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NO. 65225-7-I

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

In re the Dependency of D.P., a minor child,

DUNG QUOC PHAM,

Respondent,

v.

SHELLEY BURLILE,

Appellant.

BRIEF OF APPELLANT

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FILED
COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON
2010 SEP 29 AM 11:45

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
A. ASSIGNMENTS OF ERROR	1
B. ISSUES RELATED TO ASSIGNMENTS OF ERROR	2
C. STATEMENT OF THE CASE	3
D. ARGUMENT	9
1. THOUGH MRS. BURLILE’S APPEAL IS TECHNICALLY MOOT, THIS COURT SHOULD NEVERTHELESS EXERCISE REVIEW BECAUSE MATTERS OF CONTINUING AND SUBSTANTIAL PUBLIC INTEREST ARE INVOLVED	11
2. THIS COURT SHOULD REVIEW THE THE ACTIONS OF THE TRIAL COURT <i>DE NOVO</i>	15
3. THE FEBRUARY 19, 2010 AND MARCH 25, 2010 ORDERS ENTERED BY THE TRIAL COURT FAILED TO COMPLY WITH CHAPTERS 13.34 AND 7.21 RCW AND SHOULD BE VACATED	15
a. THE TRIAL COURT LACKED AUTHORITY TO “MODIFY” ITS PREVIOUS ORDER BASED ON WHAT IT PERCEIVED WAS A SUBSEQUENT VIOLATION OF THAT ORDER	16
b. THE RECORD CONTAINS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING OF CONTEMPT IN THIS MATTER	19
c. THE TRIAL COURT LACKED AUTHORITY TO IMPOSE A SANCTION THAT WAS BOTH REMEDIAL AND PUNITIVE WITHOUT A CRIMINAL COMPLAINT FILED BY A PROSECUTING AUTHORITY AND MAKING A FINDING OF CONTEMPT	23

d.	THE TRIAL COURT VIOLATED MRS. BURLILE’S CONSTITUTIONAL RIGHTS WHEN IT ORDERED HER TO SIGN A STATEMENT, DRAFTED BY THE COURT, UNDER DURESS	29
e.	THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT’S FINDING THAT “ANY REMEDIAL SANCTIONS ARE NOT EFFECTIVE AS TO MRS. BURLILE”	32
4.	THE COURT ERRED WHEN IT ORDERED MRS. BURLILE TO PAY COUNSEL FOR THE FATHER THE COSTS OF TRANSCRIBING A PREVIOUS HEARING	37
E.	REQUEST FOR RELIEF	39

TABLE OF AUTHORITIES

CASES

<i>City of Seattle v. Johnson</i> , 58 Wash.App. 64, 791 P.2d 266 (Div. 1 1990) -- -----	15
<i>Hart v. Dep't of Social & Health Servs.</i> , 111 Wash.2d 445, 759 P.2d 1206 (1988)-----	12, 13
<i>In re Bovan</i> , -- P.3d --, 2010 WL 3295014, Wash.App. Div. 1, August 23, 2010 (NO. 62983-2-I)-----	13
<i>In re Dependency of A.K.</i> , 162 Wash.2d 632, 174 P.3d 11 (2007)----- -----	14, 16, 22, 25, 27, 34, 35
<i>In re Dependency of G.A.R.</i> , 137 Wash.App. 1, 150 P.3d 643 (Div. 1 2007)-----	21
<i>In re M.B.</i> , 101 Wash.App. 425, 3 P.3d 780 (Div. 1 2000)----- -----	13, 14, 16, 22, 26, 34, 35
<i>In re Marriage of Curtis</i> , 106 Wash.App. 191, 23 P.3d 13 (Div. 3 2001)39	
<i>International Union, United Mine Workers of America v. Bagwell</i> , 512 U.S. 821 (1994)-----	26, 27
<i>Islam v. State Dept. of Early Learning</i> --- P.3d ---, ¶ 11, 2010 WL 3294285 (Div. 1 2010)-----	16
<i>King v. Department of Social and Health Services</i> , 110 Wash.2d 793, 756 P.2d 1303 (1988)-----	16
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S.Ct. 893, 902 (1976)-----	21
<i>Miranda v. Arizona</i> , 384 U.S. 436, (1966)-----	32, 33
<i>Orwick v. Seattle</i> , 103 Wash.2d 249, 692 P.2d 793 (1984)-----	12
<i>State v. Hendrickson</i> , 195 Wash.2d 474, 198 P.3 1029 (2009)-----	19

<i>State v. J.D.</i> , 86 Wash.App. 501, 937 P.2d 630 (Div. 1 1997)	-----15
<i>State v. Lorenz</i> , 152 Wash.2d 22 (2004)	-----33
<i>State v. Post</i> , 118 Wash.2d 596 (1992)	-----33
<i>State v. Ustimenko</i> , 137 Wash.App. 109 (Div. 3 2007)	-----33
<i>Westerman v. Carey</i> , 125 Wash.2d 277, 892 P.2d 1067 (1994)	-----13
<i>Young v. United States ex rel. Vuitton et Fils S.A.</i> , 481 U.S. 787 (1987)	-----28

STATUTES

Chapter 13.34 RCW	-----12, 39
Chapter 7.21 RCW	-----5, 12, 17, 20, 33, 39
RCW 13.34.176(1)	-----26
RCW 7.21.010(2)	-----26
RCW 7.21.010(3)	-----25
RCW 7.21.030(1)	-----20
RCW 7.21.030(2)	-----19, 26
RCW 7.21.030(2)(c)	-----29
RCW 7.21.030(2)(e)	-----26, 34
RCW 7.21.040	-----28
RCW 7.21.050	-----31

RULES

CR 59(d)	-----18, 20
ER 1101(c)(3)	-----21

ER 901-----	23, 24
ER 901(a)-----	23
ER 901(b)(1)-----	23
ER 901(b)(4)-----	23
JuCR 1.4(c)-----	21

TREATISES

<i>Courtroom Handbook on Washington Evidence</i> , Tegland, Karl B., West, 2009-2010 edition-----	24
--	----

CONSTITUTIONAL PROVISIONS

Washington State Constitution, Article I, §32-----	36
--	----

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it “modified” its previous order based on what it perceived was a subsequent violation of that order;

2. The trial court erred when it imposed a sanction, both punitive and remedial in nature, without sufficient evidence in the record upon which it could make a finding of contempt;

3. The trial court erred when it imposed a sanction, both punitive and remedial in nature, without a criminal complaint filed by a prosecuting authority and making a finding of contempt;

4. The trial court violated Mrs. Burlile’s constitutional rights when it ordered her to sign a statement, drafted by the court, under duress, while continuing the hearing without making any findings;

5. The trial court violated Mrs. Burlile’s constitutional right to due process when it made the finding that “any remedial sanctions are not effective as to Ms. Burile” based on previous hearings of which Mrs. Burlile was not notified and at which she did not have an opportunity to be heard; and

6. The trial court erred when it ordered Mrs. Burlile to pay costs associated with the contempt proceeding even though no finding of contempt

had been made.

B. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did the trial court err when it “modified” its previous order based on what it perceived was a subsequent violation of that order?

2. Did the trial court err when it imposed a sanction, both punitive and remedial in nature, without sufficient evidence in the record upon which it could make a finding of contempt?

3. Did the trial court err when it imposed a sanction, both punitive and remedial in nature, without a criminal complaint filed by a prosecuting authority and making a finding of contempt?

4. Did the trial court violate Mrs. Burlile’s constitutional rights when it ordered her to sign a statement, drafted by the court, under duress, while continuing the hearing without making any findings?

5. Did the trial court violate Mrs. Burlile’s constitutional right to due process when it made the finding that “any remedial sanctions are not effective as to Ms. Burile” based on previous hearings of which Mrs. Burlile was not notified and at which she did not have an opportunity to be heard?
and

6. Did the trial court err when it ordered Mrs. Burlile to pay costs

associated with the contempt proceeding even though no finding of contempt had been made?

C. STATEMENT OF THE CASE

On February 3, 2010, counsel for the father filed a Motion/Declaration for an Order to Show Cause re Contempt. CP, at 408 – 427. Attached to his motion, and incorporated into his Declaration, were portions of what he alleged was an email sent out by Shelley Burlile, CP, at 410 – 412 and 419 – 420, and three pages of what he alleged was attached to the alleged email. CP, at 421 – 423. On that same date, the court signed an Order to Show Cause re Contempt, ordering Mrs. Burlile, her husband and her former attorney to appear for a hearing on February 19, 2010 at 1:30 pm. CP, at 407.

In his motion, counsel for the father alleged that Mrs. Burlile, her husband and her former attorney had violated a protective order issued by the court on September 11, 2009. CP, at 409 – 414. A copy of the order that was allegedly violated was attached to the motion. CP, at 415 – 417. A declaration of a court reporter and a copy of RPC 5.3 were also attached to the motion. CP, at 418 and 426 – 427. Counsel for the father asked that Mrs. Burlile, her husband and former attorney be held in contempt of court and that sanctions be imposed. CP, at 408. Specifically, as to Mrs. Burlile, he

requested an order:

Granting sanctions for contempt, including forfeiture for each day the contempt of court continues, and granting any other relief, including reasonable attorney fees and costs as may be appropriate under Chapter 7.21 RCW, Chapter 26.09 RCW, Chapter 26.10 RCW, Chapter 26.26 RCW, and RCW 26.18.040.

... Imprisonment is sought as a sanction against Shelley Burlile for her deliberate and knowing violation of the court order.

In the alternative, a monetary sanction is requested for EACH recipient to whom Ms. Burlile disclosed the prohibited information to (sic) and an order from the court directing her to write to all recipients apologizing for disclosing the information in violation of a court order, instructing them (sic) delete the email and its attachments and to take all reasonable steps to prevent its further dissemination. In addition this counsel is requesting that within 48 hours of this court entering an order, Ms. Burlile provide to all parties the names and email addresses of anyone to whom she sent the entire deposition to (sic). Monetary sanctions are being requested for each day that lapses without this action being taken.

CP, at 408 – 409.

Mrs. Burlile filed a Memorandum of Law Regarding Father's Motion for an Order Holding Former Foster Parents in Contempt. CP, at 391 – 398. DSHS filed a declaration stating that it takes no position on the motion and that the social worker had not received a copy of either of the Burliles' depositions until she received counsel for the father's motion. CP, at 389. Counsel for the father filed a Father's Response/Show Cause Motion, CP, at 367 – 387, to which he attached another alleged email from Mrs. Burlile, a

document that purported to be a letter from the court reporter company's attorney, and a longer declaration from the court reporter. CP, at 382 – 387.

Mrs. Burlile, her husband and her current attorney appeared at the hearing on February 19, 2010. February 19, 2010 TP, at p. 6, ll. 21 – 22.¹ The hearing commenced at 1:30 PM, CP, at 363, and, with limited breaks, lasted until after the court had officially closed. CP, at 355. At the outset of the hearing, counsel for all parties, Mrs. And Mr. Burlile and their former attorney were permitted to make opening statements and some argument regarding procedure. February 19, 2010 TP, p. 8 – 32. Counsel for the father then called his sole witness, a paralegal for Mrs. Burlile's former attorney. The paralegal testified. February 19, 2010 TP, at. P. 32, l. 23 – p. 47, l. 19. At no time during her testimony were any of the alleged email(s) or their alleged attachment(s) referenced by the witness or an attorney questioning her. Nor were they offered into evidence. No other witnesses were called to testify.

Following the paralegal's testimony, counsel were permitted to argue their positions again. At one point during his argument, counsel for the father

¹ Mrs. Burlile's former attorney, along with her own legal representative, also appeared at the hearing. February 19, 2010 TP, at p. 6, ll. 23 – 24. Issues as to Mrs. Burlile's former attorney are not currently on appeal. Mrs. Burlile's former attorney also filed a response, asking that the order re contempt be quashed. CP, at 399– 406.

moved to admit a letter from Mrs. Burlile's former counsel to the parties to the dependency. February 19, 2010 TP, p. 61, ll. 10 – 19. After hearing argument, the court determined that a continuance was necessary in order for the father's counsel to clarify if he was asking for civil or criminal contempt. February 19, 2010 TP, at p. 78, l. 15 – p. 79, l. 2.

The trial court determined that it could not enter findings regarding contempt at the February 19, 2010 hearing. February 19, 2010 TP, at p. 78, l. 25 – p. 79, l. 3. Instead, the trial court ruled that it would modify its September 11, 2009 order to require Mrs. Burlile and her former attorney to sign statements drafted by the court and email them to all of the people listed on the alleged email attached to the Motion/Declaration for an Order to Show Cause re Contempt. February 19, 2010 TP, at p. 79. What followed was a lengthy discussion of what the statements, and order on the February 19, 2010 hearing, would say. February 19, 2010 TP, at p. 79 – 145.

During the lengthy discussion, the court expressed its frustration with the amount of publicity the case had received.

THE COURT: Well, the problem is I'm not a legislator, I'm a judge. And I cannot be having people give me information. This was a big problem with King 5 News kept trying to call and say things, they would try to say things in their e-mails and in their voice mails. And we basically – and they refused to stop doing it, so we refused to open them.

So that gets hard when you can't open your e-mail or answer your phone. I've been through that in this case.

February 19, 2010 TP, at p. 137, l. 16 – p. 168, l. 1.

In the February 19, 2010 Order, CP, at 356 – 362, the court continued the hearing to March 25, 2010 at 1:30 pm and set a briefing schedule. Counsel for the father filed his materials on February 26, 2010, attaching declarations from each of the parents, CP, at 347 – 352, neither of which address the alleged emails attached to previous pleadings except to say that they were harmed by what they believed was a dissemination of Mrs. Burlile's deposition. They received the information about the dissemination from the father's attorney, not by receiving the alleged emails to which the deposition was allegedly attached. CP, at 348, last paragraph. Responses and replies were filed, but no further declarations were provided by counsel for the father. CP, at 31 – 74.

