Court of Appeals, Division III, No. 325971

Spokane Country Superior Case Number: 11-3-00062-0

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

DEBRA CLAWSON

Respondent,

v.

JANELLE M. HUNTER, et al

WILLIAM FRANKLIN MARX

Petitioner.

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Authority Page

Statutes and Rules

Cases

I. SUMMARY OF ARGUMENT

The trial court applied the wrong legal standard when it determined whether the default nonparental custody decree entered by Ms. Clawson was void for lack of jurisdiction, and the trial court improperly evaluated the evidence presented to it on that subject. The trial court violated Mr. Marx' constitutional rights by declining to follow this Court's ruling in *Link v. Link*, 165 Wn. App. 268, 268 P.3d. 963 (2011). The trial court further violated due process when it restricted Mr. Marx' parental rights by default without first establishing whether he was, in fact, a legal parent.

II. ASSIGNMENTS OF ERROR

The trial court erred when it:

(a) declined to rule on Mr. Marx's *Motion to Strike* (1 RP 3);

(b) denied Mr. Marx's *Motion to Vacate* (CP 133-34);

(c) denied Mr. Marx' *Motion for Reconsideration* on the trial court's *Order Denying Motion to Vacate* (CP 206-210);

(d) determined that Mr. Marx was properly served without an evidentiary hearing (CP 133, 207);

(e) when it equated Mr. Marx' knowledge that a previous girlfriend had given birth ("he knew of Kaitlyn's existence") and that the girlfriend's mother believed him to be the father to proper notice of a nonparental custody action or that such

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knowledge cured improper notice of a nonparental custody action (CP 134, 209; 1 RP 17-19[1]);

(f) when it determined that Mr. Marx had knowledge that he "was the named father" of Kaitlyn (CP 134, 209; 1 RP 17-19);

(g) when it determined that Mr. Marx' knowledge that he was the "named father" of a child is equivalent to proper notice of a nonparental custody action regarding that child or that such knowledge would cure improper notice of a nonparental custody action (CP 134, 209; 1 RP 17-19);

(h) when it concluded that a parent's subjective belief that he is or may be a parent or a parent's knowledge that another individual believes or may believe he is a parent is equivalent to the establishment of paternity in fact (CP 134, 206-09; 1 RP 17-19);

(i) when it relied on the records of an independent dependency proceeding (Case #10-7-01826-6), which contained information that had never been served on Mr. Marx and was not presented to the Court or contained in the case file in order to addressed whether Mr. Marx had "knowledge of Kaitlyn's existence, and that he had been named the father and whether he had notice" (CP 207);

(j) when it entered the *Order re Adequate Cause* finding that Mr. Marx had failed to establish adequate cause for a major modification (CP 135-37);

(k) when it concluded that Mr. Marx was obligated to seek out more information as a result of defective

[1] The Verbatim Report of Proceedings that references the hearing on May 5, 2014 is designated as Volume 1, and the Verbatim Report of Proceedings that references the hearings on May 6, 2014 and June 5, 2014 is designated as Volume 2.

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service in order to determine whether or not a proceeding might apply to him (2 RP 23-24);

(l) when it applied RCW 26.09.260(1) and (2) in order restrict Mr. Marx' parental rights pursuant to a default nonparental custody decree when there had never been a hearing on the merits (CP 135-37, 200-01; 2 RP 21-28);

(m) when it denied Mr. Marx' *Motion to Revise Commissioner's Ruling* (CP 200-201); and

(n) when it declined to rule on whether parentage must be established before parental rights can be restricted pursuant to a default nonparental custody proceeding (2 RP 29-43).

III. ISSUES PRESENTED

A) Whether the trial court abused its discretion when it applied the wrong legal standard to deny Mr. Marx' motion to vacate the default nonparental custody decree and when it made determinations on the credibility of the witnesses without an evidentiary hearing.

B) Whether the trial court violated Mr. Marx' constitutional parental rights when it denied his motion for adequate cause to modify the default nonparental residential schedule based on a strict application of RCW 26.09.260 (1) and (2).

C) Whether the trial court violated Mr. Marx' due process rights when it entered a default nonparental custody decree restricting parental rights that had never been established.

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IV. STATEMENT OF THE CASE

Kaitlyn Rose Hunter was born to Janelle Hunter with methamphetamine in her system, and as a result, the Department of Social and Health Services removed Kaitlyn from Ms. Hunter's care. (CP 10, 86.) Kaitlyn was placed with her maternal grandmother, Debra Clawson. (CP 86.) It is undisputed that in that proceeding, Ms. Hunter alleged that three men, including Mr. Marx, could potentially be Kaitlyn's father. (CP 68.)

