70909-7

70909-7

CASE NO.70909-7

THE COURT OF APPEALS DIVISION ONE OF THE

STATE OF WASHINGTON

IN RE THE GUARDIANSHIP OF

DOROTHY MAY KERTIS

AN INCAPACITATED PERSON

REPLY BRIEF OF APPELLANT

NANCY PREG WSBA 7009
Attorney for Terry L. Kertis
4233 N.E. 88th Street
Seattle, WA 98115
Tel. 206-525-0453
Cell 206-605-1460
Nan1949@earthlink.net

Table of Contents

Table of Authorities

In her Motion on the Merits, the appellee guardian, Dianna Parish defends the Order on Motion to Terminate Restraining Order and the Order on Motion for Reconsideration as a proper exercise of the Court's discretion. A closer examination of the abuse of discretion standard support's Terry's argument Judge Meyer abused his discretion in several different ways by denying Terry's motions. Also, in light of the recently published case, Marriage of Buecking, 179 Wn.2d 438, P.3d (2013), wherein the Washington Supreme Court clarified to some extent the issues of subject matter jurisdiction and appellate review, Terry has revised his argument on subject matter jurisdiction at pages 36-38 of Appellant's brief.

1. Judge Meyer abused his discretion in denying Terry's Motion to Terminate Restraining Orders Regarding Dorothy May Kertis by relying on the wrong legal standard.

The decision to grant or deny a motion to terminate a DVPO is reviewed for abuse of discretion. In re Marriage of Freeman, 169 Wn.2d 164, 239 P.3d 557 (2010). The standard for whether a court has abused its discretion was fleshed out in detail by the

Washington Supreme Court in Mayer v. Sto Industries, Inc., 156 Wn.2d 677, 684, 132 P. 3d 115 (2006).

An abuse of discretion occurs when a decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Associated Mortgage, 15 Wash.App. at 229, 548 P.2d 558. A discretionary decision rests on "untenable grounds" or is based on "untenable reasons" if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is "manifestly unreasonable" if "the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.' " State v. Rohrich, 149 Wash.2d 647, 654, 71 P.3d 638 (2003) (quoting State v. Lewis, 115 Wash.2d 294, 298-99, 797 P.2d 1141 (1990)). Questions of law are reviewed de novo. In re Firestorm 1991, 129 Wash.2d 130, 135, 916 P.2d 411 (1996); Fisons, 122 Wash.2d at 339, 858 P.2d 1054.

In the Order on Motion to Terminate Restraining Order that he signed on August 15, 2013 Judge Meyer held that he could not look behind the original Domestic Violence Protection Order (hereafter "DVPO") as it was not appealed and becomes a verity. Cp 94-95. Here, Judge Meyer clearly applied the wrong legal standard because DVPO's like all injunctions can be terminated and modified even if they are not appealed. As the Court of Appeals pointed out in Pacific Security Companies v. Tanglewood, 57 Wn.App. 817, 820-21, 790 P.2d 643 (1990):

"CR 60(b)(6) permits the court to "relieve a party or his legal representative from a final judgment, order, or proceeding [if] ... it is no longer equitable that the judgment should have prospective application"... The rule applies primarily to injunctions and judgments other than those for money damages. United States v.

American Nat'l Bank & Trust Co.,101 F.R.D. 770 (N.D.Ill.1984). The court has the inherent right in equity to modify an injunction when changed circumstances render the injunction an instrument of wrong. Lubben v. Selective Serv. Sys. Local Bd. 27, 453 F.2d 645, 651, 14 ALR Fed 298 (1st Cir 1972)."

Also, because the DVPO's were not supported by evidence of Domestic Violence between Terry and Dorothy, it is no longer equitable that the DVPO's have "prospective application". Judge Meyer should have terminated the 2011 DVPO. The temporary DVPO and the 2010 and 2011 DVPO's contained the finding that Terry "has engaged in conduct that places his mother at risk of psychological and physical harm." Cp143, 19-20. This finding was unsupported by any proof of risk of physical or psychological harm specifically to Dorothy. In her petitions for the DVPO's the guardian presented no expert evidence of a connection between Terry's conduct and any risk of physical or psychological harm to Dorothy in violation of ER 701 and 702. And simple logic does not supply the connection. Just because a person is upset because he or she is going through a difficult life change such as divorce or death of a loved one does not mean that person will do harm to his or her mother. Here, Terry had just lost his sister and his life was changing because of the guardianship of his mother. His frustration was directed toward the guardian, not his mother.

