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 BRIEF IN REPLY

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COURT OF APPEALS, DIVISION III
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I. OBJECTION TO RESPONDENT'S STATEMENT OF FACTS

Appellant objects to the following presentment of facts:

> *A. 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. (Respondent's Brief,* pg. 1.)

Ms. Clawson cites to CP 86, her own declaration, for this proposition, but this is clearly hearsay testimony. Ms. Clawson did not testify that *she* had called Mr. Marx, rather she simply states that "he was called" and that "he hung up the phone." This very statement was the subject of Mr. Marx's *Motion to Strike*, wherein he argued that "Ms. Clawson has established no personal knowledge of whether Mr. Marx was called or not and cannot testify to this allegation." (CP 131.)

> *B. Within the dependency case, William Marx was disclosed as being the father of Kaitlyn Hunter. (Respondent's Brief,* pg. 2.)

Ms. Clawson fails to point out that while this information may have been disclosed to someone, it was not disclosed to Mr. Marx. Service of that proceeding was never effectuated on Mr. Marx, and the case was ultimately dismissed. (CP 68.)

> *C. 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. (Respondent's Brief,* pg. 2.)

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This fact is disputed by the parties, and Mr. Marx assigns error to the trial court's comments on the subject.

> D. *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.* (*Respondent's Brief,* pg. 3.)

Ms. Clawson cites to CP 88, the Declaration of Debra Clawson, for these statements, but there is no support for them at that page beyond these sentences: "The paternity case he participated in even references to the nonparental custody case and confirms his contacts with Kaitlyn are addressed in that action. As a result, there is a separate court action which confirms his visits with Kaitlyn are to occur as set forth in this case." It is unclear what these statements were originally intended to mean, but they do not support the information provided, and no other cite is made to the record.

> E. *Kaitlyn cried the whole time driving and didn't want to stay the night.* (*Respondent's Brief,* pg. 4.)
>
> *On January 31st, 2014, Kaitlyn was again crying all the way and when she arrived at Mr. Marx's home, Kaitlyn wouldn't separate.* (*Respondent's Brief,* pg. 5.)

For each of the above statements, Ms. Clawson cites to the argument of her attorney in a memorandum. This is not testimony or evidence.

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Further, such statements made by Ms. Clawson without personal knowledge were subject to Mr. Marx's *Motion to Strike.*

> *F. The ruling discusses that Mr. Marx acknowledged he was aware of litigation pertaining to his child. (Respondent's Brief,* pg. 7.)

Ms. Clawson cites to CP 207 for this statement. While the trial court determined that Mr. Marx was aware of litigation pertaining to Kaitlyn (a finding to which Mr. Marx assigns error on appeal), there is no discussion of Mr. Marx *admitting* to anything.

II. 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: Ms. Clawson does not dispute the standard of review assigned by Mr. Marx.

VOID JUDGMENT: In the trial court's oral ruling[1] on Mr. Marx's motion to vacate, it denied the motion because it determined that Mr. Marx had actual notice and that he had not brought the motion within a reasonable period of time. (1 RP 17-18.)

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[1] Ms. Clawson argues that Mr. Marx mischaracterized the content of the trial court's rulings because "Judge Eitzen made it clear that she found Mr. Marx was properly served and had actual notice of the proceedings for nonparental custody." (*Respondent's Brief,* pg. 7.) Mr. Marx provided quotes of the trial court's rulings from the verbatim report of proceedings; therefore, it is difficult for Ms. Clawson to persuasively argue that he has mischaracterized them.

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> 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.
>
> (1 RP 18.)

