UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

SUZANNE SHELL
APRIL 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 C. KENDER, Individually
ANNA HALL OWEN, Individually and Officially
DISTRICT COURT, FREMONT COUNTY, Officially
Defendants

PLAINTIFF SHELL'S RESPONSE TO DEFENDANT ANNA HALL OWEN MOTION TO DISMISS

COMES NOW, Plaintiff Suzanne Shell, *pro se*, requesting this Honorable Court to deny the defendant's, ANNA HALL OWEN'S Motion to Dismiss and in support thereof states as follows:

1. Plaintiff Shell appears *pro se*. The court shall construe the pleadings and papers of a pro se litigant liberally. See ***Haines v. Kerner,*** 404 U.S. 519, 520-21 (1972) (per curiam). ***Joseph v. United States Federal Bureau of Prisons***, 232 F.3d 901, 232 F.3d 901 (10th Cir. 10/16/2000)

2. Accepting as true the factual allegations in the complaint and drawing all reasonable inferences in favor of the plaintiff, the district court may appropriately dismiss a

complaint only when it appears that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. See ***Yoder v. Honeywell, Inc***., 104 F.3d 1215, 1224 (10th Cir. 1997). See ***Bauchman v. West High Sch***., 132 F.3d 542, 550 (10th Cir. 1997). ***Livingston v. Garcia***, 211 F.3d 1278, 211 F.3d 1278 (10th Cir. 04/26/2000)

3. Defendant Owen is named in her professional and individual capacity.

4. The action in the above captioned case does not relitigate a child protection action, it is a tort claim based on actions she committed outside the scope of her authority as a Guardian ad litem.

5. Defendant Owen acted under color of state law as a willful participant in joint action with the State and state agents. To act "under color of" state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that she is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting "under color" of law for purposes of § 1983 actions. ***Adickes v. S. H. Kress & Co.***, 398 U.S. 144, 152 (1970); ***United States v. Price***, 383 U.S. 787, 794 (1966); ***Dennis V. Sparks et al.***, 449 U.S. 24, 101 S. Ct. 183, 66 L. Ed. 2d 185, 49 U.S.L.W. 4001 (11/17/80). Private parties are state actors when they are "willful participant[s] in joint action with the State or its agents." ***National Collegiate Athletic Association v. Takanian***, 488 U.S. 179, 109 S. Ct. 454, 102 L. Ed. 2d 469, 57 U.S.L.W. 4050.

6. Any court proceeding constitutes state action. DHS employees are state actors. Defendant Owen participated in a sham legal proceeding, in concert with Fremont County Department of Human Services - a state agency - and the other defendants, willfully and

maliciously designed to impair the plaintiffs' rights to freedom of association, freedom of the press, right to contract, and to deny due process in retaliation for their exercise of those rights, and singling plaintiff Shell out from all other media representatives for this action, constituting viewpoint discrimination against plaintiff Shell. To state a cause of action under 42 U.S.C. § 1983 for an alleged violation of the Fourteenth Amendment and provisions of the Bill of Rights incorporated into the Fourteenth Amendment, the challenged conduct must constitute state action. See ***Lugar v. Edmondson Oil Co.***, 457 U.S. 922, 930-32 (1982); ***Pino v. Higgs***, 75 F.3d 1461, 1464 (10th Cir. 1996).

7. Defendant Owen's willful participation in the sham legal process, and the fact that she acted together with, and obtained significant aid from state officials, and engaged in conduct otherwise chargeable to the State, renders her liable for the deprivations suffered by the plaintiffs. Where a § 1983 claim is based on the conduct of a private individual, that conduct constitutes state action if it is "`fairly attributable to the state.'" ***Pino***, 75 F.3d at 1465 (quoting ***Lugar***, 457 U.S. at 937). A private individual's conduct is "fairly attributable to the state" if two conditions are met:

> "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the state is responsible. Second, the private party must have acted together with or . . . obtained significant aid from state officials or engaged in conduct otherwise chargeable to the State." Id. (quoting ***Wyatt v. Cole***, 504 U.S. 158, 162 (1992) (internal quotations and citation omitted)). ***Scott v. Hern,*** No. 98-1320 (10th Cir. 07/06/2000).

