

CP 57-58.

---

[1] On April 1, 2008, Daniel Barrett Jr. voluntarily dismissed his Pierce County Superior Court Non-Parental Custody Petition.

Daniel Barrett Sr. appeals the trial court's refusal to vacate all prior orders, contending that the court erred in holding that the change of county courts was a mere venue issue rather than a jurisdictional issue. He asserts that under the priority action rule, the proper result is vacation and dismissal of the case. Daniel Barrett Jr. responds that Mr. Daniel Barrett Sr. waived his right to challenge the Kittitas County Superior Court's decision because he failed to raise the venue/jurisdiction issue in his first appeal to this Court.

"Venue and jurisdiction are distinct concepts." *Dougherty v. Dep't of Labor & Indus.*, 150 Wn. 2d 310, 315, 76 P.3d 1183 (2003). "Jurisdiction 'is the power and authority of the court to act.'" *Id.* In making a determination on whether a court has subject matter jurisdiction, the focus is the type of controversy involved. *Marley v. Dep't of Labor & Indus.*, 125 Wn. 2d 533, 539, 886 P.2d 189 (1994). "If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction." *Marley,* 125 Wn. 2d at 539, 886 P.2d 189 (quoting Robert J. Martineau, *Subject Matter Jurisdiction as New Issue on Appeal: Reining in an Unruly Horse,* 1988 BYU L.Rev. 1, 28).

In contrast, "[v]enue has to do with the place of a proceeding." *Dougherty*, 150 Wn. 2d at 316. "Venue is distinguished from jurisdiction in that jurisdiction connotes the power to decide a case on its merits while venue connotes locality." *Id.* "While location determines venue, the "location of a transaction or a controversy usually does *not* determine subject matter jurisdiction." *Id.*

RCW 26.10.030 pertains to commencement of non-parental custody cases. RCW 26.10.030(1) provides:

> Except as authorized for proceedings brought under chapter 13.34 RCW, or chapter 26.50 RCW in district or municipal courts, a child custody proceeding is commenced in the superior court by a person other than a parent, by filing a petition seeking custody of the child in the county where the child is permanently resident or where the child is found, but only if the child is not in the physical custody of one of its parents or if the petitioner alleges that neither parent is a suitable custodian.

Here, both the Pierce and Kittitas County Superior Courts have subject matter jurisdiction over non-parental causes of actions. Daniel Barrett Sr.'s challenge, that the matter should have been decided in Pierce rather that Kittitas County, is a venue rather than jurisdictional issue.

While a jurisdictional challenge may be raised at any point in a proceeding, a venue challenge is deemed waived if not timely objected to. *See* CR 82. The law of the case doctrine states that "[i]ssues decided in prior appeals, or not raised that could have been decided in prior appeals, will not be considered on a subsequent appeal in the same case." *Seattle v. McCready*, 131 Wn. 2d 266, 271, 931 P.2d 156 (1997) (citing *Greene v. Rothschild,* 68 Wn. 2d 1, 414 P.2d 1013 (1966)). The law of the case doctrine has been codified in RAP 2.5(c), which provides:

> The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

While RAP 2.5(c) appears permissive, since the adoption of the rule courts have held that an appellate court may reconsider only those decisions that were clearly erroneous

and that would work a manifest injustice to one party if the clearly erroneous decision were not set aside. *See State v. Worl*, 129 Wn 2d 416, 425, 918 P.2d 905 (1996); *see also Folsom v. County of Spokane*, 111 Wn. 2d 256, 263-64, 759 P.2d 1196 (1988).

In relation to child custody cases, the parties have an obligation to expedite the resolution of the custody issues in order limit the period during which children face an uncertain future. *See In re Dependency of A.W.*, 53 Wn. App. 22, 26, 765 P.2d 307 (1988). "It is therefore of paramount importance that the trial court be apprised of alleged errors so that it can make corrections, if necessary, and thereby avoid an appeal and consequent new proceeding." *Id.*

In this case, under RCW 26.10.030(1), Kittitas County Superior Court properly had venue of the matter because at the time of the proceedings BJB and BNB resided in Kittitas County with Daniel Barrett Jr. and his wife.

Also, Daniel Barrett Sr. failed to raise the jurisdiction/venue issue in his first appeal, even though he had raised the issue in the trial court. Therefore it is deemed waived. Public policy supports this decision in the interest of the children's future.

The Kittitas County Superior Court had both jurisdiction and venue in this matter.

The motion on the merits is granted and the decision of the trial court is affirmed.

September 19, 2011.

Joyce J. McCown
COMMISSIONER

**No.** _____

**IN THE SUPREME COURT**
**OF THE STATE OF WASHINGTON**

| | | |
|---|---|---|
| Daniel Barrett Sr. | ) | |
| Appellant | ) | **DECLARATION** |
| vs | ) | **OF SERVICE** |
| | ) | |
| Daniel Barrett, Jr. | ) | |
| Respondent | ) | |
| | ) | |

Daniel Barrett Sr. declares as follows:

On the date shown below, I served a true copy of

**PETITION FOR REVIEW**

upon the Respondent by USPS to his attorney at:

Richard Cole rick@colelaw.net
P.O. Box 638
Ellensburg WA 98926

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated 10/16/13 at Tacoma WA

Dan Barrett

Dan Barrett Sr. declarant