By refusing to look behind the DVPO's Judge Meyer abused his discretion in another way: by adopting an incorrect legal conclusion that DVPO's need not be supported by proof of "domestic violence" and instead may be supported by proof of conduct that places a family member at risk of psychological and physical harm. See pp. 24-36 of Appellant's Brief.

Also, Judge Meyer's holding that there was insufficient evidence to find a substantial change of circumstances is "manifestly unreasonable." Cp 94-95. Under RCW 26.50.130(3)(a), Terry as the moving party bears the burden of proving that more likely than not he will not resume acts of domestic violence against Dorothy. In Re Marriage of Freeman, at 673-74. A court hearing the motion must determine "whether there has been a "substantial change in circumstances" by considering only factors which address whether the respondent is likely to commit future acts of domestic violence against the petitioner or those persons protected by the protection order." RCW 26.50.130(3)(b)(emphasis added).

RCW 26.50.130(3)(c) provides a non exclusive list of factors that a court may consider in determining whether there has been a substantial change in circumstances:

1. Whether the respondent has committed or threatened domestic violence, sexual assault, stalking or other violent acts since the protection order was entered;
2. Whether the respondent has violated the terms of the protection order and the time since the entry of the order;
3. Whether the respondent has exhibited suicidal ideation or attempts since the protection order was entered;
4. Whether the respondent has been convicted of criminal activity since the protection order was entered;
5. Whether the respondent has either acknowledged responsibility for the acts of domestic violence that resulted in the entry of the protection order or successfully completed domestic violence perpetrator treatment or counseling since the protection order was entered;
6. Whether the respondent has a continuing involvement with drug or alcohol abuse, if such abuse was a factor in the protection order;
7. Whether the petitioner consents to terminating the protection order;
8. Whether the respondent or petitioner has relocated to an area more distant from the other party;
9. Other factors relating to a substantial change in circumstances.

Terry presented unrefuted evidence of a substantial change in circumstances such that it is more likely than not that he will not resume acts of domestic violence to his mother. He has not violated the June 10, 2011 "Restraining Order" as modified by the "Agreed Order", nor has he violated any other restraining orders since August, 2010. Cp12-16. He obtained a mental health evaluation by Licensed Mental Health Counselor on July 28, 2011. Cp. 68. It shows that he was feeling stress due to grief, loss, finances and unemployment. Cp. 68 It also shows that the

Licensed Mental Health Counselor did not recommend treatment and gave a good prognosis. Cp. 68.

Terry completed an 8½ month long alcohol relapse treatment. Cp. 69. This factor should be weighed more heavily because his addiction to alcohol in 2010 accounts for much of the behavior that led to the guardian's initial motion for temporary restraining order. Cp. 35-36. Also, spending more than 100 days in jail changed Terry and caused him to cease harassment of the guardian and standby guardian. Terry apologized for his past actions and has learned to address his concerns about the guardianship to the courts. Cp. 33, 36.

The change in Terry is very obvious. He was courteous and respectful to the staff at Fidalgo during the 11 visits he had before Judge Meyer ruled. Cp. 62, 101-102. Fidalgo acknowledged that Terry's visits with Dorothy have gone well, without incident. Cp. 62. The Administrator of Fidalgo acknowledged the positive change in Mr. Kertis's behavior. Cp. 119. Terry has demonstrated his love and compassion for his mother during these weekly visits. Cp118-120, 64-65, 75.

Certainly an important factor in determining whether Mr. Kertis will resume acts of domestic violence against Dorothy is that

he did not commit acts of domestic violence against her in the first place. See pp. 24-36 of Appellant's Brief. If he did not commit domestic violence against Dorothy in 2010 before the guardian filed the motion for the ExParte Restraining Order and Order to Show Cause, there is no evidence or tenable reason to conclude he will commit domestic violence against her in the future.

2. Judge Meyer's denial of Terry's Motion for Reconsideration was manifestly unreasonable and was based on an incorrect legal standard.

In his Motion for Reconsideration, Terry asked the court to reconsider its holding that there is insufficient evidence to find a substantial change in circumstances. As shown above Judge Meyer's denial of the motion was manifestly unreasonable.

Terry also contended that the courts did not have subject matter jurisdiction to enter the DVPO's because the guardian did not allege or prove "domestic violence" between Terry and Dorothy. Judge Meyer answered by holding that the Court had jurisdiction...based upon Mr. Kertis "inflicting fear of imminent physical harm or bodily injury" on his mother, as voiced by his mother's guardian, who stands in his mother's shoes." RCW 26.50.020(1)(a) requires that the petitioner allege that the person

has been the victim of domestic violence committed by the respondent.