On August 31, 2010, the State of Washington initiated a dependency action for Kaitlyn Hunter (Spokane County Cause Number 10-7-01826-6). (CP 68.) It is undisputed that service of that proceeding was never effectuated on Mr. Marx, and the case was ultimately dismissed. (CP 68.)

On January 10, 2011, Ms. Clawson initiated a nonparental custody action. (CP 1.) In her petition, Ms. Clawson identified Mr. Marx as the "possible father" to Kaitlyn. (CP 4, 7.) Ms. Clawson's petition stated that parental visitation should be limited because "William F. Marx has engaged in the conduct which follows: Willful abandonment that continues for an extended prior of time or substantial refusal to perform parenting functions." (CP 9.) Ms. Clawson also checked the box next to a section entitled "other" wherein she wrote: "He's never had contact with the child." (CP 9.) At that time, Kaitlyn was three months old. (CP 4.)

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In Section 1.14 of the petition, Ms. Clawson stated that: "The requests made in this petition are in the best interests of the children because: I think being placed with family is better then being placed in a foster home." (CP 10.)

Ms. Clawson did not sign the section of the petition that required her to declare under penalty of perjury under the laws of the state of Washington that the foregoing contents of her petition were true and correct. (CP 12.)

On the same date, Ms. Clawson filed her *Proposed Residential Schedule,* which alleged: "William F. Marx's residential time with the children shall be limited or restrained completely because William F. Marx has engaged in the conduct which follows: Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions."[2] Ms. Clawson also checked the box that said "other" and wrote: "Conviction of Assault of Child 3rd Degree."

On January 11, 2011, Ms. Clawson filed a *Return of Service* alleging that Mr. Marx had received copies of the summons, petition, and her proposed residential schedule. (CP 14, 58.) The *Return of Service*

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[2] The Residential Schedule was not included in the Designation of Clerk's Papers in error. It has been designated in the Supplemental Designation of Clerk's Papers filed simultaneously with this brief.

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appears to have been filled out by Ms. Clawson and signed by her son, Corey Clawson. (CP 14, 58.)

Exactly twenty (20) days later, on February 3, 2011, Ms. Clawson filed her *Motion and Declaration for Default*. (CP 16-19.) An *Order on Motion for Default* was signed and entered by Commissioner Rachelle Anderson on the same day. (CP 20-22.)

Commissioner Anderson also signed and entered *Findings of Fact and Conclusions of Law*. (CP 27-34.) This document made findings and conclusions different from those alleged in the *Petition for Nonparental Custody*. (CP 1-15, 27-34.) In the *Findings of Fact and Conclusions of Law,* Ms. Clawson stated not what she had said in her petition about her belief that it was it was better for Kaitlyn to be with family than in a foster home, but that "[n]either parent is a suitable custodian for the child(ren), because: [b]oth parents failed to meet minimal standards of care for Kaitlyn and failed to complete services." (CP 30.)

Commissioner Anderson also signed a *Nonparental Custody Decree,* which stated that visitation shall be as set forth in the *Residential Schedule* signed by the court on January 10, 2011; however no *Residential Schedule* had ever been signed by the court on that date or ever. (CP 38.)

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On October 10, 2013, Mr. Marx's paternity of Kaitlyn was established through genetic testing in a paternity proceeding (Spokane County Cause Number 13-5-00414-9). (CP 68.)

After learning that he was Kaitlyn's father, Mr. Marx then began inquiring about her welfare, visiting agency offices and the courthouse and filling out paperwork until he was able to obtain Ms. Clawson's address. (CP 59.) He immediately sent a certified letter to Ms. Clawson requesting visitation with Kaitlyn. *Id.* She ignored the notice and the letter was never picked up. *Id.* He sent a second letter, with a return receipt, and, at the beginning of November 2013, Ms. Clawson contacted him. *Id.*

Mr. Marx began visitation with Kaitlyn on November 2, 2013. (CP 59.) That visit went well, and Kaitlyn began to have regular visitation with Mr. Marx, his son (and Kaitlyn's half-brother), Jaidin, as well as Mr. Marx's girlfriend and her children. (CP 60.) Mr. Marx and Kaitlyn had visits on November 4, 11, 14, 23, and 29, as well as on December 5, 8, 17, 23, 25, 26, and 31. (CP 60.) Mr. Marx had overnight visits with Kaitlyn on January 4 and 11. (CP 62.) He then began having longer visits over weekends, beginning with January 17-19, 24-26, and January 31 through February 2. (CP 62-63.) On Thursday, February 6, Ms. Clawson texted Mr. Marx to let him know that Kaitlyn would not be visiting him over the weekend and that Ms. Clawson had been "advised" to stick to supervised

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visits. (CP 63.) Ms. Clawson texted Mr. Marx on February 19, and told him that he could visit Kaitlyn on Saturday at McDonalds. (CP 63.) Mr. Marx went to McDonalds on February 22 to visit with Kaitlyn. (CP 63.) Mr. Marx testified that he felt Ms. Clawson actively interfered with the visit and encouraged Kaitlyn to fear him. (CP 63.)

