COURT OF APPEALS DIVISION III OF THE STATE OF WASHINGTON

In re

DEBRA CLAWSON Respondent	)	
	)	No. 325971-A-III
v.	)	
WILLIAM MARX	)	
JANELLE HUNTER Appellant	)	

Respondent's Brief

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Mr. Marx's Issues

There are fourteen assignments of error and three issues presented by Mr. Marx.

The first issue is the contention the trial court applied the wrong legal standard in denying a motion to vacate, contending the court was required to conduct an evidentiary hearing. (Brief of Appellant, page 3).

The second issue is whether the Court erred in denying Mr. Marx's motion for adequate cause for a major modification, which appellant calls a "strict application of RCW 26.09.260(1) and (2). (Brief of Appellant, page 3).

The third issue contends the due process rights of Mr. Marx were violated when a non-parental custody decree was entered without a formal establishment of parentage.

Statement of Facts

On August 25, 2010, Kaitlyn Rose Hunter was born to Janelle Marie Hunter and William Franklin Marx. (CP 2,10). Mr. Marx was not present for the birth, but was advised the next day that Ms. Hunter had given birth. Mr. Marx hung up the phone upon learning of this information. (CP 86). Mr. Marx was also present and made aware that Ms. Hunter was pregnant with his child. (CP 86).

Child Protective Service placed a hold on the child and the state of Washington commenced a dependency proceeding under 10-7-01825-8 and 10-7-01826-6, with the second case being for Ms. Hunter's older child, Kayden Hunter. This case was filed August 31, 2010. (CP 95)

Within the dependency case, William Marx was disclosed as being the father of Kaityln Hunter. (CP 86).

On September 7, 2010, Kaitlyn Hunter was released from the hospital to Debra Clawson, the maternal grandmother to the child. (CP 95)

Ms. Clawson filed a petition for non-parental custody on January 10, 2011. (CP 95, 1-13). Within the petition, Ms. Clawson alleged Mr. Marx was not a suitable custodian for the child (CP 9) Ms. Clawson alleged Mr. Marx had engaged in willful abandonment or substantial refusal to perform parenting functions (CP 8,9)

On the same date the case was filed, William Marx was personally served with the pleadings set forth in the return of service. including a blank answer form to fill out. (CP 95, 14-15)

Mr. Marx declined to respond or contest the action in any manner despite receiving papers identifying himself as a party and the possible father to Kaitlyn Hunter. (CP 96, 16-19).

On February 2, 2011, Ms. Clawson appeared before Commissioner Rachelle E. Anderson in Spokane County Superior Court for the adequate cause hearing. Commissioner Anderson signed the order re adequate cause, order of default, findings and decree. The findings and decree adopted the January 10, 2011 proposed residential schedules. (CP 24-26, 27-36, 37-42)

The findings show that after a JIS search it was shown that Mr. Marx had been convicted of assault of a child. (CP 32)

From February 2, 2011 until October 31, 2013, Mr. Marx never sought nor requested the supervised residential time he was afforded. (CP 96)

In July 2013, Mr. Marx, in an action started by the state of Washington after Ms. Clawson sought child support, was deemed to be the father of Kaitlyn. The final orders entered in that case direct that the residential time for Mr. Marx is addressed in the nonparental custody case. (CP 88)

From July 2013 to November 1, 2013, Mr. Marx did not seek residential time with the child. (CP 96)

Ms. Clawson called Mr. Marx on November 1, 2013 to set up a visit. Mr. Marx's first visit was November 2nd 2013 from 1:00 to 3:45. (CP 96) Ms. Clawson inquired to whether Mr. Marx would like to go to

the hockey game to visit a little more and he said yes. Ms. Clawson gave him 4 tickets to the game. (CP 96)

Mr. Marx then came for visits on 11-3-13 and 11-4-13. (CP 96)

On November 11th 2013, Ms. Clawson took Kaitlyn to Mr. Marx's house for a visit. (CP 96)

Ms. Clawson cancelled a few visits due to Kaitlyn being sick and then Kayden being sick and then Ms. Clawson was ill. Mr. Marx had advised Ms. Clawson that he shouldn't be around people who are sick since he only has an immune system of a one year old. (CP 97)