The guardian presented no evidence that Terry communicated to anyone a threat of imminent physical harm, bodily injury or assault toward Dorothy. Nor did the guardian present any evidence that Terry inflicted fear of imminent physical harm, bodily injury or assault on Dorothy herself. In fact, the evidence is to the contrary-that Terry loves his mother and is kind and gentle with her. Cp 119, 64, 74-75.

The second finding made by Judge Meyer in the Motion for Reconsideration is telling:

> "The court file contains voluminous evidence, including declarations made under oath and a detailed letter from Fidalgo..indicating that Mr. Kertis engaged in conduct that placed his mother at risk of emotional and psychological harm as well as physical harm, which in itself would have warranted the guardian seeking restrictions on Mr. Kertis's contact with his mother, even if it were not by means of a restraining order. Cp 108.

Perhaps the evidence adduced by the guardian would have supported an order requiring him to abide by Fidalgo's rules; to refrain from handing out cigarettes or food; to refrain from bringing and leaving items at Fidalgo without Fidalgo's approval etc. However, is not the relief the guardian sought. Instead she requested a temporary DVPO and, at the show cause hearing, a

year long DVPO. She chose to seek DVPO's that cut Terry and Dorothy off completely from visiting each other for six plus years without evidence of domestic violence between them.

It is important to keep in mind that the whole chain of events began in May, 2010 with the guardian's Motion/Declaration for ExParte Restraining Order and Order to Show cause. She repeated the same information as the letter from Fidalgo but added that Terry made "inappropriate comments" to Dorothy and generally acted "Inappropriately". Cp 129-130. These comments are not evidence of domestic violence and do not support a DVPO, nor does the declaration by Richard Ross, which contains mostly inadmissible hearsay and unfounded accusations of (1) Terry telling Dorothy that he wants to move her home, (2) Terry "prowling" Dorothy's home, (2) theft of Dorothy's rings; (2) Terry's attempts to get financial and medical information from and about Dorothy; (3) Terry asking to take Dorothy to the beach; and (4) Terry's claim to personal property.

The declaration by Laura Willingham from Fidalgo alleges the following: Dorothy demonstrated increased agitation and behavior after Terry's visits; (2) Terry drew mustaches on Ross family pictures in Dorothy's room; (3) Terry handed out cigarettes to

other residents; (4) Terry cut up an apple and handed a piece to a resident who had swallowing issues; (5) Terry dropped off a pair of scissors and utility knife that he felt his mother needed (6) Terry tried to visit his mother after hours; and (7) Terry disagreed with Fidalgo's requiring him to visit his mother in a public area. Cp. 133-135.

The guardian presented additional evidence that Terry had been arrested at Fidalgo trying to visit Dorothy on the day the temporary DVPO was signed and that he made "harassing calls" to the guardian's father. The evidence the guardian presented to support extending the DVPO five years related to Terry's actions and threats against the guardian and standby guardian after they had cut off his relationship with Dorothy. Cp. 7-18. Terry was punished for these actions by spending more than 100 days in jail, having a criminal record and paying for the damage to the guardian's windshield. It is inequitable to continue to punish him by limiting his visits with Dorothy.

3. In light of Marriage of Buecking, 179 Wn.2d 438, P.3d (2013), Terry amends Section G of his brief at pages 36 to 38.

In Marriage of Buecking, supra, the wife filed for legal separation from the husband. Over a year later, she filed an

amended petition for dissolution of marriage. By statute, the court cannot enter a decree until 90 days after the petition is filed. The trial court entered the decree 8 days too soon. The husband appealed claiming for the first time on appeal that the trial court lacked subject matter jurisdiction because it entered the decree before the 90 day period had elapsed.

In an unanimous opinion, the Washington Supreme court held that the trial court made a legal error, not an error involving subject matter jurisdiction that may be raised at any time. The Court acknowledge that "Washington courts have been inconsistent in their understanding and application of jurisdiction." Buecking, at 447. The court also acknowledged that it had previously stated that jurisdiction comprised three elements: jurisdiction over the person, jurisdiction over the subject matter, and jurisdiction to render the particular judgment sought. Buecking, at 447. The court then confirmed that "[s]ubject matter jurisdiction refers to a court's ability to entertain a type of case, not to its authority to enter an order in a particular case." Buecking, at 448.