Mrs. Burlile's counsel, based on comments made by the court at the February 19, 2010 hearing, filed a motion for the court to recuse itself. CP, at 226 – 230. It had appeared to counsel from the court's comments that the court had viewed websites and perhaps other news outlets regarding the case. CP, at 224. Counsel for the father subsequently ordered a copy of the

transcript of the February 19, 2010 hearing, which he filed with the court, CP, at 75 – 222. Counsel for the father relied on the transcript to argue that Mrs. Burlile’s counsel was wrong about the court viewing websites or other news outlets. CP, at 39 – 43. He then asked that counsel for Mrs. Burlile be ordered to pay for the transcript he had obtained. CP, at 43. Counsel for the father also used the transcript in support of some of his other arguments and requests. CP, at 31 – 35 and 62 – 68.

At the March 25, 2010 hearing, procedural and other argument continued, but no new testimony was taken and nothing was offered into evidence. The court first considered, and denied, Mrs. Burlile’s motion that it recuse itself. March 25, 2010 TP, at p. 1 – 29. Following extensive argument by the parties, the court entered a finding that “[a]ny remedial sanctions are not effective as to Ms. Burlile.” CP, at 9. The court then ordered, in pertinent part:

5. The matter of contempt regarding Shelley Burlile shall be referred to the local authorities. (Lake Stevens City Prosecutor)

...

10. Mr Ballout is paid for the transcript by Ms. Burlile.

CP, at 10.

On April 30, 2010, the court entered an order dismissing the dependency but ordering that “the file shall remain open in order to allow for the

contempt matter to be addressed and resolved.” CP, ___.² Then, following a subsequent hearing, the court entered an undated order dismissing the contempt proceeding, and stating:

[T]his case is dismissed or terminated and this Court maintains continuing jurisdiction for the sole purpose of hearing all motions regarding release for any purpose of documents sealed by law herein.

CP, ___.³

D. ARGUMENT

There exists in Washington an admirable category of people who open their homes to Washington’s most vulnerable citizens. These are the foster parents, whom we as a society depend on to house foster children; children who, for one reason or another, cannot reside in the homes of their parents or family members. We ask foster parents to open their homes, their hearts and their wallets for these children and to allow case workers, CASA’s and other child welfare personnel into their homes and into almost every conceivable corner of their lives. Often, what results is an oddly harmonious grouping of foster parents, foster children, child welfare workers, court personnel and families working together towards reunification and the end result of sending

² Mrs. Burlile and her counsel did not receive notice of this hearing. Though a redacted copy of this order was provided as an attachment to a subsequent pleading in the contempt proceeding, counsel was not able to obtain the clerk’s number to designate it as part of the clerk’s papers. That information is being sought in order to supplement the clerk’s papers.

the children home to their parents. Unfortunately, and conversely, what seems to happen with equal frequency is a dichotomy in which we ask foster parents to care for and bond with their foster children and then ignore their concerns or demonize their efforts to protect those children. That is what happened here.

When Shelley Burlile took steps to protect the foster child for whom she had cared and grown to love, the push back from the child's parents and their attorneys was overwhelming, and the personal attacks she became subject to were unrelenting. Mrs. Burlile was forced to request a protective order to protect herself and her personal information. Then, counsel for the child's father perceived what he labeled as a violation of the protective order. He filed a motion for contempt and the court's frustration with what had been a highly publicized case came to a head. Almost no evidence was taken to support the father's contentions. Mrs. Burlile never had an opportunity to defend herself. The procedural irregularities at the trial court level were rampant and deprived Mrs. Burlile of constitutionally protected due process. Nevertheless, and despite the fact that no finding of contempt was made, a sanction that was both remedial and punitive was imposed. The trial court in this case did not comply with the contempt statutes under Chapter 13.34

3 The clerk's number for this document is also being sought.

RCW, which refers to Chapter 7.21 RCW. This court should vacate the orders that were improperly entered and provide guidance to the courts on the proper use of the statute.

1. THOUGH MRS. BURLILE’S APPEAL IS TECHNICALLY MOOT, THIS COURT SHOULD NEVERTHELESS EXERCISE REVIEW BECAUSE MATTERS OF CONTINUING AND SUBSTANTIAL PUBLIC INTEREST ARE INVOLVED

A case is considered moot when “a court can no longer provide effective relief.” *Orwick v. Seattle*, 103 Wash.2d 249, 253, 692 P.2d 793 (1984).

However, a recognized exception permits an appellate court, at its discretion, to “retain and decide an appeal which has otherwise become moot when it can be said that matters of continuing and substantial public interest are involved”. *Sorenson*, 80 Wash.2d at 558, 496 P.2d 512; *see also Hart*, 111 Wash.2d at 447, 759 P.2d 1206. Three factors in particular are determinative: “(1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur”. *Hart*, at 448, 759 P.2d 1206. . . . Lastly, the court may consider “the likelihood that the issue will escape review because the facts of the controversy are short-lived”. *Seattle v. State*, 100 Wash.2d 232, 250, 668 P.2d 1266 (1983) (Rosellini, J., dissenting).

Westerman v. Carey, 125 Wash.2d 277, 286-87, 892 P.2d 1067 (1994).

These factors were not original to *Westerman* and have been repeated in numerous subsequent decisions, most recently, by this court, in *In re Bovan*, - -- P.3d ----, 2010 WL 3295014, Wash.App. Div. 1, August 23, 2010 (NO. 62983-2-I).

In *Bovan*, this court noted that the Washington Supreme Court “has observed that issues of constitutional or statutory interpretation tend to be ‘more public in nature, more likely to arise again, and the decisions help[] to guide public officials.’” *Bovan*, at ¶ 9, (citing *Hart v. Dep’t of Social & Health Servs.*, 111 Wash.2d 445, 449, 759 P.2d 1206 (1988)).

Analyzing the question of mootness in relation to former foster children who had been found in contempt of a court’s dependency orders and been sentenced to various terms in juvenile detention, the Washington Supreme Court held:

This consolidated case meets each of the three criteria. Although the due process rights of juveniles are individual rights, the public has a great interest in the care of children and the workings of the foster care system. *See, e.g., In re Interest of M.B.*, 101 Wash.App. 425, 433, 3 P.3d 780 (2000). The authority of the courts is similarly a public matter. *In re Cross*, 99 Wash.2d 373, 377, 662 P.2d 828 (1983). A determination of how the courts’ inherent power interacts with the statutory contempt scheme will provide useful guidance to judges. Finally, the Court of Appeals noted in this case that the “exercise of inherent contempt authority to force compliance with placement orders is likely to recur,” making “[c]larification of the court’s authority to exercise inherent contempt power ... a matter of continuing public interest.” *A.K.*, 130 Wash.App. at 870 n. 4, 125 P.3d 220.

In re Dependency of A.K., 162 Wash.2d 632, ¶ 13, 174 P.3d 11 (2007).