Shortly thereafter, on April 4, 2014, Mr. Marx filed a *Summons* and *Petition for Modification of Custody Decree/Parenting Plan/Residential Schedule*, as well as a motion to vacate the nonparental custody decree, entered in 2011. (CP 43-51, 67-71.) The petition alleged that Ms. Clawson's *Nonparental Custody Decree* had been obtained without proper service and without establishing whether Mr. Marx was actually a parent. (CP 47-48.) The petition requested a major modification under RCW 26.09.260(1) and (2). (CP 47-48.) It also requested, in the alternative, a minor modification pursuant to RCW 26.09.260(5)(c), (7), (9). (CP 48.)

In his declaration, Mr. Marx testified that he had never been properly served and had been unaware that he was Kaitlyn's father. (CP 57.) He testified that he and Ms. Hunter had a brief fling from just before Christmas 2009 until just after New Year's in 2010. (CP 58.) During this time period, he obtained information that led him to believe that she was doing drugs and had had relations with other men, which ended their brief relationship. (CP 58.) After they broke up, he heard rumors that Ms.

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Hunter was pregnant, but she never contacted him or informed him that he was the father. (CP 58.) He had heard that she was sexually involved with three other people during their brief relationship and believed that Ms. Hunter had already been pregnant during his relationship with her. (CP 58.)

He testified that sometime in January, Ms. Hunter's brother, Corey Clawson, had come to his home and handed him some papers at his front door. (CP 58.) He stated that he received a single packet of a few hand-written papers stapled together, and that there had been no summons or case number, and that the paperwork was poorly copied with faded and whited-out parts. (CP 58.) (In fact, the original petition contained in the file of the Clerk of Court and provided to this Court in the Clerk's Papers on appeal also contains some whited-out sections, which appear to conceal a third name between that of Janelle Hunter and William Marx. See CP 3-13.) Mr. Marx testified that he didn't understand what the paperwork meant or that any response was expected. (CP. 58.) Mr. Marx testified that he was never properly notified that he was the father of Kaitlyn until July of 2013, when he received a letter from the State of Washington requesting that he take a paternity test, which he immediately did. (CP 59.) Paternity was established, and Mr. Marx learned, for the first time, that he was, in fact, Kaitlyn's father. (CP 59.)

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MOTION FOR ADEQUATE CAUSE: Mr. Marx' *Motion for Adequate Cause*, was set for hearing before Commissioner Anderson. (CP 135-37; 2 RP 5-28.) Commissioner Anderson found no adequate cause for a major modification, but set the matter for trial on a minor modification, and entered a temporary order awarding limited visitation to Mr. Marx, stating that the matter turned on RCW 26.09.260:

> But from a procedural standpoint, what I have before me is a case where I have a decree of nonparental custody action with a parenting plan that's been referenced and incorporated as far as final decree in a custody case. When I looked at modification of that decree, it's very clear that the standard I look at is the same standard as if I were being asked to find adequate cause with regard to a parenting plan entered in a divorce action or legal separation. It's guided by RCW 26.09.260 and it talks about the requisite showing you need to make to modify a parenting plan. And under the statute it indicates that the court shall not modify a parenting plan unless it finds that there has been a substantial change in circumstances, and that the child's present environment is detrimental to the child's physical, mental, or emotional health and harm likely to be caused by a change in environment is outweighed by the advantage to the change to the child.

(2 RP 21-22.)

> But when I look back to that threshold issue of adequate cause for a major modification, the moving party, and that's in this case Mr. Marx, would have to establish, for me to grant that adequate cause that there is some detrimental environment going on in grandma's household, and that's not the case. I don't have enough information to lead me to that big jump. The child may be having some difficulty in her behaviors as a result of having a new person introduced to her life, and I think that's to be

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> expected at age three. She's resided with Ms. Clawson for her whole life, so that is the primary bond, primary attachment. So there are some times, some issues with regard to separation anxiety when you're introducing parent's visitation to kind of interfere with that. But does it rise to the level of the detrimental environment? It doesn't in this particular case. So I won't be finding adequate cause for a major modification.

(2 RP 25-26.)