IMMUNITY

8. Defendant Owen has characterized her duties to hold paramount the best interests of the child. She further claims immunity to be able to function without worry of possible later harassment and intimidation of dissatisfied parents. Plaintiff Shell is not a dissatisfied parent.

9. The court order appointing defendant Owen as GAL for Ashley Fields limits her authority in that she is only 'directed and empowered to represent the best interests of the child.'

10. The Supreme Court characterizes GAL duties (Supreme Court Directive 97-02):

> B. A guardian ad litem or special advocate in a dependency and neglect case shall specifically: 1. Attend all court hearings and provide accurate and current information directly to the court. 2. At the court's direction and in compliance with 19-3-606(1), C.R.S. (2000), file written or oral report(s) with the court and all other parties. 3. Conduct an independent investigation in a timely manner, which shall include, at a minimum: a) Personally meeting with and observing the child(ren)'s interaction with the parents or proposed custodians when appropriate; b) Personally meeting with and observing the child at home or in placement; c) Personally interviewing the child (if age-appropriate); d) Reviewing court files and relevant records, reports, and documents; e) Interviewing, with the consent of counsel, respondent parents; f) Interviewing other people involved in the child's life; and g) When appropriate, visiting the home from which the child was removed. 4. In cases in which the parents or child are living or placed more than 100 miles outside of the jurisdiction of the court, the requirements to personally meet with and interview the person are waived unless extraordinary circumstances warrant the expenditure of state funds required for such visits. However, the appointee shall endeavor to meet the person if and when that person is within 100 miles of the jurisdiction of the court. 5. Continue to perform all duties listed above as necessary to represent the best interest of the child for the duration of the case unless relieved of such duty by the court.

11. C.R.S. 19-1-111 instructs the GAL to follow the aforementioned Supreme Court Directives and any other practice standard established by rule or directive. C.R.S. 19-1-209 limits GAL authority and jurisdiction to cooperate and share information with CASA, to cooperate with CASA to represent the best interests of the child. The legal reasons why a GAL is not authorized to scrutinize the legal and peaceful associations of a respondent parent have been clearly established in law for years - See paragraph 22 et. seq.

12. Jurisdiction for UPL is vested exclusively in the Colorado Supreme Court. ***Watt, Tieder, Killian & Hoffar v. U.S. Fidelity & Guar. Co.***, 847 p.2d 170 (Colo. App. 1992) ***citing Denver Bar Ass'n v. Public Utilities Commission***, 391 P.2d 467 (Colo. 1964).

13. The only way a lawyer may prosecute a claim for UPL is through the initiation of a separate suit permitting only injunction against engaging in UPL but not restricting freedom of association, or through contempt proceedings with the burden of proof being 'beyond a reasonable doubt,' C.R.S. 12-5-112. ***Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n***. 135 Colo. 398. 312 P.2d 998. The DHS motion to join plaintiff Shell as a Special Respondent does not conform to these clearly established mandates. It would be only in this regard that defendant Owen was NOT acting in her capacity as GAL, but rather, as any other attorney, which would render her immunity claim without merit.

14. The Colorado Children's Code C.R.S. 19-1-104 does not grant the Juvenile Court jurisdiction to hear issues about parties or non-parties who are alleged to engage in the unauthorized practice of law. The Children's Code also excludes UPL as a reason for joining a person to a D&N case under C.R.S. 19-3-502(6) which clearly declares the

limitations on claims in dependency or neglect actions for the joinder of a special respondent to a person who has had some relevant involvement in the child's life. Plaintiff Shell had never met the subject child and Owen never alleged that she had.

15. Judicial immunity is not available in the clear absence of all jurisdiction. ***Bradley v. Fisher***, 80 U.S. 335 (1871). Except where a judge has acted "in the clear absence of all jurisdiction," the doctrine of judicial immunity shields that judge from liability for the judge's official adjudicative acts. ***Stump v. Sparkman,*** 435 U. S. 349, 356-57 (1978) Quasi-judicial immunity possess the same limitations. The motion that brought the issue of plaintiff Shell's joinder to the case before the Fremont County court involved a contrived complaint about Shell engaging in the unauthorized practice of law - clearly an issue which has no bearing on the child, and which the juvenile court had no jurisdiction over outside of contempt of court proceedings. The only remedy sought was to prevent plaintiff Shell from associating with Plaintiff Fields - clearly a remedy which is inconsistent with protecting the legal profession. The sham hearing consisted solely of Unauthorized Practice of Law allegations against Shell. Under statute, and under Supreme Court directives, a GAL has no authority or jurisdiction to represent the best interests of a child in any action involving the alleged unauthorized practice of law by anyone, nor does GAL jurisdiction extend to a person who is not a party to the case and who has never been involved in the child's life. Furthermore, the GAL for the child is not charged with representing the legal interests or best interests of the respondent parents as defendant Owen did during the hearing. Finally, there was no evidence pertaining to nor any finding based on the requisite legal standard "the best interests of the child" in any

