

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 03-RB-0743(MJW)

SUZANNE SHELL, pro se  
APRIL J. FIELDS, by and through her agent  
Suzanne Shell

**PLAINTIFFS**

v.

ROCCO F. MECONI, Individually and Officially  
FREMONT COUNTY DEPARTMENT OF  
HUMAN SERVICES, Officially  
STEVE CLIFTON, Individually and Officially  
DAWN RIVAS, Individually and Officially  
TODD HANENBERG, Individually and Officially  
DAN KENDER, Individually  
ANNA HALL OWEN, Individually and Officially  
DISTRICT COURTS, FREMONT COUNTY Officially

**DEFENDANTS**

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**DEFENDANTS, DANIEL C. KENDER'S, MOTION TO DISMISS**

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Defendant, Daniel C. Kender, pursuant to Fed. R. Civ. P 12(b)(6), submits the following Motion to Dismiss:

1. Plaintiffs filed this action alleging violations under 42 U.S.C. §1983. Specifically, plaintiffs alleged that, while acting **under color of state law**, all defendants violated their constitutional rights by interfering with the plaintiffs freedom of association, right to contract, freedom of press, due process and viewpoint discrimination.
2. In evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim, the court must accept as true all well-pleaded factual allegations in plaintiff's complaint. *Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 543 (10<sup>th</sup> Cir. 1995).
3. All reasonable inferences must be resolved against a nonmoving party, *Bauchman v.*

*West High School*, 132 F.3d 542, 550 (10<sup>th</sup> Cir. 1997).

4. Pro se litigants' pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10<sup>th</sup> Cir. 1991).
5. Dismissal is appropriate only if it appears that plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. *Jandro v. Foster*, 53 F.Supp.2d 1088, 1094 (D. Cob. 1999) citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L.Ed. 80 (1957) If plaintiffs cannot state a claim against Defendant, Daniel C. Kender, under 42 U.S.C. § 1983, and dismissal is proper.
6. In order to state a claim against Defendant, Daniel C. Kender, under 42 U.S.C. § 1983, plaintiffs must allege:
  - (1) that Defendant, Daniel C. Kender deprived them of a right, privilege, or immunity secured by the federal constitution; and
  - (2) that Defendant, Daniel C. Kender acted under color of state law.

*International Society for Krishna Consciousness, Inc. v. Colorado State Fair & Industrial Exposition Commission*, 673 P.2d 368, 373 (Colo. 1983).

7. The Tenth Circuit has held that a guardian ad litem does not act under color of state law and cannot be sued under § 1983. *Meeker v. Kercher*, 782 F.2d 153, 155 (10<sup>th</sup> Cir. 1986). The court in *Meeker* reasoned that "a guardian ad litem assumes no obligation to the missions of the state, but owes his or her undivided loyalty to the minor, not the state." 782 F.2d at 155 (citations omitted). The court held that because a guardian ad litem must exercise independent, professional judgment, a guardian ad litem is not acting under color of state law for purposes of § 1983. *Id*; See also, *Schaffrath v. Thomas*, 189 F.3d 478 (10<sup>th</sup> Cir. 1999) (unpublished).
8. Further, in *Polk County v. Dodson*, 454 U.S. 312, 102 S. Ct. 445, 325, 453, the Court held that a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to an indigent Defendant in a state criminal proceeding. The rationale in *Polk*, *id.* and *Meeker*, *supra*, is substantially similar. Both conclusions result from the fact that attorney's must exercise independent judgment on behalf of their client, regardless of state enumeration. This would be true in Defendant, Daniel C. Kender's position as court-appointed counsel for the respondent-mother, April Fields.
9. Plaintiffs brought this § 1983 action against Defendant, Kender in his capacity as court-appointed counsel for the respondent parent.
10. Defendant Kender has acted independently, and not under color of state law, plaintiff's § 1983 claim fails to state a claim upon which relief may be granted. Accordingly, dismissal with prejudice against Defendant Kender is proper.

11. Plaintiff Suzanne Shell, has not made any allegations that Defendant Kender in his capacity as court-appointed counsel for the respondent parent, acted **under color of state law** in depriving the plaintiff Suzanne Shell, of any of her constitutional rights.

**WHEREFORE**, Defendant Kender, prays this Honorable Court dismiss the claims of the Plaintiff Suzanne Shell and April J. Fields, with prejudice, and for any and other further relief the Court deems just and appropriate.

**RESPECTFULLY SUBMITTED** this 6<sup>th</sup> day of May, 2003.



Daniel C. Kender, Reg. #15523  
131 South Union Avenue  
Pueblo, Colorado 81003  
Telephone: (719) 542-6388

#### **CERTIFICATE OF SERVICE**

I, Susan McKay, certify that on this 6<sup>th</sup> day of May, 2003, I served a true and correct copy of the above and foregoing **DEFENDANTS, DANIEL C. KENDER'S, MOTION TO DISMISS** by United States Mail, postage prepaid, and addressed to the following by 5:00 o'clock P.M.:

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