Mr. Marx moved to revise the commissioner's order before the Honorable Tari Eitzen. (CP 146-149.) He argued that the commissioner's ruling on adequate cause violated his constitutional rights, citing *Link v. Link*, 165 Wn. App. 268, 268 P.3d. 963 (2011), a case in which this Court (Washington Court of Appeals, Div. III) held that in a nonparental custody action, a parent's constitutional rights are ordinarily highly protected in the initial custody action if it is contested, but where a parent's constitutional rights are not taken into account or protected in the initial custody action, they must be recognized in the modification proceeding. *Link* at 283. In *Link*, this Court held that where the non-parent has never demonstrated that the parent was unfit or that placing the child with the parent would result in actual detriment to the child's growth and development, the modification standards and process under RCW 26.09.260(1) and (2) interfere with the parent's constitutional rights to raise his/her child. *Link* at 284. Under these circumstances, Mr. Marx

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argued that the court should apply the parentally protective "best interest" standards of RCW 26.10.100. *Id.* Mr. Marx also noted that not only was it never demonstrated that he was an unfit parent, but *it was never demonstrated that he was a parent at all.* (CP 185-190.)

His motion for revision was denied. (CP 200-201.)

MOTION TO VACATE: In his motion to vacate, Mr. Marx argued that he was not properly served with the summons and petition, and that the resulting judgment was therefore void. (CP 67-71.) Mr. Marx argued that he has custody of his two other children, and, had he been properly notified of the petition and established as a parent, Ms. Clawson could never have met her burden to prove that he was an unfit parent. *Id.* Mr. Marx argued that a court cannot properly cut off a person's parental rights prior to establishing whether that person is, in fact, a parent at all. (CP 65, 70; See also CP 79, 123-26.) Mr. Marx also argued that the judgment was procedurally deficient because the decree references a parenting plan that was signed by the court on January 10, 2011, but no parenting plan had ever been signed. (CP 67-71.)

Ms. Clawson responded to his testimony about service, saying that her daughter, Ms. Hunter, had announced that she was pregnant to her family during dinner at Christmas of 2009, and that Mr. Marx had been there to hear it. (CP 86.) She also testified that after Ms. Hunter had given birth to

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Kaitlyn, "Bill was called the next day to let him know that Janelle had the baby, and he hung up the phone." (CP 86.) Ms. Clawson did not testify that *she* had called Mr. Marx, however, and Mr. Marx formally objected to this hearsay statement through his *Motion to Strike.* (CP 130.) The trial court declined to rule on this motion saying instead:

> "I noted for myself there was some potential hearsay. I think I can sort that out. I don't want to waste half an hour this morning talking about hearsay. We all know what it is when we see it, I hope.

(1 RP 3.)

Ms. Clawson argued that Mr. Marx had been properly served and that Corey Clawson's *Return of Service* "speaks for itself." (CP 87.) Interestingly, Corey Clawson's girlfriend, Danielle Bergeson, filed a declaration discussing her relationship with Kaitlyn and detailing how she and Corey had driven Kaitlyn to visitation with Mr. Marx on several occasions, but Corey Clawson did not file any declaration even though the question of whether he had properly served Mr. Marx was at the heart of the dispute. (CP 103.) Ms. Clawson argued that Mr. Marx had waived his due process rights by not appearing in the case. (CP 100.)

Mr. Marx replied and testified that it would be impossible for Ms. Hunter to have announced that she was pregnant with Kaitlyn on Christmas Day since Ms. Hunter gave birth on August 25, 2010 after 35

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weeks gestation, which would have required her to have conceived Kaitlyn within a day or two of her supposed announcement. (CP 106; See also CP 183-84.) This was not disputed by Ms. Clawson. Mr. Marx also argued that it was unfair that Ms. Clawson was attempting to shift the burden to prove parentage on him when he was never served with notice of the CPS or dependency actions in 2010, either. (CP 108.)

Mr. Marx' motion to vacate was denied. (CP 133-34.)

Mr. Marx filed a motion for reconsideration. (CP 136-45.) Primarily, he disputed the trial court's finding that Mr. Marx knew he was the father of Kaitlyn and the trial court's failure to rule on whether paternity must be established prior to the entry of a default judgment in a nonparental custody matter. *Id.*

Mr. Marx disputed the trial court's conclusion that he had had a duty to respond to a petition for nonparental custody in which he had no apparent interest at stake and for which he had not been properly served. In doing so, he argued, the trial court improperly shifted the burden from Ms. Clawson to Mr. Marx. (CP 144-45.) He argued that the trial court's conclusion that Mr. Marx should have defended against the nonparental custody petition by arguing that he was not the father is not reasonable, because the correct response to a petition for nonparental custody is not that a person is not a parent, but that a person is not an unfit parent. (*Id.*)

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A person is not obligated to defend their parental fitness when that person is not a parent.

His motion for reconsideration was denied. (CP 206-210.)

Mr. Marx appealed.

V. ARGUMENT

A. The trial court abused its discretion when it applied the wrong legal standard to deny Mr. Marx' motion to vacate the default nonparental custody decree and when it made determinations on the credibility of the witnesses without an evidentiary hearing.