part of this hearing. While this hearing was held under the caption of the D&N case and under the falsely assumed jurisdiction of the Juvenile Court, it did not address plaintiff Shell's conduct or lack thereof toward the child which had any affect on the child, the affect on the child or lack thereof caused by plaintiff Fields' association with plaintiff Shell, or any other issue relating to the child. The court and the GAL clearly lacked subject matter jurisdiction over the UPL allegations against plaintiff Shell, and lacked personal jurisdiction over plaintiff Shell under the Colorado Children's Code in the context of this D&N case.

16. Owen erroneously claims quasi-judicial immunity for all acts arising out of her appointment as a Guardian ad litem. The acts committed by defendant Owen against the plaintiffs with regard to their freedom of association, freedom of the press, the right to contract, due process during a hearing which only addressed allegations of plaintiff Shell engaging in the unauthorized practice of law, and which did not concern the best interests of the child and viewpoint discrimination are all acts committed outside the scope of her authority as a guardian ad litem. A guardian ad litem has no authority to act regarding issues unrelated to parenting practices or abilities directly affecting the well-being or safety of the child she represents. A GAL has no sanction by the state to harass, intimidate, or otherwise use her position with the court to deprive a non-party to a D&N case of his or her constitutionally protected rights. The court has held that a court-appointed guardian ad litem is only entitled to absolute quasi-judicial immunity for conduct that is within the scope of a guardian ad litem's duties. ***Short ex rel. Oosterhous v. Short,*** 730 F. Supp. 1037 (D. Colo. 1990). Whether a person is entitled to absolute

immunity or only qualified immunity depends on the nature of the function they were performing. ***Snell v. Tunnell,*** 920 F.2d 673 (10th Cir. 11/30/1990).

17. Owen possesses no court direction or empowerment to harass, impair, retaliate, intimidate censor or scrutinize the constitutionally protected rights of the respondent mother, April Fields, including her freedom of association for the purposes of advocacy and publication, the nature and scope of her contractual obligations or choices, what other remedies she might seek to redress any grievances she might have, or to impair her absolute right to contest the subject dependancy and neglect petition. Even assuming, arguendo, that Owen professes an interest in the activities and associations of a parent who is the subject of a child protection intervention, her interest is strictly limited to activities or associations involving parenting ability, home environment, or illegal or dangerous conduct in proximity to the child. Since the Fields' dependency case has not yet been adjudicated, her legal interest does not yet extend to any treatment plan for the parent, either. It is indisputable that a parent's lawful activities and associations with the general public, including Shell, which have no bearing on the parent's ability to provide a safe and appropriate home for the subject children, are not subject to GAL scrutiny because they do not fall under DHS or the court's jurisdiction. By subjecting Fields to this scrutiny of issues which have no bearing on the best interests of Ashley Fields and no bearing on April Fields' parenting skill and ability, which expanded scrutiny Owen has not practiced on any other case under her authority as GAL, and which she has not extended to any other aspect of Fields' life except her association with Shell, she has stepped outside the scope of her authority as a GAL. The defendants have succeeded in impairing Shell's

rights through their limited jurisdiction over April Fields. As GAL, Owen acted outside her scope of authority in intimidating and retaliating against Shell for exercising her constitutionally protected right to associate with Fields for advocacy and news gathering.

18. Plaintiff Shell is not the subject of a child abuse investigation or Dependency & Neglect action in Fremont County. Shell does not reside in Fremont County. Defendant Owen has not been appointed GAL to any of Shell's children. Neither is Shell a proposed custodian of the subject child nor a person involved with the child's life. It is undisputed that Shell has made no effort to contact the subject child which would be the only reason that Owen could justify any legal interest in Shell's activities. Therefore, Owen as a GAL, has absolutely no authority to intimidate, harass, retaliate, infringe or impair the legal activities of Shell, including her associations (including with other respondent parents), news gathering, advocacy, her agency under Fields' power of attorney or other legal activity that Shell and Fields mutually choose to engage in.