On December 8th, 2013, Mr. Marx had a supervised visit. (CP 97)

On December 14, 2013, Mr. Marx joined Ms. Clawson and the children for the teddy bear toss game. Mr. Marx sat one section over from Ms. Clawson. (CP 97)

On December 25th, 2013 Ms. Clawson offered an overnight visit. (CP 97)

On January 24th, 2014, Kaitlyn Hunter was picked up from daycare to be taken to Mr. Marx's residence. (CP 97). Kaitlyn cried the whole time driving and didn't want to stay the night. (CP 97) When she arrived, she was still in tears. (CP 97) Ms. Clawson tried to call Kaitlyn that evening, but was not allowed to speak with Kaitlyn. (CP 97) When Kaitlyn got home on Sunday she was crying.

On January 31st, 2014 Kaitlyn was again crying all the way and when she arrived at Mr. Marx's home, Kaitlyn wouldn't separate. (CP 98)

On February 4th, 2014 I Ms. Clawson texted Mr. Marx to advise him whether Kaitlyn would be unable to go for a visit as she was going to have surgery on February 6th for inner ear issues. On February 6th after the surgery Ms. Clawson advised Mr. Marx that based on the changed behaviors she saw in Kaitlyn, she was returning to the supervised visits. (CP 99)

On April 4, 2014, Mr. Marx filed a petition for modification. (CP 43-51) The petition for modification requests the Court modify the prior decree. (CP 44)

Within the petition, Mr. Marx sought a major modification contending Ms. Clawson was providing the child with a detrimental environment and that the harm likely to be caused by a change in the environment was outweighed by the advantage of a change to Kaitlyn. (CP 46). The modification petition lists a nonstatutory factor claim contending a nonparental custody action could not be commenced until Mr. Marx was actually legally established to be the father. (CP 46-47)

Mr. Marx pleaded a minor modification in the alternative, which would not cause a change in primary placement of the child. (CP 47)

Under substantial change in circumstances, Mr. Marx did not allege Ms. Clawson was providing Kaitlyn with a detrimental environment. He challenged service and the issue of his not having been legally established to be the father. (CP 48)

On May 6, 2014, an order re adequate cause was entered after a contested hearing before Commissioner Rachelle Anderson. (CP 135-137). This order denied adequate cause for a major modification finding there was no detrimental environment shown in Ms. Clawson's home. (CP 135-137, CP 155-182) The Court did find adequate cause for a minor modification, something Ms. Clawson stipulated to. (CP 135-137).

Mr. Marx timely filed a motion to revise the Commissioner's ruling. (CP 146-147) Within the motion to revise, the sole claim for revision was "Denial of adequate cause for major modification" (CP 146)

On May 30, 2014, Mr. Marx filed a motion for an order appointing a counselor for the child.

On June 5, 2014, an order denying motion for revision was entered from a hearing before Judge Tari Eitzen, of the Spokane County Superior Court. (CP 200-201)

On June 10, 2014, an order appointing a counselor was entered.

Mr. Marx also filed a motion to vacate. (CP 75). The sole basis pleaded was CR 60 (b)(5), that the judgment is void. The sole basis for this claim is Mr. Marx contending he did not get the summons with the papers he was served with.

An order denying motion to vacate was entered. (CP 133-134)

Mr. Marx filed a motion for reconsideration. (CP 138-145)

On May 5, 2015, an order denying Mr. Marx's motion for reconsideration was entered. (CP 206-210). The ruling discusses that Mr. Marx acknowledged he was aware of litigation pertaining to his child. Specifically, Judge Eitzen found that it was disingenuous for Mr. Marx to assert he was unaware that he was the father of Kaitlyn. (CP 207). The Court went on to find that Mr. Marx chose not to be involved until it was scientifically proven to him that he was the father of the child. (CP 207).

Legal Argument

Motion to Vacate

The Appellant's brief accurately discusses Judge Eitzen's rulings and citations thereto. (Appellant's brief, page 17-18) However, Appellant mischaracterizes the content. Judge Eitzen made it clear that she found Mr. Marx was properly served and had actual notice of the proceedings for nonparental custody.