Furthermore, the courts have held that use and application of the contempt statutes should be done carefully and “the contempt power must be

used with great restraint. As the U.S. Supreme Court has noted, ‘the contempt power also uniquely is liable to abuse.’” *In re M.B.*, 101 Wash.App. 425, 439, 3 P.3d 780 (Div. 1 2000).

Here, we are dealing with the very same foster care system and contempt schemes as the *A.K.* court. Though the person negatively impacted in this case was a foster parent, rather than a foster child, the misapplication of law that occurred in this case is as likely to reoccur as it was in *AK*. Though, subsequent to the orders now on appeal, the trial court first entered an order dismissing the dependency and then entered a subsequent order dismissing the contempt proceeding, the issue of how and when a court can impose sanctions against a foster parent is likely to reoccur. The issue is one of statutory interpretation, including when and against whom the contempt power should be used, and the courts of this state will benefit from guidance on these issues.

This court should also provide review in this matter due to the procedural irregularities in the trial court, which resulted in violations of Mrs. Burlile’s Constitutional due process rights. In *State v. J.D.*, 86 Wash.App. 501, 937 P.2d 630 (Div. 1 1997), city and county officials were using a curfew statute to stop juveniles who were out in public after the curfew, but dismissing the

infractions they issued if the juvenile raised a constitutional issue. After citing the criteria for determining whether a technically moot issue should nevertheless be reviewed, this court held that where a constitutional issue was evading review via manufactured mootness, “review is particularly appropriate.” At p. 506. *See also City of Seattle v. Johnson*, 58 Wash.App. 64, 791 P.2d 266 (Div. 1 1990)(This court proceeded in review of lewdness statute even though case was technically moot due to a deficiency in the complaint because the parties had requested and the court found it was important to “resolve the issues relating to the alleged constitutional infirmities of the ordinance.” At 67.)

As will be discussed below, Mrs. Burlile had the right to a hearing in a contempt proceeding, wherein the rules of evidence and requirement of sworn testimony attached. Mrs. Burlile also had a right to a hearing on any previous findings regarding her character and alleged actions before the court could rely on those findings in making its rulings on the contempt motion. The trial court has now dismissed first the dependency proceeding (without notice to Mrs. Burlile) and then the contempt proceeding, rendering the issue moot. Nevertheless, the procedures followed by the trial court deprived Mrs. Burlile

of her Constitutional right to due process of law, and the trial court's dismissal of the matter should not allow it to evade review.

2. THIS COURT SHOULD REVIEW THE THE ACTIONS OF THE TRIAL COURT *DE NOVO*

While the court's finding of contempt in a particular case is reviewed for abuse of discretion, the question of a court's *authority* to impose sanctions for contempt is a question of law and is reviewed *de novo*. *King v. Department of Social and Health Services*, 110 Wash.2d 793, 798, 756 P.2d 1303 (1988); *In re M.B.*, 101 Wash.App. 425, 454, 3 P.3d 780 (Div. 1 2000); and *AK*, at ¶ 14. Likewise, “[c]onstitutional challenges are questions of law subject to *de novo* review.” *Islam v. State Dept. of Early Learning* --- P.3d ---, ¶ 11, 2010 WL 3294285 (Div. 1 2010). The procedural irregularities at the trial court level implicate both the court's authority to impose contempt sanctions and issues of constitutional due process. Thus, this court should use the *de novo* standard of review.

3. THE FEBRUARY 19, 2010 AND MARCH 25, 2010 ORDERS ENTERED BY THE TRIAL COURT FAILED TO COMPLY WITH CHAPTERS 13.34 AND 7.21 RCW AND SHOULD BE VACATED

The February 19, 2010 and March 25, 2010 orders here are on appeal contain multiple findings and orders that are not supported by evidence and do not comply with Chapter 7.21 RCW. They should therefore be vacated by

this court.

**a. THE TRIAL COURT LACKED AUTHORITY TO
“MODIFY” ITS PREVIOUS ORDER BASED ON WHAT IT
PERCEIVED WAS A SUBSEQUENT VIOLATION OF THAT
ORDER**

The February 19, 2010 order contains a finding that

[T]he prior court order governing the possession of and access to and dissemination of, Shelley Burlile’s deposition should be modified so as to protect the dissemination of the deposition, which occurred in violation of the court’s order.

CP, at 357. Based on this finding, the court went on to order

The prior order entered 9/11/09 is hereby modified as follows: Attorney Linda Passey and Shelley Burlile shall review and sign statements (this court has written in an attempt to control the damage created by the dissemination of the deposition. (Sic) These statements shall then be sent by Mrs. Passey and Mrs. Burlile to the individual email addresses listed as recipients of Mrs. Burlile’s two emails to which the deposition was attached.

CP, at 357. What the trial court called a “modification” of its prior order, was actually an imposition of a sanction for an alleged violation of that order.

What the trial court ordered Mrs. Burlile and her former attorney to do - send out a statement written by the court to a list of email addresses which had been attached to the Motion/Declaration for an Order to Show Cause re Contempt, was actually a sanction, both remedial and punitive in nature. In fact, requiring Mrs. Burlile to send out such a statement and request that all

recipients delete what was alleged to have been her previous email(s) and attachment(s) was one of the sanctions counsel for the father requested in his Motion/Declaration for an Order to Show Cause re Contempt. CP, at 409.⁴

A court entering an order does retain some authority to go back and modify that order. For instance, under CR 59(d) a court, within ten (10) days of entry of a judgment, may on its own initiative set a hearing on its own proposed order granting a new trial. Likewise, under the common law, a court has the authority to enter a *nunc pro tunc* order which “allows a court to date a record reflecting its action back to the time the action in fact occurred.”

State v. Hendrickson, 195 Wash.2d 474, ¶ 7, 198 P.3 1029 (2009).

“A retroactive entry is proper only to rectify the record as to acts which did occur, not as to acts which should have occurred.” *Id.* at 641, 694 P.2d 654. A *nunc pro tunc* order “records judicial acts done at a former time which were not then carried into the record.” *State v. Petrich*, 94 Wash.2d 291, 296, 616 P.2d 1219 (1980). A *nunc pro tunc* order “ ‘may be used to make the record speak the truth, but not to make it speak what it did not speak but ought to have spoken.’ ”

4 Notably, even the court recognized that requiring Mrs. Burlile to send out a letter of apology or request that copies of her deposition be destroyed would be a remedial sanction. When counsel for Mrs. Burlile’s former counsel stated that he did not see any of the requested sanctions as remedial in nature, the court responded, “[w]ell, the things like apology letter, send it back, that kind of thing. ... Or how about – sending the deposition copies back, requesting that the recipients send them back or destroy them.” February 19, 2010 TP, p. 25, ll. 3-7 and 11 - 13.

“TRIAL COURT: ... But you have all asked that something be done to try to get the thing fixed.” February 19, 2010 TP, at p. 80, ll. 12 – 13.

“TRIAL COURT: Well, the other side has requested as a means to mitigate the potential problem -- ...” February 19, 2010 TP, at p. 114, ll. 22 – 23.

“TRIAL COURT: ... Counsel, the other side is requesting this as a way to attempt to mitigate the damages to their clients.” February 19, 2010 TP, at p. 116, ll. 16– 18.