19. ***Harlow v. Fitzgerald***, 457 U.S. 800 (1982) states:

> We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. See ***Procunier v. Navarette***, 434 U.S. 555, 565 (1978); ***Wood v. Strickland***, 420 U.S., at 322 . 30 . . . If the law was clearly established, the immunity defense ordinarily [457 U.S. 800, 819] should fail, since a reasonably competent public official should know the law governing his conduct.

20. Owen acted and conspired to intimidate, harass and retaliate against Shell's exercise of the aforementioned rights by conspiring with the other defendants before Shell was joined

to the Fields case and then extended her activities to subjects which have no bearing on the best interests of the child, and which were not authorized by any rule, directive or statute and were outside of her lawful scope of authority as GAL. Owen's nontestimonial actions that form the basis of Shell's complaint are similarly "not integral to the judicial process," and her actions before the court lacked personal and subject matter jurisdiction and do not fall within her clearly defined scope of authority as GAL to the child, Ashley Fields, and, therefore, defendant Own is not entitled to absolute immunity. ***Spielman v. Hildebrand***, supra.

21. Jurisdiction for UPL is vested exclusively in the Colorado Supreme Court. ***Watt, Tieder, Killian & Hoffar v. U.S. Fidelity & Guar. Co.***, 847 p.2d 170 (Colo. App. 1992) ***citing Denver Bar Ass'n v. Public Utilities Commission***, 391 P.2d 467 (Colo. 1964). DHS and the defendant wilfully and wantonly disregarded this jurisdictional mandate in her zeal to prosecute Shell for UPL in Juvenile Court without legal authority or jurisdiction to do so in order to achieve the deprivation of her constitutionally protected rights as enumerated in the original and supplemental complaints.

22. The only way a lawyer may prosecute a claim for UPL is through the initiation of a separate suit permitting only injunction against engaging in UPL but not restricting freedom of association, or through contempt proceedings with the burden of proof being 'beyond a reasonable doubt,' C.R.S. 12-5-112. ***Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n***. 135 Colo. 398. 312 P.2d 998. The defendant's motion to join plaintiff Shell as a Special Respondent does not conform to these clearly established mandates. If the intent of defendant Owen's motion in support of defendant Meconi's motion was to

prosecute Shell for alleged UPL as was stated in his motion, then that action can only be brought in the same capacity as any other attorney, not as GAL, and her claim for quasi-judicial immunity fails and full liability attaches. The only other intent would be to allege UPL, wilfully, wantonly and knowingly bringing it before a court which lacked jurisdiction to hear it, as a device to inflict constitutional injuries upon the plaintiffs by acting in concert with state agents to use the force of law to deprive the plaintiffs of their aforementioned rights in the furtherance of the defendants' agendas against plaintiff Shell; at which juncture, as GAL, she acted outside the scope of her authority and in the absence of any and all jurisdiction, severing her from immunity.

23. The Colorado Children's Code does not give a GAL jurisdiction or authority to investigate or prosecute issues about parties or non-parties who are alleged to engage in the unauthorized practice of law, nor to seek or exercise jurisdiction over persons who have no involvement in the child's life, nor to seek or exercise jurisdiction over persons who present no risk to a parent's therapeutic progress in a court ordered treatment plan, ***People V. District Court,*** 731 P.2d 652 (Colo. 1987). The Children's Code also excludes UPL as a reason for joining a person to a D&N case under C.R.S. 19-3-502(6) which clearly declares the specific limitations on claims in dependency or neglect actions for the joinder of a special respondent to a person who has had some relevant involvement in the child's life. It is undisputed that Plaintiff Shell had never met the subject child.

24. Similarly, defendant Owen possess no immunities in her personal capacity. ***Wyatt v. Cole,*** 112 S.Ct. 1827 (1992).

