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**SUPREME COURT OF THE STATE OF WASHINGTON**

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JAMES HAMILTON,

Petitioner,

v.

DEPARTMENT OF  
SOCIAL AND HEALTH SERVICES,  
STATE OF WASHINGTON,

Respondent.

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**ANSWER TO PETITION FOR REVIEW**

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 **ORIGINAL**

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## I. INTRODUCTION

After James Hamilton's teenage daughter B.J.H. ran away from home, Hamilton acquiesced to her wish to live with her stepaunt and uncle because he wanted her to return voluntarily rather than by force. But Hamilton objected to the Department of Social and Health Services, Division of Child Support's (DCS) decision to stop sending him child support payments from B.J.H.'s mother after B.J.H. moved out, and its actions to require him to pay child support. The Court of Appeals unanimously ruled in an unpublished decision that Hamilton is not entitled to attorney's fees arising out of these child support disputes.

Hamilton's failure to obtain attorney's fees should not be accepted for review because none of the criteria in RAP 13.4(b) have been met. The Court of Appeals' decision is entirely consistent with case law construing RCW 4.84.185 (authorizing attorney's fees for frivolous actions and defenses) and RCW 4.84.350 (authorizing attorney's fees in judicial appeals of agency actions under the Administrative Procedure Act). Hamilton's petition does not demonstrate any actual conflict with precedent; it merely reveals that Hamilton disagrees with the court's application of settled law to the facts of this case.

Nor does the petition raise an issue of substantial public interest. The Court of Appeals correctly concluded that DCS's actions and defenses

were not frivolous under RCW 4.84.185 because they were grounded in statute. The Court of Appeals also correctly decided that Hamilton was not entitled to attorney's fees under RCW 4.84.350 since Hamilton chose to bypass available administrative processes and bring a separate action in superior court. Hamilton's claims for attorney's fees were denied based on a straightforward and correct application of settled law.

## **II. COUNTER-STATEMENT OF THE ISSUES**

This case is not appropriate for review by the Court under the considerations governing acceptance of review, RAP 13.4(b). If review were granted, the only issues presented would be:

1. Is Hamilton entitled to an award of attorney's fees under RCW 4.84.350, which authorizes awards when final agency action is appealed to superior court under the Administrative Procedure Act, when Hamilton bypassed available administrative review processes by instead bringing a separate action in superior court?
2. Was it frivolous under RCW 4.84.185 for DCS to assert a right to retain the mother's child support payments while the child was living with relatives and supported by public assistance, when RCW 26.23.035 authorizes DCS to retain the payments in these circumstances?

### III. RESTATEMENT OF THE CASE

Petitioner James Hamilton is the legal custodian of his teenage daughter B.J.H. CP at 9-15. She ran away from home following a physical altercation with Hamilton's wife. CP at 182, 236. The 16-year-old stayed in a local youth shelter for several weeks before moving in with her stepaunt and uncle. CP at 236. She did not want to return home. CP at 239. Although Hamilton was unwilling to relinquish legal custody, he agreed that his daughter could live with the relatives because he wanted her to return home voluntarily. CP at 233, 236-47.

The relatives applied for and received public assistance payments for B.J.H. CP at 251. Her stepaunt attested she had not unlawfully deprived Hamilton of custody and that B.J.H. was living with them with Hamilton's consent. CP at 233, 251, 254. Child Protective Services workers had several contacts with Hamilton. CP at 233-47. He repeatedly affirmed that B.J.H. could remain with the relatives, but he was adamantly opposed to paying for her support. CP at 233-47.

B.J.H.'s decision to live with relatives prompted DCS to do two things. First, DCS started retaining the child support payments her mother sent to DCS and stopped sending them to Hamilton. CP at 3, 33. DCS has statutory authority to distribute child support payments to "another person who has lawful physical custody of the child or custody with the

payee's consent." RCW 26.23.035(2). Based on the steppaunt's written statements and Hamilton's communications with Child Protective Services workers, DCS reasonably believed that Hamilton consented to his daughter living with the relatives. CP at 233-247, 251, 254. The State retained the payments because the relatives' right to child support had been assigned to the state, by operation of law, when they applied for public assistance. RCW 74.20.030; CP 33.

Although Hamilton could have requested an administrative hearing under RCW 26.23.035(2) and WAC 388-14A-5050 to challenge DCS's decision to retain the mother's child support payments, he filed a separate action in superior court instead. CP at 3. DCS offered to prove that Hamilton had consented to his daughter's living arrangement by having the Child Protective Services worker testify, but the superior court declined to hear the testimony. RP (Aug. 19, 2011) at 19-21. The superior court ordered DCS to send the mother's child support payments to Hamilton since he was the payee named in the order. RP (Aug. 19, 2011) at 24.