Mr. Marx has never contended he was not served. He admits he was served with nonparental custody papers by Corey Clawson. He now claims he was not served with a summons.

In the Woodruff case cited by Appellant, there was a dispute whether service even occurred. Specifically, the pleadings were alleged to have been left with a person of suitable age and discretion. Woodruff v. Spence, 88 Wn. App. 566. 1987. Further, in Woodruff v. Spence, there was a dispute whether Mr. Spence himself had actually received the papers or whether they were given to a third party. Id at 567.

In the Woodruff v. Spence case that was the predecessor to the one cited by Appellant, Mr. Spence contended he was in Bellingham at the time he was alleged to have been served in Renton. Woodruff v. Spence, 76 Wn. App. 207 1994. A declaration of Mr. Spence's son was filed contending that no process server had come to the residence on the date in question. Id at 210.

In the instant case, there is no dispute that service occurred and once again, Mr. Marx admits to receiving the non-parental custody papers. Mr. Marx contended some of the papers he received were whited out or faded and that he was not served with a summons. Mr. Marx actually has never filed copies of the papers he was served with, but contends three years later specifics with regards to the papers served. Mr. Marx

contended he was served "with a couple of papers, stapled together." (CP 58) He somehow, three years later, is contending he was not served with a "summons."

The Court was able to evaluate the credibility and did not abuse its discretion in not conducting an evidentiary hearing. It is of note that Mr. Marx never requested an evidentiary hearing and raises this issue for the first time on appeal.

Allegation re alleged violation of constitutional rights in application of 26.09.260 (1) and (2) to nonparental custody orders.

Chapter 26.10 RCW sets forth the procedure for nonparental actions for child custody. A nonparental custody petition is available in two circumstances: (1) the child is not in the custody of one of its parents or (2) the petitioner alleges neither parent is a suitable custodian. RCW 26.10.030(1) ; RCW 26.10.032(1). If a motion for child custody establishes "adequate cause for hearing the motion," the court will set a show cause hearing. RCW 26.10.032(2). The petition can be granted if it is in the best interests of the child to do so. RCW 26.10.100.

Unsurprisingly, the statute also makes provision for modification of nonparental custody orders. "The court shall hear and review petitions for modifications of a parenting plan, custody order, visitation order, or

other order governing the residence of a child ... pursuant to chapter 26.09 RCW." RCW 26.10.190(1) (partial).

Once again, a party seeking modification proceeds by submitting an affidavit alleging facts and the court, upon determining that "adequate cause" exists, shall set a show cause hearing. RCW 26.10.200.

The modification standards of chapter 26.09 RCW referenced by RCW 26.10.190(1) are found in RCW 26.09.260. In part, subsection (1) provides that the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child. RCW 26.09.260(1).

(2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless:

(a) The parents agree to the modification;

(b) The child has been integrated into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan;

(c) The child's present environment is detrimental to the child's physical,

mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.

RCW 26.09.260(2) (partial). Thus, modification is available when a substantial change in circumstances and the best interests of the child require it, and either (a) the parents agree.

Legislative policy is in favor of finality of custody determinations. *E.g., In re Marriage of Thompson,* 32 Wn. App. 418, 421, 647 P.2d 1049 (1982) (dissolution statutes seek to (1) maximize finality of custody awards to avoid repeated litigation of custody issues, (2) prevent "ping-pong" custody litigation, and (3) preserve • basic policy of custodial continuity); *In re Marriage* of *Roorda,* 25 Wn. App. 849, 851, 611 P .2d 794 (1980) ("strong presumption" in statutes and case law in favor of custodial continuity and against modification). The legislature, likewise, has stated that one of its policies behind the custody statutes is to limit disruption to the children: "Further, the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm." RCW 26.09.002 (partial). This policy is critically important to our construction of the statute. RCW 26.10

The plain meaning of a statute is discernable by examining everything the legislature has said in the statute itself and any related

statutes that reveal legislative intent regarding the provision at issue. Cornhusker Cas. Ins. Co. v. Kachman, 165 Wn.2d 404, 409, 198 P.3d 505 (2008). The meaning of words in a statute is not determined from those words alone but from all the terms and provisions of the act as they relate to " ' "the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another." Burns v. City of Seattle, 161 Wn.2d 129, 146, 164 P.3d 475 (2007) (quoting State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (quoting State v. Huntzinger, 92 Wn.2d 128, 133, 594 P.2d 917 (1979))).