FREEDOM OF ASSOCIATION

25. Association for the purposes of issue advocacy is a well established constitutionally protected right. The action taken by the defendants effectively curtailed the plaintiffs' rights to freedom of association free from retaliation, recrimination, reprisal or sanctions. The fact that the defendants' actions in this case are unrelated to the plaintiff's protected liberties does not preclude the fact that the result of their actions curtailed the plaintiffs' protected liberties. In ***National Association for Advancement Colored People V. Alabama ex Rel. Patterson*** 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (06/30/58) the U. S. Supreme Court said:

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. The Supreme Court has more than once recognized this by remarking upon the close nexus between the freedoms of speech and assembly. ***De Jonge v. Oregon***, 299 U.S. 353, 364; ***Thomas v. Collins***, 323 U.S. 516, 530. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. ***See Gitlow v. New York***, 268 U.S. 652, 666; ***Palko v. Connecticut***, 302 U.S. 319, 324; ***Cantwell v. Connecticut***, 310 U.S. 296, 303; ***Staub v. City of Baxley***, 355 U.S. 313, 321. It is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.
>
> . . .In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action. . .
>
> . . .Similar recognition of possible unconstitutional intimidation of the free exercise of the right to advocate underlay this Court's narrow construction of the

> authority of a congressional committee investigating lobbying and of an Act regulating lobbying, although in neither case was there an effort to suppress speech. ***United States v. Rumely***, 345 U.S. 41, 46-47; ***United States v. Harriss,*** 347 U.S. 612, 625-626. The governmental action challenged may appear to be totally unrelated to protected liberties. Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment. ***Grosjean v. American Press Co.***, 297 U.S. 233; ***Murdock v. Pennsylvania,*** 319 U.S. 105. . ."

26. The issue of freedom of association was clearly established in the middle of the 20th century during the Civil Rights movement. There, government agencies who forwarded a policy of racial segregation deemed it necessary to attack civil rights advocates like the National Association for Colored Persons (NAACP) because their association with and advocacy on behalf of blacks jeopardized the status quo and threatened the entire institution of racial segregation. State agencies actually instituted UPL complaints, investigations and prosecution against NAACP lawyers in order to prevent their association with civil rights activists. In a series of cases, the Supreme Court consistently ruled that such conduct, in all forms, on the part of state agencies, violated the first amendment rights of the activists and advocates. For example: The rights of advocacy and to petition the government for redress of grievances are protected by the First Amendment. ***NAACP v. Button***, 37 U.S. 415, 429; ***Edwards v. South Carolina***, 372 U.S. 229, 235; and "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."

NAACP v. Alabama ex rel. Patterson 357 U.S. 449 at 460. The fact that the facts in this case so closely parallel the facts in these and other historic decisions, coupled with the fact that this clearly established law was held in such contempt by the defendant that it didn't even enter into her consideration before she conspired and acted to violate those explicitly protected rights belonging to the plaintiffs, is both shocking and frightening.

27. The rights of the plaintiffs are intertwined through their mutual desire for their lawful association. Plaintiff Fields has the same right to have her story of governmental abuse published/broadcast as plaintiff Shell has to engage in news gathering regarding Fields' story and to publish/broadcast it, therefore, they are jointly engaged in a common endeavor. Freedom of association is necessary for the advancement of other First Amendment freedoms. The First Amendment protects the right to associate with others in pursuit of a wide variety of political, advocacy, social, economic, educational, religious and cultural ends. When the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association is implicated. ***Boy Scouts of Am. v. Dale,*** 530 U. S. 640, 678 (2000). It only takes an infringement against one person to implicate the rights of other persons who wish to associate with the aggrieved person where the desire to associate is mutual.

VIEWPOINT DISCRIMINATION

28. Plaintiff Shell espouses and publishes a viewpoint which is unpopular with the defendants, a viewpoint which they wanted silenced. The defendants' actions have silenced both plaintiffs, prohibited the plaintiffs' assembling together, and prevented

plaintiff Shell's legal and peaceful news gathering by force of law. ***Boy Scouts of Am. v. Dale,*** 530 U. S. 640, 678 (2000) expands this principle to unpopular issues:

> "And the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view.
>
> "In speaking of the Founders of this Nation, Justice Brandeis emphasized that they 'believed that the freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.' ***Whitney v. California***, 274 U. S. 357, 375 (concurring opinion). He continued: "Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed." Id., at 375-376."

