

CONFIDENTIAL FAX TRANSMISSION

October 20, 1999

To: **Dale Parrish**
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From: **Harmon Wilfred**

Regarding: Legal Research On Assignment of Custody

Number of Pages (Including Cover Page) 4

Dear Dale,

Could the attached case law be relevant in this case?

Case Law of "Ashlock v. District Court, Fifth Judicial District"

This case law states clearly that the assignment or changing of custody of a child may not be ordered to punish a custodial parent for removing the child from the jurisdiction of the court or for secreting the child to prevent visitation by the other parent. As the Statute quoted also states clearly that the "court shall determine custody in accordance with the best interests of the child," it is clear that the statute provides that a change requires notice to be served on the custodial parent, who may present testimony and file opposing affidavits in order for the court to impartially and fairly determine the best interests of the child. Even though Wheelock, my legal council, was present at the hearing with witnesses as to Dearn's inability to care for the children, even to the extent of child abuse, the Judge refused to provide any opportunity to hear the available testimony or receive opposing affidavits. The Judge assigned custody to Dearn in order to punish me for not showing up at the hearing which ultimately opened up the children to the further possibility of abuse. Thereby, the Judge also did not act "in accordance with the best interests of the children".

What do you think?

Sincerely,



Harmon L. Wilfred



Carolyn R. Wilfred

#2

ASHLOCK v. DIST. COURT, FIFTH JUDICIAL DIST. Colo. 483
Cite as 717 P.2d 483 (Colo. 1986)

Sharyn ASHLOCK, n/k/a Sharyn Alden, Petitioner,

v.

DISTRICT COURT, FIFTH JUDICIAL DISTRICT, Colorado and Honorable William Jones, Chief Judge thereof, Respondents.

No. 85SA433.

Supreme Court of Colorado, En Banc.

April 7, 1986.

Rehearing Denied May 5, 1986.

In an original proceeding for a rule to show cause, custodial mother sought relief from order by the District Court, Fifth Judicial District, which ordered mother to purge herself of contempt by delivering custody of minor child to father or to Department of Social Services in obedience to prior court order awarding temporary custody of child to father. The Supreme Court, Erickson, J., held that the order awarding temporary custody to father, which was entered without notice to mother and without requisite finding that changed circumstances necessitated change of custody, was void and could not be basis for subsequent contempt judgment compelling compliance with such order.

Rule to show cause made absolute.

1. Divorce §305

Order awarding temporary custody of minor child to father, which was entered without notice to custodial mother, without service on mother of supporting affidavit required by C.R.S. 14-10-132 and without showing that changed circumstances made transfer of custody necessary to serve best interests of child, was void and could not be basis for subsequent order that mother purge herself of contempt of transferring custody of child to father or to Department of Social Services.

2. Constitutional Law §274(5)

Ex parte order changing custody of child without notice to custodial parent is a clear violation of due process and is therefore void. C.R.S. 14-10-132; U.S.C.A. Const. Amend. 14.

3. Parent and Child §2(18)

Change in custody of child may not be ordered to punish custodial parent for removing child from jurisdiction of court or for secreting child to prevent visitation by other parent. C.R.S. 14-10-132.

4. Divorce §303(2), 305

Mother's removal of child from state in alleged violation of court-approved custody agreement, which mother alleged was necessary due to harassment by father and adverse effects on child from visitation with father, was not in itself sufficient grounds for court order, entered without notice to mother, awarding temporary custody of child to father, and mother's subsequent refusal to obey such order was not grounds for subsequent order that mother purge herself of contempt by surrendering custody of child to father or Department of Social Services. C.R.S. 14-10-132.

Jeanne Elliott, Sherman & Howard, Mary J. Kelly, Denver, for petitioner.

J. Bruce Teichman, Denver, for respondents.

Law Office of Stephen J. Harhai, Stephen J. Harhai, Denver, for amicus curiae, American Civil Liberties Union.

ERICKSON, Justice.

In this original proceeding, petitioner contends that the respondent district court abused its discretion and exceeded its jurisdiction in ordering a temporary change of custody of petitioner's minor child and in finding petitioner in contempt for failing to comply with the court's order. We issued a rule to show cause and now make the rule absolute.

The marriage of Sharyn Ashlock (petitioner or mother) and Rex Ashlock (father) was dissolved in a decree issued by the

under such court may

J., concur.

respondent district court in August 1982. The mother was awarded permanent custody of the couple's three-year-old child, Orin Ashlock (child), pursuant to a custody agreement which was approved by the district court in February 1983. Under the custody agreement, the father was entitled to visitation, and neither parent was permitted to remove the child from Colorado without prior notification of the other parent.

In a letter dated February 26, 1985, the mother advised the respondent district court that she was leaving Colorado with the child to establish a new home in Illinois. The mother stated in her letter that she felt compelled to leave the state because of continual harassment by the father and because of the violent and destructive atmosphere the child was exposed to during visitation with the father. The mother included in the letter an Illinois address where she could be contacted. On February 28, 1985, the father filed a handwritten "motion for contempt citation" alleging that the mother had removed the child from Colorado in violation of the custody agreement. In his motion, the father requested temporary custody of the child. The mother was not served with a copy of the father's motion and did not receive notice of the hearing. Consequently, she was not present or represented at the hearing on March 7. Nevertheless, the respondent district court, after receiving the testimony of the father, entered an order modifying the original custody agreement and transferring custody of the child to the father on a temporary basis.