STANDARD OF REVIEW: A trial court's decision to grant or deny a motion to vacate a default judgment is generally reviewed for abuse of discretion; however, a court has a nondiscretionary duty to vacate a void judgment. *Allstate v. Khani,* 75 Wn.App. 317, 323, 877 P.2d 724 (1994). Whether a trial court erred by failing to hold an evidentiary hearing on an issue of fact that can only be resolved by determining the credibility of the witnesses is reviewed for abuse of discretion. *Woodruff v. Spence,* 76 Wn.App. 207, 210, 883 P.2d 936 (1994). "A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds or reasons." *State v. Kaiser,* 161 Wn.App. 705, 726, 254 P.3d 850 (2011), citing *State ex rel. Caroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "A discretionary decision rests on 'untenable grounds' or is based on 'untenable reasons' if the trial court relies on

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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.'" *Mayer v. Sto Indus., Inc.,* 156 Wn.2d 677, 684, 132 P.3d 115 (2006), quoting *State v. Rohrich,* 149 Wn.2d 647, 654, 71 P.3d 638 (2003.)

VOID JUDGMENT: "Proper service of *the summons* and complaint is a prerequisite to the court obtaining jurisdiction over a party, and a judgment entered without such jurisdiction is void." *Woodruff* at 209; *emphasis added.* Personal service of a summons and complaint is required by state statute, and these documents must be served together. CR 4; RCW 4.28.080. A motion to vacate a void judgment under CR 60(b)(5) may be brought at any time after entry of judgment. *Khani* at 323. Motions to vacate under CR 60(b)(5) are not barred by the 'reasonable time' or the 1-year requirement of CR 60(b), and void judgments may be vacated regardless of the lapse of time. *Khani* at 323-24. Because a motion to vacate a void judgment can be made at any time, a trial court errs by finding that such a motion was not brought within a reasonable time. *Khani* at 324. Further, a trial court's finding that a litigant had actual notice of the default judgment through other means is irrelevant. *Khani* at 324-35. A party will not be deemed to have waived the right to

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challenge a default judgment that is void for lack of personal jurisdiction merely because time has passed since the judgment was entered; under such circumstances, the trial court *must* vacate that judgment and *has no discretion to do otherwise. Khani* at 326-27.

During the hearing on Mr. Marx' motion to vacate, the trial court concluded:

> It's hard to know where to start. ***It's unreasonable for someone who absolutely knew these proceedings were going on to wait three years*** to say I didn't get one of the pieces of paper, ***albeit an important piece of paper, the summons***, years ago. Rule 60 is intended to provide certainty.
>
> We have a child who has been with grandma since she was an infant. He has known for several years that he's the father, or probably was the father. He knew that proceedings were going on. Yes, he got papers. He didn't do anything. He didn't do anything. So the remedy here is going to have to be down the hall initially for the adequate cause. You talk, Ms. Hoover, a little bit about best interest of this child. This has to go to a hearing on the merits. Under Rule 60, it's been too long to vacate. ***It's not a reasonable period of time.*** And I don't find it believable that he didn't get the Summons along with the rest of the papers. ***Even if he didn't, there has just been too much time that's gone by.***

(1 RP 17-18.)

In its *Order Denying Reconsideration,* determined without argument, the trial court wrote:

> On May 5, 2014, this Court entered An Order Denying Motion to Vacate Nonparental Custody Decree and

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> Findings Entered February 2, 2011. This Court found that Mr. Marx was properly served, and ***that even if there were flaws in the service (which the Court cannot find) there is no doubt that he knew of Kaitlyn's existence, he knew he was the named father of Kaitlyn*** and that he did nothing to avail himself of the court proceedings or participate. ***Further, he waited several years to bring this motion to vacate.***

(CP 209; *emphasis added.*)

The trial court's conclusion that it did not matter whether Mr. Marx was properly served because "there has just been too much time that's gone by," and its later comments that Mr. Marx's actual notice cured any deficiency in the service demonstrates, in both instances, that the trial court did not apply the proper legal standard in evaluating Mr. Marx' claim that the nonparental custody decree in this matter is void for lack of personal jurisdiction. The trial court abused its discretion when it denied Mr. Marx's motion to vacate pursuant to an application of the wrong legal standard. *Mayer* at 684.