FREEDOM OF THE PRESS

29. Neither the court nor any state agency has the authority or jurisdiction to exercise editorial control over the content of plaintiff Shell's publications and broadcasts through state agency intervention or court edicts.

> "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time," ***Miami Herald Publishing Co. v. Tornillo***, 418 U.S. 241 (1974) .

30. The U. S. Supreme Court has upheld, without exception, the press's right to publish. In ***Cox Broadcasting Corp. v. Cohn***, 420 U.S. 469 (1975), the court found unconstitutional a civil damages award entered against a television station for broadcasting the name of a

rape-murder victim which the station had obtained from courthouse records, In ***Oklahoma Publishing Co. v. Oklahoma County District Court***, 430 U.S. 308 (1977), the court found unconstitutional a state court's pretrial order enjoining the media from publishing the name or photograph of an 11-year-old boy in connection with a juvenile proceeding involving that child which reporters had attended. Finally, in ***Smith v. Daily Mail Publishing Co.***, 443 U.S. 97 (1979), the court found unconstitutional the indictment of two newspapers for violating a state statute forbidding newspapers to publish, without written approval of the juvenile court, the name of any youth charged as a juvenile offender.

31. ***Ex parte Jackson***, 96 U.S. 727 , 733 clearly defines that the freedom of the press extends to all activities surrounding the dissemination of ideas: 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' Correspondingly, without a willing and accessible subject who has a story, or if the access to that subject is prevented by force of law, there is no story to publish, implicating freedom of the press, prior restraint and censorship.

32. Court hearings in Dependency and Neglect proceedings are open to the public pursuant to C.R.S. 19-1-106. What transpires in the court room is public property. Those who see and hear what transpired can report it, analyze it and editorialize on it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it. ***Craig v. Harney,*** 331 U.S. 367, 374 (1947), ***Cox Broadcasting Corp. et al. v. Cohn*** 1975.SCT.714, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328. See

also ***Sheppard v. Maxwell***, 384 U.S. 333, 350 (1966) at 362-363; ***Estes v. Texas***, 381 U.S. 532, 541-542 (1965); ***Pennekamp v. Florida***, 328 U.S. 331 (1946); ***Bridges v. California,*** 314 U.S. 252 (1941).

RIGHT TO CONTRACT

33. Fields assigned a limited power of attorney to Shell on February 2, 2003, on her own initiative and without any influence whatsoever by Shell. The plaintiffs did not e-mail or speak by telephone prior to the assignment of Field's power of attorney. The first contact between the plaintiffs occurred in person on April 26, 2003. Owen has no legal authority as a GAL to scrutinize this principle/agency relationship as it has no bearing on Fields' parenting abilities or the best interests of the child. Defendant Owen falsely claimed plaintiff Shell had exerted undue influence over plaintiff Fields in order to obtain the power of attorney, over the objections of plaintiff Fields. The power of attorney was a condition of the contract in which plaintiff Shell would video document Fields' case for her proposed broadcast. The power of attorney legally permitted her to access the DHS case file (indeed, plaintiff Shell used to obtain a simple release of confidentiality signed by a parent until DHS refused them, accusing Shell of forging the signatures. Shell then obtained powers of attorney and required the parent to have them notarized so that she could not be falsely accused of forgery and her right to access the file could not be similarly denied). DHS has no statutory authority or jurisdiction to interfere with the contracts or contractual obligations between a respondent parent and a third party. Indeed, a court does not have the power to alter the terms of contracts, even through court order, ***Parrish Chiropractic Center v. Progressive Case. Inc.***, 874 P.2d 1049 (Colo. 1994).

There is no case law in Colorado, or the 10th Circuit or the Supreme Court which permits any court to invalidate a power of attorney, nor any state or municipal agency to seek invalidation through any court, when neither the agent nor the principle are seeking invalidation - indeed are resisting such invalidation. The defendant exercised a false authority and jurisdiction to impair the plaintiffs' rights to contract with wilful and wanton disregard for the law and the rights of the plaintiffs for the express purpose of preventing plaintiff Shell's news gathering activities and depriving the plaintiffs' of their rights to freedom of association. The fact that an attorney, with a high knowledge of the law, would act as though she were not bound by constitutional restraints and has the absolute right to act outside her legal authority to interfere with and impair the plaintiffs' rights to contract through the force of law, with a complete disregard for clearly established law to the contrary, is shocking to the conscience.