The mother did not return the child to Colorado but instead filed a motion to vacate the custody modification in July 1985. Following a hearing on November 4, 1985, at which both the mother and father were present, the respondent district court denied the motion and found the mother in contempt for failing to comply with the court's previous order. The court ordered the mother to purge herself of the contempt by returning the child to Colorado and transferring temporary custody to the father or, if the father's home was not

safe, by placing the child in the custody of the Department of Social Services and disclosing his address and telephone number to the father. This original proceeding followed.

[1] A party seeking modification of a custody decree is required to submit an affidavit setting forth facts in support of the requested modification. § 14-10-132, 6 C.R.S. (1985 Supp.). Notice of the motion and a copy of the affidavit must be served on the custodial parent, who may file an opposing affidavit. *Id.* Under section 14-10-132, "[t]he court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing...."

[2] There is no evidence in the limited and sketchy record before us indicating that the mother was given notice of the father's motion for temporary custody. Nor did the father file in the district court or serve on the mother a supporting affidavit, as required by section 14-10-132. Despite these procedural defects, the respondent district court entered an order granting the father temporary custody of the child on March 7, 1985. An *ex parte* order changing the custody of a child without notice to the custodial parent is a clear violation of due process and is therefore void. *Olson v. Priest*, 193 Colo. 222, 564 P.2d 122 (1977); *Parker v. Parker*, 142 Colo. 416, 350 P.2d 1067 (1960).

Equally important, the respondent district court failed to make the necessary findings under section 14-10-131(2), 6 C.R.S. (1973 & 1985 Supp.), prior to modifying its previous custody decree. The statute provides:

The court shall not modify a prior custody decree granting custody to one party unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or his custodian and that the modifi-

PEOPLE v. TUFTS
Cite as 717 P.2d 485 (Colo. 1986)

ation is necessary to serve the best interests of the child.

mother's refusal to transfer the child to the father is reversed.

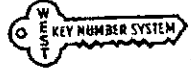
The rule to show cause is made absolute.

§ 14-10-131(2), 6 C.R.S. (1985 Supp.). Of particular importance to this case, section 14-10-131(2) mandates that the court refuse to disturb the prior custody decree unless:

(c) The child's present environment endangers his physical health or significantly impairs his emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.

§ 14-10-131(2)(c), 6 C.R.S. (1973). See also § 14-10-124(1.5), 6 C.R.S. (1985 Supp.) (court shall determine custody in accordance with best interests of child). Here, the district court made no finding, either at the March 7 or the November 4 hearing, that changed circumstances made it necessary to modify the original decree in the interests of the child. All we have is the district court's statement at the November 4 hearing that "she [the mother] has violated the Court's order and because of that violation of the Court's order I have ordered that the child should be returned to the father."

[3, 4] A change in custody may not be ordered to punish a custodial parent for removing a child from the jurisdiction of the court or for secreting the child to prevent visitation by the other parent. *Holland v. Holland*, 150 Colo. 442, 373 P.2d 523 (1962); *Pearson v. Pearson*, 141 Colo. 336, 347 P.2d 779 (1959). However unjustified the custodial parent's conduct may be, it is still incumbent upon the noncustodial parent to demonstrate that changed circumstances make a transfer of custody necessary to serve the best interests of the child. *Deines v. Deines*, 157 Colo. 363, 402 P.2d 602 (1965). Because no such showing was made in this case, the respondent district court abused its discretion in ordering a change of custody. Accordingly, the order of the court awarding temporary custody of the child to the father is vacated. The judgment of contempt based on the



The PEOPLE of the State of Colorado,
Plaintiff-Appellant,

v.

David Wilder TUFTS,
Defendant-Appellee.

The PEOPLE of the State of Colorado,
Plaintiff-Appellant,

v.

Paul Joseph DAVIDSON,
Defendant-Appellee.

Nos. 85SA138, 85SA139.

Supreme Court of Colorado,
En Banc.

April 14, 1986.

Appeal was taken by the People from an order of the District Court, Boulder County, Michael R. Enwall, J., granting defendants' motion to suppress evidence in a criminal prosecution. The Supreme Court, Erickson, J., held that: (1) defendants had standing to challenge searches of vinyl bag and automobile; (2) defendants' arrests were supported by probable cause; (3) trial court erred in suppressing as fruits of an illegal arrest items seized from defendants prior to their incarceration; (4) search of vinyl bag was within scope of a valid premises search warrant; and (5) search of automobile was pursuant to a warrant supported by probable cause.

Reversed and remanded.

in the custody of Services and dis- telephone number al proceeding fol-

modification of a eg to submit an cts in support of § 14-10-132, 6 ice of the motion it must be served who may file an Under section 14- l dany the motion equate cause for established by the it shall set a date

nce in the limited tete as indicating ven notice of the mgerary custody. the district court supporting affida- on 14-10-132. De- ects, the respon- ed an order grant- y custody of the An ex parte order of a child without parent is a clear and is therefore 123 Colo. 222, 564 v. Parker, 142 (1960).

ne respondent dis- ke the necessary 14-10-131(2), 6 p.), prior to modify- decree. The stat-

modify a prior cus- tody to one par- n the basis of facts the prior decree or o the court at the ree, that a change r circumstances of the and that the modifi-