EVIDENTIARY HEARING: In *Woodruff v. Spence*, the plaintiff, Woodruff, filed an affidavit of service showing that the defendant, Spence, had been personally served. *Woodruff* at 208. Spence moved for relief from the judgment, filing his affidavit that he had never been served. *Id.* This Court held that:

> An affidavit of service is presumptively correct, and the challenging party bears the burden of showing improper

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> service by clear and convincing evidence. *Leen v. Demopolis,* 62 Wash.App 473, 478, 815 P.2d 269 (1991), review denied, 118 Wash.2d 1022, 827 P.2d 1393 (1992). When a motion to set aside a default judgment is ***supported by affidavits asserting*** lack of personal service, and the plaintiff files controverting affidavits, ***a triable issue of fact is presented.*** *Roth v. Nash,* 19 Wash.2d 731, 144 P.2d 271 (1943), see *Little v. Rhay*, 8 Wash.App. 725, 509 P.2d 92 (1973). The court in its discretion may direct that an issue raised by motion be heard on oral testimony if that is necessary for a just determination. *Swan v. Landgren,* 6 Wash.App. 713, 495 P.2d 1044 (1972); CR 43 (e)(1). ***A court may abuse its discretion by failing to hold an evidentiary hearing when affidavits present an issue of fact whose resolution requires determination of a witness credibility.*** See *Autera v. Robinson,* 419 F.2d 1197, 1202 (D.C. Cir. 1969).

Woodruff at 210; *emphasis added.*

This Court further held that where the affidavits present an issue of fact that can only be resolved by determining the credibility of the witnesses, the matter must be remanded for an evidentiary hearing to resolve the fact issue. *Id.*

At hearing on his motion to vacate, Mr. Marx argued that the matter comes down to weighing credibility. (1 RP 11.) The trial court made its determination of credibility without an evidentiary hearing, saying, "I don't find it believable that he didn't get the summons along with the rest of the papers." (1 RP 18.) In its *Order Denying Reconsideration,* determined without argument, the trial court further found that:

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> It is disingenuous for Mr. Marx to assert that he '*was unaware* that he was the father of Kaitlyn' as he does in his Motion, p.2. Clerk's document 27. Rather it would be more accurate to say *he chose not to be involved* until it was scientifically proven to him.

(CP 206.)

The only admissible evidence in the record with respect to the issue of service is Mr. Marx' own testimony contained in his declarations and the *Return of Service* filed by Ms. Clawson's son. The credibility of Corey Clawson was never evaluated, and neither witness was permitted to present oral testimony to the trial court. Because the affidavits present an issue of fact that can only be resolved by determining the credibility of the witnesses, the trial court abused its discretion when it failed to conduct an evidentiary hearing on the issue of whether Mr. Marx was properly served.

B. The trial court violated Mr. Marx' constitutional parental rights when it denied his motion for adequate cause to modify the residential schedule entered pursuant to a default nonparental custody decree based on a strict application of RCW 26.09.260 (1) and (2).

STANDARD OF REVIEW: Issues of law, including the interpretation of a statute and the determination of whether a statute violates the United States Constitution as applied, are reviewed *de novo*. *Link v. Link*, 165 Wash.App. 268, 280, 268 P.3d 963 (2011).

PARENTAL RIGHTS: "The United States and Washington Supreme Courts have long recognized parents' fundamental rights to the care and

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custody of their children." *Link v. Link*, 165 Wash.App. 268, 280, 268 P.3d 963 (2011). These rights are protected by the due process clause of the Fourteenth Amendment, the equal protection clause of the Fourteenth Amendment, and the Ninth Amendment. *Id.* "Protecting a parent's right to rear his or his child has sometimes required Washington and federal courts to read special protections into custody and visitation statutes when a parent's interest conflicts with that of a nonparent," and in other cases, "the need to protect the parent's right has led to such statutes being found unconstitutional, facially or as applied." *Link* at 281. The Washington Supreme Court has acknowledged that a parent has a recognized right to the companionship, care, and custody of his or her minor children of which he or she cannot be deprived without due process. *McDaniels v. Carlson*, 108 Wash.2d 299, 311, 738 P.2d 254 (1987).

RCW 26.10 addresses custody determinations where a nonparent seeks custody or visitation. *Link* at 275. "While RCW 26.10.100 provides that '[t]he court shall determine custody in accordance with the best interest of the child,' it has long been held to require that a third party seeking custody from a parent demonstrate that the parent is unfit or that placement of the child with the otherwise fit parent will result in actual detriment to the child's growth and development." *Id.* "While chapter 26.10 RCW imposes this heightened burden for a nonparent seeking

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custody or visitation in the first instance, it provides at RCW 26.10.190(1) that trial courts shall hear and review petitions for modification of custody decrees 'pursuant to Chapter 26.09 RCW.'" *Id.*

In the *Link* case, the appellant, Tia Link, had a substance abuse problem, and Tia's mother filed a petition for nonparental custody of Tia's child. *Link* at 271. Tia, who recognized her problem, agreed to an award of temporary custody to her mother until she could achieve stability in her life, and signed the paperwork entered by the trial court. *Id.* Approximately a year later, Tia filed a motion to modify the custody decree, claiming that she had improved her health, living situation, and financial security such that he believed herself to be stable and wanted to regain custody of her child. *Link* at 272. A court commissioner denied Tia's petition for failure to demonstrate adequate cause. *Link* at 273. Tia moved the superior court to revise the commissioner's order, but the superior court declined to do so. *Link* at 274. Tia appealed. *Id.*

On appeal Tia argued that RCW 26.10.190 and the incorporated provisions of RCW 26.09.260(1), (2), and .270 are unconstitutional when applied to a parent who has never been shown to be unfit and where it has never been established that the child's residence with the parent will result in actual detriment to the child's grown and development. *Link* at 276.