State v. Ryan, 146 Wash. 114, 117, 261 P. 775 (1927) (quoting 15 Ruling Case Law 622-23 (1917)). Thus, for example, a nunc pro tunc order is not appropriate to reopen a matter that was previously closed in order to resolve substantive issues differently. *Barros v. Barros*, 26 Wash.App. 363, 613 P.2d 547 (1980) (vacating a nunc pro tunc order, reasoning that a court could not alter a property distribution order between spouses to change an allegedly improper distribution). Instead, a nunc pro tunc order is generally appropriate to correct only ministerial or clerical errors, not judicial errors. *Ryan*, 146 Wash. at 116, 261 P. 775; see also *Smissaert*, 103 Wash.2d at 641, 694 P.2d 654. A clerical or ministerial error is one made by a clerk or other judicial or ministerial officer in writing or keeping records. *Ryan*, 146 Wash. at 116, 261 P. 775.

Id., at ¶ 8.

RCW 7.21.030(2), which describes the remedial sanctions available to a court upon a finding of contempt, includes section (c), “[a]n order designed to ensure compliance with a prior order of the court.” It is clear, then, that entry of an order which is said to modify a prior order based on an alleged violation of the previous order is actually imposition of a sanction.

Here, the trial court exceeded its authority to amend a previous order based on an alleged violation of that order. Though the trial court labeled its action as modification of a previous order, it is impossible to conclude that the modification fell within the court’s authority to call a hearing within ten (10) days pursuant to CR 59(d) or to issue a *nunc pro tunc* order making the record state what the court originally meant for it to state.

Instead, knowing it could not make a finding of contempt without holding a hearing, and faced with a request for a punitive sanction necessitating referral to a prosecuting authority, the court attempted to circumvent the law. Labeling what was really an imposition of a sanction, both remedial and punitive in nature, as “modification” of its previous order exceeded the court’s authority.

b. THE RECORD CONTAINS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING OF CONTEMPT IN THIS MATTER

This contempt proceeding took place in the context of a dependency and thus is governed both by the requirements for proceedings in Juvenile court and by Chapter 7.21 RCW. RCW 7.21.030(1) allows a court to impose a remedial sanction only “after notice and hearing” and a finding of contempt. Emphasis added.

The “right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.” *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard “at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965).

Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 902 (1976). While the level of scrutiny to be applied to a particular case varies depending on the

liberty interest to be affected, a hearing has been defined as, “at a minimum, the opportunity to argue the strengths of one's own position and to attack the [opposing party's] position.” *In re Dependency of G.A.R.*, 137 Wash.App. 1, ¶ 17, 150 P.3d 643 (Div. 1 2007).

For proceedings in juvenile court, JuCR 1.4(c) states “[t]he rules of evidence shall apply in juvenile court proceedings to the extent and with the exceptions stated in ER 1101.” ER 1101(c)(3) specifically excepts “contempt proceedings in which the court may act summarily,” from those proceedings in which the Evidence Rules apply.

[T]he explicit reference in ER 1101(c)(3) to contempt proceedings in which the court may act summarily (that is, direct contempt) is a strong indicator that the exceptions do not apply (and therefore the rules of evidence do apply) in all other contempt proceedings.

In re M.B., 101 Wash.App. 425, 469, 3 P.3d 780 (Div. 1 2000).⁵

Furthermore, the “conclusion that the rules of evidence apply requires that witnesses be sworn.” *Id.*, at 470. “[S]worn testimony serves the government’s interest in ensuring that the integrity of the courts is not compromised and that courts do not appear to use their authority arbitrarily.” *Id.*, at 471. Thus, in order for a finding of contempt to be made in a

⁵ “Contempt may be direct, occurring in the court’s presence, or indirect, occurring outside of court.” *A.K.*, at ¶ 14. In this case, the alleged contempt occurred outside of court and would therefore, if proven, have been considered “indirect.”

proceeding in juvenile court, the person alleging contempt must present evidence and sworn testimony upon which the court could find that violation of its previous order has occurred, and the person accused of contempt must have an opportunity to attack and/or rebut that evidence.

Here, almost no evidence was offered. Counsel for the father attached what he alleged were emails sent out by Mrs. Burlile to a number of listed addresses to his motion and pleadings, along with a portion of what he alleged was attached to the first email. Counsel also filed several declarations, but did not call any of the declarants as witnesses or make them available for cross-examination. Counsel for the father took the testimony of one witness, Mrs. Burlile's former attorney's paralegal. The witness did not address the attachments to counsel's motion.⁶ At no time were the alleged emails or portions of their alleged attachments offered into evidence.

Had counsel for the father moved to have the email(s) and attachment admitted, ER 901 would have precluded their admission. ER 901 requires that a document moved into evidence be authenticated. This requirement is satisfied only "by evidence sufficient to support a finding that the matter in

⁶ The trial court appears to have treated the attachments to pleadings submitted for the contempt proceeding as "evidence," despite the documents never having been authenticated or offered. "THE COURT: ... Mr. Ballout has produced evidence that indicates [the deposition] has been disseminated." February 19, 2010 TP, at p. 126, l. 25 – p. 127, l. 1.

question is what its proponent claims.” ER 901(a). Under ER 901(b)(1), a document can be authenticated by the “testimony of a witness with knowledge.” (This would have to be personal knowledge, unless a hearsay exception were identified.) ER 901(b)(4) allows a document to be authenticated by “distinctive characteristics and the like.”

In this case, what is purported to be an email from Mrs. Burlile is attached to the father’s Motion/Declaration for an Order to Show Cause re Contempt. If the attachment is, indeed, an email, it has been altered significantly. Though from the subject line it appears that the alleged email was one that had been forwarded, CP, at 419, the “to/from” portions of the email showing who forwarded it and who received it are redacted and it is impossible to know how many times it was forwarded, by whom and what alterations each person may have made along the way. Likewise, there is no indication of the IP address from which the alleged email originated.

While it is true that “[t]o date, the court (sic) have not developed any special rules regarding the admissibility of e-mails,” *Courtroom Handbook on Washington Evidence*, Tegland, Karl B., West, 2009-2010 edition, at p. 493, the minimum indicia of authenticity of any other correspondence should be present in order to admit an email under ER 901. Here, those minimum

indicia are not present. The actual recipient of the alleged email, if he exists, is not identified and did not offer sworn testimony. Counsel for the father would have been precluded from offering the authenticating testimony had he attempted to do so.⁷ The alleged email therefore cannot be authenticated and would not have been admissible had counsel moved to admit it.

One witness was called in an attempt to demonstrate that the copy of her deposition that Mrs. Burlile allegedly had *must* have come from her former attorney, no evidence was offered which proved the underlying accusation. The father's counsel's allegations⁸ and attachments to pleadings not properly authenticated or moved into evidence, thereby depriving Mrs. Burlile of the opportunity to attack the "evidence," form an insufficient basis on which a finding of contempt could be made.