This ruling was an abuse of discretion because it applied the wrong legal standard. In her brief, Ms. Clawson does not dispute Mr. Marx's argument that the trial court applied the wrong legal standard when it dismissed the motion to vacate. Ms. Clawson does not dispute the law presented by Mr. Marx with respect to CR 4, RCW 4.28.080, CR 60(b)(5), or *Allstate v. Khani,* 75 Wn.App. 317, 323, 877 P.2d 724 (1994). Ms. Clawson further does not dispute that the summons must be served with the complaint, that failure to do so voids any subsequent judgment, and that a void judgment can be vacated at any time, even years after the fact; rather, Ms. Clawson ignores Mr. Marx's primary arguments about the proper legal standard governing motions to vacate and focuses instead making an argument that there is some distinction between an alleged total failure of service (as in *Woodruff v. Spence*) and allegations of insufficient service (as in this case). This argument is without merit as it is undisputed that proper service requires that the summons and the complaint be served together. CR 4; RCW 4.28.080. Ms. Clawson's arguments distinguishing these circumstances do nothing more than argue that actual notice cures

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improper service, which is a conclusion that is contradicted by undisputed law. *Khani* at 324-335.

Ms. Clawson attempts to avoid the prerequisite issue that the trial court failed to apply the proper legal standard to Mr. Marx's motion to vacate by ignoring it entirely and moving on to a secondary issue regarding evidence. She observes that Mr. Marx did not request an evidentiary hearing at the trial court level. Given that Ms. Clawson does not dispute any of the preceding arguments, however, this Court need not reach the question of an evidentiary hearing. Because the motion was improperly denied based on the wrong legal standard – only *after which* did the trial court make observations about credibility – the trial court's comments are irrelevant. The trial court clearly confirmed that its observations about credibility did not form the basis of its ruling when it noted that its conclusions about the service of the summons made no difference to the ruling:

> 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 18.)

A trial court has a nondiscretionary duty to vacate a void judgment; proper service of the summons and complaint is a required for the court to

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obtain jurisdiction over a party, and a judgment entered without jurisdiction is void. *Khani* at 323; *Woodruff v. Spence,* 76 Wn.App. 207, 209, 883 P.2d 936 (1994). The trial court erred when it denied Mr. Marx's motion to vacate.

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: Ms. Clawson does not dispute the standard of review assigned by Mr. Marx.

PARENTAL RIGHTS: Ms. Clawson's brief fails to acknowledge any of Mr. Marx's constitutional arguments; instead, she focuses entirely on arguing that the statute governing the modification of a non-parental custody decree is unambiguous. This is puzzling given that Mr. Marx never argued otherwise. Rather, Mr. Marx argued that the statute, as applied in this case, is unconstitutional, and Ms. Clawson makes no effort to dispute that argument.

Ms. Clawson attempts to distinguish *Link v. Link*, 165 Wn. App. 268, 268 P.3d 963 (2011) from the present case by observing that in *Link*, the mother had agreed to temporary placement of the child in third-party custody and had continued to exercise residential time. In the instant case, Mr. Marx had not agreed to third-party custody nor did he exercise

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residential time. Ms. Clawson observes these distinctions, but does not explain on what basis they matter, nor does she actually address this Court's ruling in *Link,* which requires that a parent's constitutional rights be addressed:

> 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.

Ms. Clawson also notes that there was no hearing on adequate cause in the *Link* case and that Mr. Marx did have a hearing on adequate cause. This incorrect, but regardless, Ms. Clawson does not explain how such a fact, if true, would have significance. First, a court commissioner in *Link* denied the mother's petition for failure to demonstrate adequate cause, which he explained in an oral ruling, so it is unclear how Ms. Clawson arrived at her conclusion that there was no hearing on adequate cause in *Link*. *Link* at 273. More importantly, though, Ms. Clawson's suggestion that the existence or absence of a hearing on adequate cause should affect

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the analysis completely ignores the ruling in *Link*, in which this Court determined that a parent is not required to prove adequate cause in cases where it has never been proven that the parent is unfit or that placing the child with the parent will result in actual detriment to the child's growth and development. *Link* at 284. This Court held that to require a showing of adequate cause in such circumstances is constitutional error. *Id.*

Ms. Clawson complains that if Mr. Marx's argument that *Link* should be applied to this case is accepted, then "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." Ms. Clawson's argument, which is clearly intended to demonstrate a perceived absurdity is, however, exactly correct. Ms. Clawson does not dispute the meaning or necessary outcome of this Court's ruling in *Link;* rather she is simply unhappy about it.