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In *Link*, this Court held that even when a parent has relinquished a child's care to grandparents for an extended period of time by agreement, such a fact does not establish that returning custody to the parent will result in actual detriment to the child. *Link* at 282-83. This Court concluded that the parent's liberty interest is ordinarily highly protected in the initial custody action brought by a nonparent, and it is through that process, if contested, that the parent's constitutional rights are taken into account, holding:

> The modification standards and process provided by RCW 26.09.260(1), (2), and .270 interfere with Tia's right to rear her son, and they fail strict scrutiny analysis where [Tia's mother] has never demonstrated that Tia is an unfit parent or that placing [Tia's son] with Tia will result in actual detriment to his growth and development. In a case such as this it is a constitutional error to require a parent seeking restored custody of his or her child to satisfy the requirements of RCW 26.09.260 and .270; instead, the placement of the child must be decided applying the parentally-protective "best interest" standard of RCW 26.10.100.

Link at 284.

The facts of the *Link* are directly on point with Mr. Marx' plight, except unlike Tia Link, Mr. Marx's parentage was not established at the time the nonparental custody decree was entered and he never appeared or participated in the proceeding where his parental rights to custody of his child were lost to him by default. In *Link*, this Court concluded that Tia's

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stipulation to temporary nonparental custody (and the related conclusion that she was unstable, irresponsible, and temporarily unable to care for her child) was insufficient to establish that the trial court did or could make findings that Tia was an unfit parent or that her custody would result in actual detriment to the child. *Link* at 283. In this instance, Mr. Marx (who argues he was never properly served) never participated at all, yet the both the court commissioner and the trial court concluded that he waived his rights and bore the burden of proof on modification (contrary to this Court's holding in *Link* that "to pass constitutional muster, the nonparent bears the burden of proof under the heightened standard"). *Link* at 281; 1 RP 17-18; 2 RP 23-24.

During the hearing on Mr. Marx' motion to revise the commissioner's ruling, Mr. Marx specifically argued the *Link* case, saying that the Court of Appeals (Div. III) had already ruled on this issue. (2 RP 31, 34.) The trial court concluded that it would not grant the motion to revise, and that it would certify the question for the Court of Appeals if either party requested it. (2 RP 42.)

The trial court erred by failing to apply the controlling authority of *Link* to the facts in this case, and Mr. Marx requests that this Court reverse the trial court's ruling and remand the matter for trial on the matter of custody of Kaitlyn.

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C. The trial court violated Mr. Marx' due process rights when it entered a default nonparental custody decree restricting parental rights that had never been established.

STANDARD OF REVIEW: Alleged constitutional due process violations are reviewed *de novo*. *Post v. City of Tacoma*, 167 Wn.2d 300, 308, 217 P.3d 1179 (2009).

PARENTAL RIGHTS: Parents have a fundamental liberty interest in the care and custody of their children. *In re Dependency of J.H.*, 117 Wn.2d 460, 473, 815 P.2d 1380 (1991). "Procedural elements of this constitutional guarantee are notice and the opportunity to be heard and defend before a competent tribunal *in an orderly proceeding adapted to the nature of the case.*" *In re Marriage of Ebbighausen*, 42 Wn.App. 99, 102, 708 P.2d 1220 (1985)(*emphasis added)*, citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950); *Wenatchee Reclamation Dist. v. Mustell*, 102 Wn.2d 721, 725, 684 P.2d 1275 (1984). "When a court disregards a person's due process rights, the resulting judgment is void." *Id.*

Before a court can enter a default decree that restricts a party's parental rights based on the determination that the person is "an unfit parent," it must first be determined that the person *is,* in fact, a parent (unfit or otherwise), and the party must be given notice that he has such rights and that the petitioner is seeking to restrict them. This is basic due

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process.

RCW 26.26.011 provides definitions applicable to determination of parentage. A "parent" means an individual who has established a parent-child relationship under RCW 26.26.101. RCW 26.26.011(17). A "parent-child relationship" means the legal relationship between a child and a parent of the child." RCW 26.26.011(18).