The second action DCS took was to establish Hamilton's child support obligation administratively pursuant to RCW 74.20A.055. CP at 142. This statute authorizes DCS to set support administratively when there is no court order setting the responsible parent's child support

obligation. DCS relied on statute and case law to serve Hamilton with an administrative notice to set his child support obligation, even though he had legal custody. *See* RCW 74.20A.055 (authorizing DCS to set child support administratively when no court order establishes the parent's obligation or specifically relieves the parent from owing child support); *Brown v. Dep't of Soc. & Health Servs.*, 136 Wn. App. 895, 896, 151 P.3d 235 (2007) (DCS can set child support administratively against legal custodian even though court order required other parent to pay support); *Powers v. Dep't of Soc. & Health Servs.*, 32 Wn. App. 310, 316, 648 P.2d 439 (1982) (mother's failure to obtain legal custody did not absolve father from his financial obligation or deprive DCS of jurisdiction to set support).<sup>1</sup>

Hamilton requested and received numerous administrative continuances so his child support obligation could be addressed in court instead of administratively. CP at 184, 214, 233. No administrative hearing on the merits occurred. CP at 233. The administrative proceeding was dismissed shortly after the superior court approved an agreed order between Hamilton and DCS that relieved Hamilton of a support obligation during the time BJH had lived with relatives. CP at 233.

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<sup>1</sup> DCS is authorized under RCW 74.20.065 to excuse a parent from child support payments if the parent has been unlawfully deprived of custody.

After his daughter had been living with her stepaunt and uncle for several months and DCS had commenced efforts to collect child support from him, Hamilton changed his mind about letting B.J.H. stay with the relatives. CP at 9-15, 135, 142-51. He filed an at-risk-youth petition in superior court to force B.J.H. to return home. CP at 118, 155-58. The trial judge ordered the teenager to return after she completed the current school semester. CP at 155-58. B.J.H. complied with the ruling; she had been gone for over five months. CP at 90.

Hamilton argued he was entitled to attorney's fees because DCS's actions were frivolous under RCW 4.84.185. Even though it is undisputed that no agency record was ever filed or reviewed by the superior court, Hamilton also asserted that his superior court action was a judicial review of final agency action under the Administrative Procedure Act that entitled him to attorney's fees under RCW 4.84.350. The superior court agreed with both assertions and awarded Hamilton \$12,000 in attorney's fees. SCP<sup>2</sup> at 502-504. The attorney's fee award was unanimously vacated by the Court of Appeals in an unpublished decision, from which Hamilton now petitions for review.

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<sup>2</sup> "SCP" abbreviates supplemental clerk's papers.

#### IV. ARGUMENT

**A. The Decision of the Court of Appeals Does Not Conflict with this Court's Decision in *Costanich v. Department of Social and Health Services***

Hamilton argues that the Court of Appeals' decision conflicts with a Supreme Court case and that it raises a question of substantial public interest. Because Hamilton is unable to show that either of these grounds apply, this Court should decline to accept review.

The Court of Appeals ruling that Hamilton is not entitled to attorney's fees under RCW 4.84.350, when there was no final agency action that was judicially reviewed, does not conflict with the Court's decision in *Costanich v. Dep't of Soc. & Health Servs.*, 164 Wn.2d 925, 194 P.3d 988 (2008). Hamilton's assertion to the contrary is based on a mischaracterization of the *Costanich* court's holding. Pet. at 16-17.

In *Costanich*, a foster mother sought judicial review of an administrative ruling revoking her foster care license. The superior court restored Costanich's foster care license and also awarded her attorney's fees under RCW 4.84.350. The Department appealed to Division II, which conducted its review by applying the standards of the Administrative Procedure Act directly to the records before the agency. See *Costanich v. Dep't of Soc. & Health Servs.*, 138 Wn. App. 547, 156 P.3d 232 (2007), *rev'd*, 164 Wn.2d 925, 194 P.3d 988 (2008). Division II

affirmed the superior court on the merits but reversed the attorney's fees award. *Id.*

*Costanich* appealed to the Washington Supreme Court solely on the attorney's fees issue. Relevant to the present case, the question before the Court was whether attorney's fees are available under RCW 4.84.350 when the merits of the underlying administrative appeal have been fully adjudicated and only the issue of attorney's fees is appealed. The Supreme Court concluded that the attorney's fees dispute could not be separated from the underlying merits of the administrative appeal and ruled attorney's fees could be awarded at each level of review, including the Supreme Court. *Costanich*, 164 Wn.2d at 933-34. *Costanich* did not address the situation here, where Hamilton separately went to superior court in a direct effort to avoid administrative review under the Administrative Procedure Act. Contrary to Hamilton's assertion, *Costanich* does not stand for the proposition that a separate action in superior court can be deemed to be judicial review of final agency action under the Administrative Procedure Act.