C. THE TRIAL COURT LACKED AUTHORITY TO IMPOSE A SANCTION THAT WAS BOTH REMEDIAL AND PUNITIVE WITHOUT A CRIMINAL COMPLAINT FILED BY A PROSECUTING AUTHORITY AND MAKING A FINDING OF CONTEMPT

Rather than a modification of its September 11, 2009 order, the court's February 19, 2010 order requiring Mrs. Burlile and her former attorney to

⁷ Rule of Professional Conduct 3.7 precludes a lawyer from testifying in a matter in which he represents a party unless certain conditions are met which were not met here.

⁸ The Declaration submitted in support of the allegations of contempt is signed by Mr. Ballout, counsel for the father, who, again, is precluded from providing testimony under RPC

sign a statement drafted by the court and email it to a list of addresses which had been attached to the father's motion for a finding of contempt was actually an imposition of a sanction. In this case, it bore the imprimatur of both a remedial and a punitive sanction, neither of which can be imposed without a finding of contempt after hearing or, in the case of a punitive sanction, after a criminal conviction for contempt.

A "remedial sanction" is one that is "imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform." *A.K.*, at 644-46, (citing RCW 7.21.010(3)). A "punitive sanction" is one that is "imposed to punish a past contempt of court for the purpose of upholding the authority of the court." *Ibid.*, citing RCW 7.21.010(2). In order to determine whether sanctions are punitive or remedial, "courts look not to 'the subjective intent of a State's laws and its courts,' but examine the 'character of the relief itself.'" *M.B.*, at 439.

In *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994), the United States Supreme Court described "civil contempt sanctions" as "those penalties designed to compel future compliance with a

3.7.

court order...coercive and avoidable through obedience.” *Id.*, at 827-28. By contrast, a criminal contempt sanction is “imposed retrospectively for a ‘completed act of disobedience’ ...” *Id.*, at 828. If the contemnor does not have the opportunity to purge, reduce, or avoid a fine or period of confinement imposed by contempt sanctions, the contempt is punitive not remedial. *Ibid.*

Civil contempt in dependencies is governed by RCW 13.34.176(1), “Failure by a party to comply with an order entered under this chapter is civil contempt of court as provided in RCW 7.21.030(2)(e).” RCW 7.21.030(2) authorizes remedial contempt sanctions, “[i]f the court finds that the person has failed to perform an act that is yet within the person’s power to perform.”

This section also limits the range of sanctions available to the court:

- (a) Imprisonment if the contempt of court is of a type defined in RCW 7.21.010(1) (b) through (d). The imprisonment may extend only so long as it serves a coercive purpose.
- (b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.
- (c) An order designed to ensure compliance with a prior order of the court.
- (d) Any other remedial sanction other than the sanctions specified in (a) through (c) of this subsection if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

(e) In cases under chapters 13.32A, 13.34, and 28A.225 RCW, commitment to juvenile detention for a period of time not to exceed seven days. This sanction may be imposed in addition to, or as an alternative to, any other remedial sanction authorized by this chapter. This remedy is specifically determined to be a remedial sanction.

A punitive sanction is criminal in nature. *A.K.*, at 645-46 (citing *Bagwell*, at 828). Punitive, criminal penalties may not be imposed unless the contemnor has received due process. *Id.* (citing *Bagwell*, 512 U.S. at 832).

Criminal due process protections include:

[N]otice of the charges, a reasonable opportunity to respond, the presumption of innocence, the right to have guilt proved beyond a reasonable doubt, the right to refuse to testify, the right to call witnesses and to cross-examine, the assistance of counsel, and the right to a trial before an unbiased judge.

A.K., 162 Wash.2d 632, 642 (citing *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 798-99 (1987)).

RCW 7.21.040 authorizes imposing punitive sanctions “only pursuant to this section,” i.e. criminal prosecution. The procedure for punitive sanctions under RCW 7.21.040 is as follows:

(2)(a) An action to impose a punitive sanction for contempt of court shall be commenced by a complaint or information filed by the prosecuting attorney or city attorney charging a person with contempt of court and reciting the punitive sanction sought to be imposed.

(b) If there is probable cause to believe that a contempt has been

committed, the prosecuting attorney or city attorney may file the information or complaint on his or her own initiative or at the request of a person aggrieved by the contempt.

(c) A request that the prosecuting attorney or the city attorney commence an action under this section may be made by a judge presiding in an action or proceeding to which a contempt relates. If required for the administration of justice, the judge making the request may appoint a special counsel to prosecute an action to impose a punitive sanction for contempt of court.

A judge making a request pursuant to this subsection shall be disqualified from presiding at the trial.

(d) If the alleged contempt involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial of the contempt unless the person charged consents to the judge presiding at the trial.

(3) The court may hold a hearing on a motion for a remedial sanction jointly with a trial on an information or complaint seeking a punitive sanction.

(4) A punitive sanction may be imposed for past conduct that was a contempt of court even though similar present conduct is a continuing contempt of court.

(5) If the defendant is found guilty of contempt of court under this section, the court may impose for each separate contempt of court a fine of not more than five thousand dollars or imprisonment for not more than one year, or both.

The sanction imposed here, signature and emailing of a statement drafted by the court to a list of email addresses attached to the father's Motion/Declaration for an Order to Show Cause re Contempt, was both

remedial and punitive in nature. It was remedial in the sense that the court apparently intended for the alleged recipients of portions of the protected deposition of Mrs. Burlile to destroy or delete any copies of the protected deposition that had been received in violation of the September 11, 2009 order. RCW 7.21.030(2)(c). However, if evidence had been submitted showing that it actually had been distributed, the protected deposition, like the proverbial bell, once read (or rung) could not be unread (or unring). Instead, the secondary purpose of the court ordering Mrs. Burlile and her attorney to send out the statement drafted by the court was to punish them through embarrassment and humiliation.⁹ The court lacked the authority to impose the sanction, for either purpose, without a finding of contempt or conviction for contempt of court.

⁹ The court had drafted some language for the statement that would be included if the redacted version of the deposition that was allegedly released certain statements. It appeared the court wanted to make sure recipients of the alleged email knew about what events that showed Ms. Burlile in a negative light. Thus, the trial court asked: "THE COURT: Did she leave in the part about how she signed a false name to a document, or was that redacted out?" February 19, 2010 TP, at p. 74, ll. 2 – 4. "TRIAL COURT: Did she leave in the part about where questions were asked about her alleging the party was having an adulterous affair with a step sibling? Did she leave that in?" *Id.*, at ll. 7 – 10. "THE COURT: ... Did she take out the parts where she's required to get a psychological evaluation to get her own foster care license back?" *Id.*, at p. 75, ll. 4 – 6. "THE COURT: [Mrs. Burlile] may just say that the - - I made a formal complaint to the GAL that needed to be investigated." February 19, 2010 TP, at p. 109, ll. 9 – 11. "THE COURT: ... [Ms. Burlile's statement should include} I also admit under oath I signed a fake name to an expert evaluating the biological parents in this case." February 19, 2010

d. THE TRIAL COURT VIOLATED MRS. BURLILE'S CONSTITUTIONAL RIGHTS WHEN IT ORDERED HER TO SIGN A STATEMENT, DRAFTED BY THE COURT, UNDER DURESS