DUE PROCESS

34. 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. The hearing to join plaintiff Shell as a party to the Fields' D&N case did not afford the plaintiffs the opportunity to be heard. Plaintiff Shell was not allowed to participate in the hearing nor afforded an attorney as mandated by statute. Plaintiff Fields' attorney refused to represent her legal interests or her wishes.

35. Procedural Due Process demands a fair procedure. ***Zinermon v. Burch***, 494 U.S. 113 (1990). The deprivation was achieved as the direct result of a one-sided hearing. A one-

sided hearing is not a fair procedure. Owen actively participated in this hearing in the absence of legal authority or jurisdiction to deprive the plaintiffs of their rights.

FACTS OF THE CASE

36. Defendant Kender, on or about April 15, 2003, did request and obtain an order from Judge Julie Marshall of the Fremont District Court, to appoint a Guardian ad litem for his client, April Fields. The purpose and effect of this request was to interfere with and impair the rights of the plaintiffs to associate with each other for the purposes of advocacy and news gathering, and to impair their principal-agent relationship under a power of attorney. Owen participated in and approved of this action. The obligations of a contract are impaired by the exercise of police powers which renders them invalid, or releases or extinguishes them. ***Sturges v. Crowninshield***, 4 Wheat. 122.

37. Upon discovering that Fields was associating with Shell and had assigned Shell a limited power of attorney, by virtue of Kender's unethical disclosure of the same, Owen participated in and supported DHS's actions to join Shell to the case for the limited purposes of issuing orders restricting her contact with Fields under the auspices of prosecuting a UPL allegation against Shell. In the months prior to Kender's disclosure, Owen had no objections to any of Fields' associations outside of her home, nor did she scrutinize those associations. Her scrutiny and objections were only brought to bear upon the discovery that Shell was involved. The Supreme Court has recognized the vital relationship between freedom to associate and privacy in one's associations. Inviolability of privacy in group or individual association may in many circumstances be indispensable

to preservation of freedom of association, particularly where a group or individual espouses dissident beliefs. United ***States v. Rumely***, supra, at 56-58 (concurring opinion). ***National Association for Advancement Colored People V. Alabama ex Rel. Patterson*** 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (06/30/58).

38. Defendant Owen acted together with the other defendants to deny the plaintiffs' due process rights through the mechanism of the Department of Human Services motion and sham legal 'hearing' to add plaintiff Shell as a Special Respondent to plaintiff Fields' dependency case; for the purposes of issuing court orders preventing the plaintiffs from associating with or contacting each other based on false UPL allegations.

39. Defendant Owen made no attempt to conceal her participation in the events described above, and even filed her own motion in support of the proposed hearing about Shell's alleged UPL and proposed joinder. She acted to intimidate, harass, retaliate, interfere with and impair the constitutionally protected rights of the plaintiffs. She stepped outside the authority of her appointment to assume control over issues she was not authorized to investigate or prosecute, which were unrelated to the best interests of the child and to deprive Shell, who she had no legal jurisdiction or authority over, of her constitutionally protected rights.

40. The effect of the aforementioned actions was to intimidate, harass, retaliate, impair, infringe and deny the plaintiffs' exercise of their protected rights to freedom of association, freedom of the press, right to contract, and due process. Owen's actions and participation with the other defendants were intended to prevent the plaintiffs from associating for the purposes of advocacy and news gathering and to impair the plaintiffs'

principal-agent relationship under their power of attorney and related contractual obligations.

41. Defendant Owen actively participated in denying the plaintiffs' aforementioned rights solely because of plaintiff Shell's viewpoint, which is highly critical of child protection practices and its practitioners, and extremely critical of practices in Fremont County. Shell has been singled out for this treatment by Owen and the defendants. No other member of the media and no other advocate or activist is joined to any D&N case, including this case, against his or her will for the purposes of infringing on freedom of association and/or freedom of the press. This constitutes viewpoint discrimination. First Amendment principles start with the premise lying at the heart of the First Amendment that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration and adherence, ***Turner Broadcasting System, Inc. v. Federal Communication Comm'n,*** 114 S. Ct. 2445 (1994). For these reasons, the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control or retaliation over the content of messages expressed by private individuals. Court precedents thus apply the most exacting scrutiny to State actions that retaliate, suppress, disadvantage, or impose burdens upon speech because of the content. Viewpoint discrimination is an egregious form of content discrimination. Content-based restrictions are subject to strict scrutiny. Viewpoint-based restrictions receive even more critical judicial treatment. ***Mesa v. White,*** 197 F.3d 1041 (10th Cir. 11/23/1999)