Unlike the *Costanich* case, Hamilton chose to forego administrative review processes available to him in favor of proceeding directly in court. Hamilton never asked DCS to review its decision to keep the mother's child support payments. And he succeeded in obtaining

several continuances of the administrative proceeding to set his child support obligation, so his obligation could be set in court instead. No agency record was ever filed or reviewed by the superior court, and there was no agency order for the court to affirm or reverse. Because Hamilton did not exhaust his administrative remedies, there was no final agency action. *See Orion Corp. v. State*, 103 Wn.2d 441, 456-57, 693 P.2d 1369 (1985) (listing policy reasons supporting the exhaustion of remedies requirements and stating the “general rule” that “when an adequate administrative remedy is provided, it must be pursued before the courts will intervene”).

The appellate court’s decision to deny Hamilton attorney’s fees under RCW 4.84.350 is a correct application of settled law. Attorney’s fees are only available under RCW 4.84.350 when the applicant prevails in an administrative appeal of final agency action under the Administrative Procedure Act. As explained in *Wells Fargo Bank, N.A. v. Dep’t of Revenue*, 166 Wn. App. 342, 356, 271 P.3d 268, *review denied*, 175 Wn.2d 1009 (2012), the finality requirement is met only at the consummation of the administrative process or when it is understood that the agency does not intend to take any further action. Here, the finality requirement was not met because Hamilton intentionally bypassed the administrative decision-making process. Division II correctly relied upon

*Wells Fargo Bank* to conclude there was no final agency action for the superior court to review, so that RCW 4.84.350 did not apply.

**B. Hamilton's Quest for Attorney's Fees Does Not Raise a Question of Substantial Public Interest**

Washington follows the American rule, which precludes an award of attorney's fees absent specific statutory authority, contractual provision, or recognized ground in equity. *Nicum v. Enquist*, 175 Wn.2d 441, 446, 286 P.3d 966 (2012); *see also Wagner v. Foote*, 128 Wn.2d 408, 416, 908 P.2d 884 (1996). Hamilton's assertion that he is entitled to attorney's fees for public policy reasons, Pet. at 8-10, is an attempt to ground an attorney's fee award in equity, rather than in statute or contract.

Hamilton asserts that DCS should pay his attorney's fees because he was providing a good home with rules and structure, and any other ruling encourages strangers to step in and assist a child to avoid following family rules. Pet. at 8. But the statutory scheme does not encourage third-parties to interfere in the parent-child relationship. A third-party is not entitled to child support if the payee under the order does not consent to the living arrangement. RCW 26.23.035(2). And a legal custodian is not required to pay child support if he has been unlawfully deprived of custody. RCW 74.20.065. DCS took the actions it did because Hamilton agreed his daughter could live with the relatives. Hamilton only changed

his mind when he learned that he would be required to support his daughter financially.

Further, Hamilton fails to cite any legislative policy that authorizes an award of attorney's fees based on parenting skills. *Id.* Even if they were available, the record would not support an award of attorney's fees on this ground. The issue before the trial court was child support; the trial court did not review the quality of Hamilton's parenting or make any findings about whether Hamilton provided a good home. Hamilton relies on his alleged testimony at the at-risk-youth proceeding to bolster his public policy argument. But that proceeding was a separate action, and his testimony was not made part of the record in this case. In short, public policy does not authorize awarding Hamilton attorney's fees against DCS in contradiction of the plain language of the statutes he relies upon. No question of substantial public interest is presented in this case.

**C. Hamilton's Other Argument Does Not Address RAP 13.4(b).**

Addressing the merits, rather than the criteria under RAP 13.4(b), Hamilton argues the Department's reliance on RCW 26.23.035(2)(a) was frivolous. Pet. at 11-13. The Court of Appeals concluded the Department's reliance was reasonable under the circumstances and not frivolous, because the Department acted within its authority and had a factual basis for believing Hamilton had consented to his daughter's living

with relatives during the time period at issue, slip op. at 8-11. Hamilton alleges no conflict with any other decision and does not identify any public interest implicated by the Court of Appeal's conclusion that the Department's actions were reasonable.

Because Hamilton cannot show that this case presents an issue of substantial public interest or that the decision below conflicts with existing case law, this Court should decline to accept review.

**V. CONCLUSION**

The Court of Appeals' decision correctly applies settled law. None of the criteria for accepting review in RAP 13.4 have been satisfied. Therefore this Court should deny Hamilton's petition for review.

RESPECTFULLY SUBMITTED this 6 day of November, 2013.

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**CERTIFICATE OF SERVICE**

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

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 **By US Mail**

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

Dated this 6 day of November, 2013 at Olympia, WA.

  
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LOETTA IBABAO, Legal Assistant

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Case No. 89413-2

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