Pursuant to RCW 26.26.101, there are eight ways by which a parent-child relationship can be established:

> The parent-child relationship is established between a child and a man or woman by:
>
> (1) The woman's having given birth to the child, except as otherwise provided in RCW 26.26.210 through 26.26.260;
>
> (2) An adjudication of the person's parentage;
>
> (3) Adoption of the child by the person;
>
> (4) An affidavit and physician's certificate in a form prescribed by the department of health wherein the donor of eggs or surrogate gestation carrier sets forth her intent to be legally bound as the parent of a child or children born through assisted reproduction by filing the affidavit and physician's certificate with the registrar of vital statistics within ten days after the date of the child's birth pursuant to RCW 26.26.735;
>
> (5) An unrebutted presumption of the person's parentage of the child under RCW 26.26.116;
>
> (6) The man's having signed an acknowledgement of

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paternity under RCW 26.26.300 through 26.26.375, unless the acknowledgement has been rescinded or successfully challenged;

(7) The person's having consented to assisted reproduction by his or her spouse or domestic partner under RCW 26.26.700 through 26.26.730 that resulted in the birth of the child; or

(8) A valid surrogate parentage contract, under which the person asserting parentage is an intended parent of the child, as provided in RCW 26.26.210 through 26.26.260.

Mr. Marx was included in none of these categories at the time Ms. Clawson filed her petition or at the time she obtained a default nonparental custody decree. Therefore, he had no established parent-child relationship and was not a legal parent.

RCW 26.10.030 requires that notice of a nonparental custody proceeding be given to the child's parents, custodian or guardian because these are the individuals who have standing to respond. Mr. Marx was not a legal parent at the time his parental rights were adjudicated by default. Therefore, even if he received proper notice of the nonparental custody proceeding, he did not, at that time, receive due process with respect to the adjudication of his *parental* rights because he was not, at that time, a legal parent.

This principle is borne out by the application of Washington statutes related to parentage. For example, RCW 26.26.375(3) governs judicial

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proceedings in cases where there is an acknowledgement of paternity, but the period for rescission has not yet expired. In such an instance, the petitioner may proceed under the circumstances set forth in RCW 26.26.375(3), *unless* a person appears in the action and denies that the alleged father is, in fact, the actual father. At that point, a permanent parenting plan or residential schedule may not be entered for the child without being converted to a proceeding to challenge the acknowledgement of paternity. It is clear, therefore, that the court cannot adjudicate or interfere with the custody of a child without properly confirming the identity of the parents who have an interest in and rights to such custody.

The nonparent custody statute operates only where there is no available, suitable legal parent. *In re Parentage of J.A.B.*, 146 Wn.App. 417, 425, 191 P.3d 71 (2008). "The statute permits nonparent custody only where the child does not currently reside with a legal parent, or the *legal parents* are shown to be unsuitable custodians." *J.A.B.* at 425; *emphasis added.* Further:

> A nonparent custody order confers only a temporary and uncertain right to custody of the child for the present time, because the child has no suitable legal parent. When and if a legal parent becomes fit to care for the child, the nonparent has no right to continue a relationship with the child. *In re Parentage of J.A.B.*, 146 Wn.App. 417, 426, 191 P.3d 71 (2008).

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Mr. Marx could not have been fairly determined to be as an *unfit* parent during a period of time when it had not been established that he was a parent at all.

It is important to note that the issue here is *not,* as Ms. Clawson has repeatedly argued at trial, whether a person can properly obtain a nonparental custody decree by default. The issue is whether such a default decree is *binding* on a person who was not a legal parent at the time of default and who did not receive due process in the adjudication of his/her parental rights at the time default was entered. When there is no parent to be found, it makes good sense that a nonparent can obtain custody, and Mr. Marx does not dispute that point; however, when a fit legal parent is presented to the court for the first time after default, that person must not be denied due process in the protection of his constitutional rights as a parent.

VI. CONCLUSION

The trial court did not properly determine whether the default nonparental custody decree was void for lack of jurisdiction, and the trial court did not properly evaluate the evidence presented to it on that subject. The trial court violated Mr. Marx' constitutional rights by declining to follow this Court's ruling in *Link*, and the trial court further violated due

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process when it restricted Mr. Marx parental rights by default without establishing whether he was, in fact, a legal parent.

Mr. Marx respectfully requests this Court to reverse the trial court's denial of his motion to vacate the default nonparent custody decree with directions to remand for an evidentiary proceeding on the issue of jurisdiction. Mr. Marx also requests this Court to reverse the trial court's denial of his motion for adequate cause with directions to remand for trial on a major modification of the default residential schedule governing custody of Kaitlyn.

RESPECTFULLY SUBMITTED this 2nd day of MARCH, 2015,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20 day of March, 2015, the undersigned caused a true and correct copy of the foregoing document to be served by the method indicated below to the following parties:

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