There is no question that at least some of the sanctions requested in the original Motion/Declaration for an Order to Show Cause re Contempt were punitive (e.g. incarceration with no purge condition, CP, at 409). And in fact, the March 25, 2010 order required that the matter be referred to the Lake Stevens City Prosecutor to investigate whether criminal contempt had occurred. CP, at 10. Yet, at the hearing on Friday, February 19, 2010, the trial court ordered Mrs. Burlile to sign a statement, drafted by the court, under threat of incarceration, at least through the weekend, if she refused to sign. Before even getting a chance to refuse to sign the statement, Mrs. Burlile was ordered to remain in the courtroom.¹⁰ She was then ordered to sit in the jury box to talk to her attorney, like an in-custody criminal defendant, rather than to talk to her attorney in the hallway. She was not permitted to leave the courtroom until and unless she signed. February 19, 2010 TP, at p. 90, l. 22. She had to be accompanied by her attorney, an officer of the court, to use the

TP, at p. 121, ll. 1 – 3.

¹⁰ “THE COURT: ...Now, even though this court is not in the position to, or is not going to go forward with finding contempt one way or another today, I will be modifying my order. I have drafted statements for Mrs. Passey and Mrs. Burlile who are ordered to remain in this courtroom at this time.” February 19, 2010, TP, at p. 78, l. 25 – p. 79, l. 6, emphasis added.

restroom. *Id.*, at p. 101, ll. 21 – 23.

The court lacked the authority to place Mrs. Burlile under arrest when no criminal act or act of contempt had occurred in the court’s presence. As discussed, *supra.*, the court lacked authority to modify its September 11, 2009 order to require Mrs. Burlile to sign and distribute a statement drafted by the court. No finding of contempt had been made upon which incarceration with a purge condition, as a remedial sanction, could be imposed. No criminal proceeding had been commenced. While the trial court does have authority to impose punitive sanctions, such as incarceration, when direct contempt occurs in the courtroom and in the judge’s presence, RCW 7.21.050, it does not have the authority to impose a punitive sanction as a method of coercing compliance with an invalid order. Nor does it have the authority to preemptively arrest someone before she has had a chance to comply with its order (valid or otherwise),¹¹ and continue proceeding with no finding or final order.

Though the statement has not yet been used, or offered, in a criminal proceeding, the protections that would attach there nevertheless apply. It is

¹¹ “THE COURT: I’m making a court order right now. However, you’re in an open court, if you want to defy it, you know what the process is.” *Id.*, at p. 84, ll. 17 – 19.
“THE COURT: If she doesn’t want to sign this once we take out anything you feel that is a problem, then she will be in contempt.” *Id.*, at p. 121, ll. 19 – 22.

well settled law that a statement obtained from a person held in custody without advisement of that person's right to remain silent is inadmissible against her in a criminal proceeding. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

Under *Miranda*,

[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

“*Miranda* warnings were designed to protect a defendant's right not to make incriminating statements while in police custody. *Miranda* warnings are required when an interrogation or interview is (a) custodial (b) interrogation (c) by a state agent.” *State v. Lorenz*, 152 Wash.2d 22, 36 (2004)(citations omitted). “‘Custodial’ refers to whether the defendant's movement was restricted at the time of questioning.” *Ibid.* “In determining whether an accused was in custody at the time of questioning, we use an objective test: ‘whether a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest.’” *State v. Ustimenko*, 137 Wash.App. 109, 115 (Div. 3 2007), quoting *Lorenz*, at 37.

See also, *State v. Post*, 118 Wash.2d 596, 607 (1992)(“defendant must show some objective facts indicating his ... freedom of movement [or action] was restricted [or curtailed]”).

Here, the court impermissibly exceeded its authority under Chapter 7.21 RCW, stepped into the role of law enforcement officer, took Mrs. Burlile into custody, failed to advise her of her *Miranda* rights and forced her, under threat of incarceration, to sign a statement against her interest.

e. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT’S FINDING THAT “ANY REMEDIAL SANCTIONS ARE NOT EFFECTIVE AS TO MRS. BURLILE”

As noted, *supra.*, “the contempt power must be used with great restraint. As the U.S. Supreme Court has noted, ‘the contempt power also uniquely is liable to abuse.’” *M.B.*, at 439. Under the scheme condoned by the court in *M.B.*, the least restrictive remedial sanctions are to be used first once a finding of contempt is made. In *M.B.*, the trial courts were faced with juveniles who had been adjudicated as At Risk Youth, Child(ren) In Need of Services and Truants who subsequently refused to comply with orders requiring them to stay in their placements, attend school and the like. This court found that once the trial court had found contempt of its orders by such juveniles, it should first try the least restrictive remedial sanction: asking for

the juveniles' promise to comply. Only "where such a promise is demonstrably unreliable (as it may be even on a first contempt)," *Id.*, at 450, should the court move on to more restrictive remedial sanctions, such as incarceration with a purge condition.

Likewise, in *A.K.*, *supra.*, the Washington Supreme Court addressed consolidated cases in which juveniles had been found in contempt and incarcerated for longer than the seven (7) day period allowed for in RCW 7.21.030(2)(e), pursuant to the trial court's purported use of its inherent contempt authority. Analyzing the differences between statutory and inherent contempt, the *A.K.* court held "that a juvenile court must find [the statutory criminal contempt] sanctions inadequate before exercising its inherent contempt power." *A.K.*, at ¶ 27.

It follows, then, that before a court imposes punitive sanctions (following a criminal contempt procedure), it should determine whether or not less restrictive, remedial sanctions will adequately address the contempt.¹² As

¹² The statute defines a punitive sanction as one imposed "to punish a past contempt of court," but also "for the purpose of upholding the authority of the court." RCW 7.21.010. In other words, a punitive sanction can be imposed to deter future acts of contempt. Thus, the difference in purpose between a remedial and a punitive sanction does not defeat the "hierarchy" of sanctions referenced here. The court must look to whether a remedial sanction will have the effect of coercing performance in the future. Only if the court finds that a contemnor's prior behavior following previous sanctions indicates that a remedial sanction will not have the desired effect of deterring a future contempt in the present instance, a punitive sanction becomes appropriate. *A.K.*, at ¶ 16.

with the juveniles in *M.B.*, if a person has previously been found in contempt and the lesser sanction imposed did not successfully deter the contemnor from committing subsequent acts of contempt of court, a more restrictive, perhaps punitive, sanction could be imposed. If there has been no previous finding of contempt and no previous imposition of a sanction that subsequently proved unsuccessful to cure the contempt or deter the contemnor, then the court abuses its authority under the contempt statute, which “should be used with great restraint,” by imposing the most restrictive and/or punitive sanction upon the first motion for a finding of contempt.