The court then reasoned that the legislature cannot restrict the court's jurisdiction where the constitution has specifically granted jurisdiction but it can prescribe prerequisites to a court's

exercise of its jurisdiction. Buecking, at 448. On this point, the court cited James v. Kitsap County, 154 Wn.2d 574, 115 P.3d 286 (2005). In that case, developers sought refund of impact fees but had not complied with time requirements of LUPA. The developers contended that LUPA did not apply; that the Superior Court had appellate jurisdiction under the state constitution and that their causes of action were subject to the general three year statute of limitations. The Washington Supreme Court held that the superior court actions were subject to LUPA; that LUPA did not divest the superior court of jurisdiction; but that the legislature may enact procedural requirements that must be met before a superior court will exercise its original jurisdiction.

> Thus, while a superior court may be granted power to hear a case under article IV, section 6, that grant does not obviate procedural requirements established by the legislature. Article IV, section 6, pertains to both original trial jurisdiction and original appellate jurisdiction. Here, a LUPA action may invoke the original appellate jurisdiction of the superior court, but congruent with the explicit objectives of the legislature in enacting LUPA, parties must substantially comply with procedural requirements before a superior court will exercise its original jurisdiction. James v. Kitsap County, at 588-89.

Like LUPA, the legislature enacted the Domestic Violence Protection Act, RCW Ch. 26.50, which provides procedural requirements that a petitioner must comply with before a court can

exercise jurisdiction. In RCW 26.50.20 entitled "Commencement of Action-Jurisdiction-Venue, the legislature states in the very first section:

(1)(a) Any person may seek relief under this chapter by filing a petition with a court alleging that the person has been the victim of domestic violence committed by the respondent. The person may petition for relief on behalf of himself or herself and on behalf of minor family or household members.

RCW 26.50.020(4) sets forth which courts have jurisdiction over "proceedings under this chapter" and RCW 26.50.020(5) sets forth venue requirements. Clearly a petition alleging that a person has been the victim of domestic violence committed by the respondent is a prerequisite to the court's exercise of subject matter jurisdiction under RCW 25.50. In other words the petitioner must allege and prove standing as a prerequisite to the court's exercise of jurisdiction.

In a similar case Gross v. City of Lynnwood, 90 Wn.2d 395, 583 P.2d 1197 (1978), a 35 year old Mr. Gross brought an age discrimination claim and the trial court dismissed the action. On appeal, the Washington Supreme court affirmed the trial court on the basis that Washington statutes protect people age 40-65, not 35, from age discrimination. Mr. Gross argued that the City of Lynnwood had waived the defense. In answer, the Court cited RAP

2.5(a)(2) and stated "this particular statutory limitation on the class of persons entitled to a civil cause of action for age discrimination operates to define the specific facts upon which relief may be predicated. A party may raise failure to establish facts upon which relief can be granted for the first time in the appellate court. RAP 2.5(a)(2)." Gross v. City of Lynnwood, at 400.

RAP 2.5(a)(2) provides in pertinent part "The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

The legislature requires a petition alleging Domestic Violence before the Superior Court exercises jurisdiction. Terry has demonstrated that the guardian failed to plead and establish facts of domestic violence between Terry and Dorothy. This court should dismiss the DVPO, which was entered on June 10, 2011, and the Agreed Order, which was entered on June 4, 2013.

Conclusion

In his opening brief and Reply Brief, Terry has demonstrated several grounds to grant his appeal and reverse the Order on

Motion to Terminate Restraining Order dated August 15, 2013 and the Order on Motion for Reconsideration dated September 11, 2013. In these briefs, he has also demonstrated two other grounds under RAP 2.5(a)(2) and (3) which require this appellate court to terminate the DVPO entered on June 10, 2011 directly. The first is the failure of the guardian to establish facts of domestic violence between Terry and Dorothy upon which relief in the form of a DVPO can be granted. The second is that the DVPO's granted in this case are not supported by any proof of domestic violence between Terry and Dorothy and therefore violate Terry's constitutional rights to due process and equal protection under the laws.

Dated this 1st day of April, 2014

NANCY W. PREG WSBA # 7009
Attorney for Terry L. Kertis

CERTIFICATE OF MAILING

I certify and declare under penalty of perjury under the laws of the State of Washington I mailed a copy of the Reply Brief of the Appellant to Appellee's attorney of record, Dewey Weddle, 909 7th Street, Anacortes, WA. 98221 postage prepaid April 1 2014.

Dated this 1st day of April and signed in Seattle, Washington.

Signed

Nancy W. Preg WSBA 7009