Adjudication of a parent's constitutional rights requires due process of law, and that principle is not limited to the brief window of time contained by the initial stages of a proceeding instigated by a third party. When a parent comes to court seeking protection of his/her constitutional rights, those rights must be addressed. Ms. Clawson makes no argument why this should not be so. If a parent is truly unfit, he/she will be determined unfit as surely at the modification stage as at the initial stage. Her suggestion

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that this confers some unforeseen benefit on dilatory parents is not persuasive. It is to the disadvantage of any parent to delay in asserting parental rights because the longer a parent waits, the more likely a court may conclude that placing the child with the parent would result in actual detriment to the child's growth and development. A parent desiring custody of his/her child has no reasonable motivation to wait in making the request. The only individual who is disadvantaged by the ruling in *Link* is a third-party who has obtained custody of a child by default without proving the allegations made and who *cannot* actually prove that the child's parents are unfit or that actual detriment that would result to the child if placed with her parents. Ms. Clawson is such a person. She obtained Mr. Marx's child by default based on her allegations that she could prove unfitness and actual detriment. Why is Ms. Clawson now so troubled by the suggestion that she should prove her previous allegations, which have always been her burden to prove? In circumstances where a parent is seeking custody, this Court's ruling in *Link* does nothing but prevent a clever third-party from permanently divesting a child of her parent without *actually* proving (rather than simply alleging) the unfitness of the child's parent or the actual detriment that would result to the child if placed with her parent.

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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: Ms. Clawson does not dispute the standard of review assigned by Mr. Marx.

PARENTAL RIGHTS: Ms. Clawson does not dispute the law presented by Mr. Marx in his brief. Ms. Clawson summarily concludes that Mr. Marx's argument is absurd (though she does not explain why) and dismisses them based on inadmissible hearsay evidence (which was subject to a motion to strike at the trial court level) and concludes that actual notice can cure insufficient notice – a position that has already been established as contrary to law.

Ms. Clawson then devises a variety of scenarios in an effort to demonstrate a perceived absurdity in the application of Mr. Marx's arguments.

The first hypothetical poses a situation wherein Mr. Marx is defaulted in jail. The jail scenario is somewhat confusing because it does not address whether Mr. Marx was properly served, nor does it provide any information about the procedural posture of the case at the time of his release. This Court need not address arguments that a party does not discuss meaningfully with citation to authority. *Saviano v. Westport Amusements,*

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Inc., 144 Wn.App. 72, 84, 180 P.3d 874 (2008); citing RAP 10.3(a)(6); *State v. Mills*, 80 Wn.App. 231, 234, 907 P.2d 316 (1995).

Ms. Clawson's adamant stance that a parent should not be entitled to due process and an actual adjudication of his/her rights at any stage after a default does, however, illustrate that Ms. Clawson appears to assume some unspoken foregone conclusion about what the *result* of any such adjudication would necessarily be. She appears to project what she expects to be the outcome of her own case onto the circumstances of *any* possible case and concludes that the mere requirement that a parent be afforded due process at some point in the proceedings has the obvious and unavoidable conclusion that the child will be returned to the parent. But, the mere requirement that a parent be afforded the opportunity to have his fitness as a parent properly considered does not mean that the outcome of such an inquiry is known or certain. That is precisely the point. Such an inquiry must be had.

Ms. Clawson poses a second hypothetical involving an action wherein Ms. Clawson requests status as a de facto parent. It is unclear what the implications of this argument are intended to be because Ms. Clawson does not draw any conclusions, provide any authority, or give any citation to the record. This Court need not address arguments that a party does not discuss meaningfully with citation to authority. *Saviano* at 84.

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VI. CONCLUSION

Mr. Marx respectfully requests this Court to reverse the trial court's denial of his motion to vacate the default nonparent custody decree. 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 11th day of June, 2015,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of June, 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:

_X_ HAND DELIVERY	Matthew Dudley
____ U.S. MAIL	Matthew Dudley & Lea Conner, Attorneys at Law
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