Here, despite the fact that it never made a finding of contempt, the trial court made the finding that “[a]ny remedial sanctions are not effective as to Mrs. Burlile.” CP, at 9. However, this was the first contempt proceeding against Mrs. Burlile. “A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.” Washington State Constitution, Article I, §32. The Court’s conclusion that remedial sanctions were not enough appeared to be based on information relating to her character that was presented and accepted at prior hearings, hearings for which Mrs. Burlile was not present, or given notice or the opportunity to be heard.

During the contempt proceedings, the Court referred to hearings conducted on the issues related to Mrs. Burlile's character and behavior.¹³ These included discussion of Mrs. Burlile's alleged interference with reunification efforts; however, Mrs. Burlile was not afforded the opportunity to be heard or to correct the record regarding those allegations. Apparently, hearings occurred regarding counsel for the father's previous allegations that Mrs. Burlile interfered with reunification efforts, without notice to Mrs. Burlile. At these hearings on the issue of interference with reunification, it appears that Mrs. Burlile's character and reputation were attacked without

13 "MR. BALLOUT: ... This is the paralegal [referring to a paralegal for Mrs. Burlile's previous counsel] that called 911 to report an alleged assault of a Pham child in the middle of a workday in Marysville, and she was the only one that saw it. So that's the matter that I'm talking about. It relates to the dependency." February 18, 2010 TP, at p. 12, ll. 1 – 7.

Responding to Mrs. Burlile's counsel's argument that "[t]he idea of the contempt statute is, you don't start with the hardest ball first, ... THE COURT: I don't think this is the first situation, however, in this case, counsel." *Id.*, at p. 67, ll. 16 – 21.

After Ms. Burlile allegedly made a claim about an adulterous incestuous relationship, "the attorneys in this case brought forth the people whose e-mails they were, who happened to have the names on the e-mails, who said those were our comments." February 19, 2010 TP, at p. 85, ll. 12 – 15.

"THE COURT: I know Ms. Burlile was quite into who was related to whom, but that was pretty much neither here nor there." February 19, 2010 TP, at p. 104, ll. 9 – 11.

"THE COURT: But they have independent witnesses who indicate that it's clearly completely false." February 19, 2010 TP, at p. 111, ll. 17 – 18.

"THE COURT: ... There's been much, much testimony over many hearings regarding the signing of the fake name." February 19, 2010 TP, at p. 124, ll. 5 – 7.

"MS. LILLEVIK: [reviewing portions of the court file tabbed by the court] It looks from the records certainly that the court was presented with that information at various hearings." March 25, 2010 TP, at p. 4, ll. 21 – 23.

"THE COURT: ... when I went back to look at this, I think of this as a Daniel case issue, but it's only found in Serenity's file because it was attached to Mr. Desmond's report which was a report of all the children." March 25, 2010 TP, at p. 21, ll. 12 – 15.

affording Mrs. Burlile the opportunity to correct the record. It is unknown what was stated, what witnesses were presented, and what findings the court made during its various hearings that occurred outside the presence of Mrs. Burlile because these records have been kept secret.¹⁴

During the contempt proceedings, where Mrs. Burlile and her counsel were afforded notice and appeared, the Court confused the Pham children and the different foster parents involved in the dependency. At one point, the Court noted harm to Daniel due to teasing at school; however, Daniel was not yet of school age. The Court also expressed concern that Mrs. Burlile released sensitive medical information about the child; however, it is believed this was meant to be in reference to another one of the Pham children's foster parents.¹⁵

The Court's confusion over the children and foster parents involved in the multiple Pham dependency cases during these contempt proceedings involving just one of the Pham children's former foster parents raises concern

14 At one point, the trial court offered Mrs. Burlile's counsel the opportunity to review the entire court file, but then rescinded her offer. March 25, 2010 TP, pp. 5 – 7, 10, 12, 27, 72 – 74 and 92.

15 "THE COURT: ... I also tabbed another document that's 20 pages of - - I don't know if those are called blogs or e-mails, but it's 20 pages of people going back and forth on the internet. MR. BALLOUT: But that's Amy Langley." March 25, 2010 TP, at p. 27, l. 24 – p. 28, l. 3.

"THE COURT: ... It's not really neat and tidy between the three children." March 25, 2010, p. 67, ll. 16 – 17.

that there may have been confusion during other hearings affecting Mrs. Burlile's reputation, for which she was never given notice or an opportunity to correct the record. Mrs. Burlile has a Constitutional right to knowledge of, presence at, and the opportunity to be heard on any proceedings regarding her reputation.

Being careful of its contempt authority, the trial court should have required evidence that would support a finding of contempt. Had it done so and subsequently made such a finding, the record before the court was that this would have been Mrs. Burlile's first contempt, and the court should have started with the least restrictive remedial sanction. The court had no permissible evidentiary basis on which to base its finding that "remedial sanctions are not effective as to Mrs. Burlile." CP, at 9.

4. THE COURT ERRED WHEN IT ORDERED MRS. BURLILE TO PAY COUNSEL FOR THE FATHER THE COSTS OF TRANSCRIBING A PREVIOUS HEARING

Nothing in Chapter 13.34 RCW, which governs these proceedings, allows for the assignment of the costs expended by one party to another person. RCW 7.21.030 allows the court to "order a person *found in contempt* of court to pay a party for ... any costs incurred in connection with the contempt proceeding..." Emphasis added. Pursuant to Chapter 7.21 RCW, when there

is no finding of contempt, attorneys fees and costs cannot be awarded. *In re Marriage of Curtis*, 106 Wash.App. 191, 202, 23 P.3d 13 (Div. 3 2001).

Endemic to these contempt proceedings was Mrs. Burlile and her counsel's lack of knowledge regarding the underlying dependency proceedings. As the court and parties emphasized on a number of occasions, Mrs. Burlile was not a party to the dependency. Thus, she and her counsel had no knowledge of the numerous motions, cross motions, Attorney Guardian Ad Litem reports, Individual Service and Safety Plans and other documents that had been submitted to the court with materials from various websites and news outlets attached. *See e.g.* February 19, 2010 TP, at p. 105, l. 22.

Therefore, when counsel for Mrs. Burlile heard the trial court make statements such as, "I saw nothing on that website," February 19, 2010 TP, at p. 105, l. 22, she had no way of knowing that the court's knowledge of materials on websites and news outlets was not from independent investigation. Counsel for the father chose, of his own volition, to have the February 19, 2010 hearing transcribed. Furthermore, he used the transcript to support other portions of his briefing and other arguments. CP, at 62 – 68. No finding of contempt was made. Therefore, there is no basis on which the

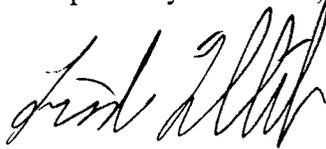
court could order Mrs. Burlile to pay for the cost of transcribing the hearing and this court should vacate, or reverse, the trial court's order requiring her to do so.

E. REQUEST FOR RELIEF

Based on the foregoing, Shelley Burlile respectfully requests that this court vacate the trial court's February 19, 2010 and March 25, 2010 orders and provide guidance to the court on how to proceed in contempt hearings against foster parents under Chapter 13.34 and 7.21 RCW.

DATED this 29th day of September, 2010,

Respectfully submitted,



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