42. Plaintiff Shell is an author, publisher and independent documentary video producer. It is well established that freedom of the press is not confined to newspapers or periodicals, but is a right of wide import and in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. ***Lovell v. City of Griffin***, 303 U.S. 444; ***Burstyn, Inc. v. Wilson***, 343 U.S. 495. In ***New York Times Co. V. United States***, 403 U.S. 713 (1971) the Court said:

> "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." ***Bantam Books, Inc. v. Sullivan***, 372 U.S. 58, 70 (1963); see also ***Near v. Minnesota***, 283 U.S. 697 (1931). The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." Organization for a Better ***Austin v. Keefe***, 402 U.S. 415, 419 (1971)

By requesting a no contact order between a producer and her subject, the defendants have, through retaliation and intimation, invoked prior restraint on freedom of the press, and censorship without meeting the constitutional scrutiny required.

43. Judge Julie Marshall has made no secret of her aversion to plaintiff Shell's advocacy and activism, and has historically used her bench to retaliate against any respondent parent who associated with Shell. Owen and the defendants are all aware of this bias and exploited it to achieve the aforementioned deprivations against Shell. An "impartial decision maker" is an "essential" right in civil proceedings. The judicial neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness by ensuring that no person will be

deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. ***Marshall v. Jerrico***, 446 U.S. 238, 242 (1980); ***Schweiker v. McClure***, 456 U.S. 188, 195 (1982). Knowing of Judge Marshall's bias against her, Shell raised the issue at the sham hearing. Shell's attempts to have Judge Marshall removed were rebuffed by her.

44. Defendant Meconi shares Judge Marshall's aversion and has also endeavored to impair Shell's First Amendment rights in the past through retaliation, threat and coercion and sham and vexatious legal filings without proper jurisdiction. Fremont County Department of Human Services also practices retaliation against respondent parents who associate with Shell and acts to prevent Shell's association with respondent parents who seek association with her through the use of threats, intimidation and coercion. Owen did not want Fields to associate with Shell, and did not want Fields to assign agency to Shell under a power of attorney. Defendant Owen participated in legal action to prevent the exercise of their rights when Fields insisted on continuing with her association and right to contract. Further, defendant Owen acted outside her scope of authority by knowingly participating in and/or acquiescing to a corrupt legal process to achieve her goal.

45. Defendant Owen did not act independently inasmuch as she had an interest in the overall scheme, shared the same desire for the outcome, participated in the scheme with state actors, and facilitated the successful outcome of that scheme. Express agreement is not required. ***Snell v. Tunnell***, 920 F.2d 673 (10th Cir. 11/30/1990)

46. Defendant Owen, is liable under § 1983 by virtue of her willful participation in joint action with the State or its agents to forward the interests of the state over the

constitutionally protect rights of the plaintiffs by participating in prosecuting plaintiff Shell for the Unauthorized Practice of Law in Juvenile Court, exclusive of the best interests of the child; and outside of legitimate scope of authority as a Guardian ad litem and by employing intimidation and retaliation through state action against both plaintiffs for their exercise of their constitutionally protected rights, which exercise had no relevance to the well being, safety or best interests of the child which is the statutory criteria governing child protection issues, under the color of law.

47. There are material facts in dispute which MUST be addressed through discovery and therefore, a summary dismissal, as requested by Defendant Owen, is prohibited as a matter of law, see F.R.C.P 56.

WHEREFORE , for the reasons stated herein, Plaintiff Shell respectfully requests this Honorable Court to deny Defendant Owen's MOTION TO DISMISS.

Respectfully submitted August 25, 2003

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the attached document **PLAINTIFF SHELL'S RESPONSE TO DEFENDANT ANNA HALL OWEN'S MOTION TO DISMISS** were placed in the United States Mail, first class mail, postage prepaid on August 25, 2003

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_____August 25, 2003
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