If a statute is susceptible to more than one reasonable interpretation, it is considered ambiguous. Wingert v. Yellow Freight Sys., Inc., 146 Wn.2d 841, 852, 50 P.3d 256 (2002). However, a statute is not ambiguous merely because we may conceive of different interpretations. State v. Tili, 139 Wn.2d 107, 115, 985 P.2d 365 (1999).

The statute for modifying a nonparental custody decree is unambiguous.

The Appellant relies on Custody of T.L. for their claim that that the Court violated Mr. Mark's parental rights. See Link v. Link, 165 Wn. App. 268, 2011. This is a misunderstanding of Link.

In Link, Ms. Link agreed to a temporary placement of the child

with her mother. There were no restrictions on Tia Link's contacts with her child and she continued to exercise time with her child, including every other weekend, alternating visits on holidays and a month in the summer Id at 272. The child in Link had been in her mother's care from birth to age 6, when she ran into problems with substance abuse.

By contrast, Mr. Marx never had the child in his care He was afforded only supervised residential time. Mr. Marx delayed exercising his supervised residential time. There was also a hearing on adequate cause set in the instant case when no such hearing was set in Link.

To accept the position of Appellant, any parent who failed to respond to a nonparental custody action could come to Court at any time and seek custody of their child without having to meet the thresholds of the modification parenting plan statute. This would set the absurd result of a parent, knowing they would lose a nonparental custody action, doing nothing and allow themselves to be defaulted then return to Court at a later date and claim there was never a contested hearing on the issue of unfitness so the adequate cause rules do not apply.

Appellant next contends that the Court could not enter a nonparental custody order as Appellant had not yet been legally established to be the father.

This position is absurd. Mr. Marx was on notice and told that Ms.

Hunter was pregnant with this child. Mr. Marx was made aware that Kaitlyn was born. Mr. Marx never sought to file a paternity action to establish himself as the legal father to the child. Mr. Marx was served with a nonparental custody action identifying him as the possible father to the child.

To accept Mr. Marx's theory, Ms. Clawson would have filed an action and not identified him as the possible father, and claim to not know who a possible biological father was. Presuming such a sequence of events was to occur, Mr. Marx, if he eventually filed an action to establish himself as the father, would protest that Ms. Clawson was aware he was the biological father to the child and failed to serve him or disclose he was a possible father to the child. He would then seek to vacate the final orders due to a necessary party not having been served.

Let us apply a scenario. Let's say Mr. Marx was incarcerated at the time he was served with a nonparental custody action. Let us further presume Mr. Marx, while in jail for assault of a child, was defaulted. Let us further assume Mr. Marx was released from jail 10 years later when the child was 11. Under Mr. Marx's theory, the nonparental custody order is void as unconstitutional and not binding because Ms. Clawson did not bring an action to establish Mr. Marx as the biological father of the child.

Let us apply another scenario. Let us presume Ms. Clawson filed

an action contending she was a de facto parent to Kaitlyn. Let us further presume that Mr. Marx had yet to be established as the father to the child when he was served with a de facto parent action. Let us further presume Mr. Marx failed to respond to the action and was defaulted on a de facto parent action. To accept the theory of Mr. Marx, the de facto parent order would not be binding on him.

Conclusion

Mr. Marx was properly served with the nonparental custody action. He chose not to respond to the action and as a result, the child was placed in the custody of Ms. Clawson. The orders were entered after a hearing on adequate cause occurred and a determination was made by a court commissioner.

Kaitlyn Hunter is not some inanimate object that can be uprooted when Mr. Marx decides he wants to be involved in the life of the child.

The Respondent requests the Court affirm the trial Court.

May 9, 2015

Respectfully submitted,

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