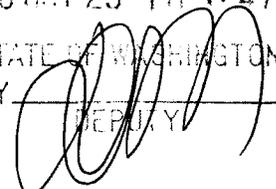


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DIVISION II

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STATE OF WASHINGTON
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40559-8-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

CORRY TIGHE MARTIN,

Appellant,

v.

CRYSTAL MARIE MARTIN,

Respondent.

BRIEF OF APPELLANT

LAW OFFICES OF
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I. ASSIGNMENT OF ERROR

The court erred when it denied a finding of adequate cause and dismissed the petition for modification of the parenting plan entered on January 30, 2009.

II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Pursuant to the Timmons case, the court erred when it denied adequate cause for modification of the parenting plan when it refused to consider facts that arose prior to the entry of the permanent parenting plan entered on January 30, 2009.

III. STATEMENT OF THE CASE

Corry and Crystal Martin have three children, Tighe 7, Kaylie 6, and Mykaella 4. CP 1. The parties were married in 2001 and separated on October 20, 2007. CP 135. The divorce was finalized on January 30, 2009 which provided that Corry was to have primary care and that Crystal would have a "standard" long-distance visitation schedule with no .191 factors and no limitations on her visitation. CP 139-148.

On December 15, 2009, Corry filed a Petition for Modification of the Parenting Plan, requesting that .191 factors be found by the court against Crystal and that restrictions be placed on

her visitation with the children. CP 149-153.

Corry relied primarily on facts that arose prior to the entry of the parenting plan on January 30, 2009. VRP 5 to 6. There were two new facts alleged that arose subsequent to the January 30, 2009 parenting plan: (1) That Crystal had a warrant out for her arrest due to non-compliance with a DUI charge from 2007; and, (2) that Crystal was residing with Nicolas George who has a history of felony drug charges. VRP lines 13 to 20.

In support of his hearing for a finding of Adequate Cause, Corry submitted the same documents he submitted in support of his initial proposed parenting plan in November 2007. VRP 7, lines 2-3; VRP 10, lines 6 to 21. Those documents are as follows:

1. Timeline Narrative RE: Martin Intervention; CP 53-59.
2. Supplemental Declaration of Corry T. Martin in Support of Motion for Temporary Order and Temporary Parenting Plan; CP 44-49.
3. United States District Court Violation Notice No. 1359994; CP 60-61.
4. Photographs Depicting Condition of Marital Residence; CP 62-104.

5. Declaration of Corry T. Martin; CP 9-31.
6. Declaration of Dorothy Martin; CP 50-52.

The main facts alleged in those documents are as follows:

1. That Crystal admitted on October 12, 2007 at 9:00 a.m. to C. Admundsen of Fort Lewis Family Advocacy that Crystal used cocaine once and marijuana three times; CP 55-56.
2. That Crystal admitted on October 12, 2007 at 9:00 a.m. to C. Admundsen of Fort Lewis Family Advocacy that Crystal had consensual sex with her father with her children in the same room; CP 55-56.
3. That Crystal was pulled over on I-5 for DUI on April 16, 2007 on Interstate 5 with her three young children in the vehicle and she blew a .170 and .171 grams of alcohol per 210 liters of breath; CP 24.
4. That Crystal was allowing an unregistered level 1 sex offender, Alexander Hylton to reside in her home; CP 57.
5. That Crystal was charged in Federal Court with Criminal Mistreatment in the 4th Degree; CP 61.

6. That the condition of the family home was atrocious and not safe for children; CP 57-58.

Corry Martin was deployed to Iraq from during 2007 and was brought back on emergency leave due to the above stated allegations. CP 47.

IV. SUMMARY OF ARGUMENT

Pursuant to the Timmons case, the court should have considered the facts presented by Corry Martin that arose prior the entry of the final parenting plan in determining whether or not adequate cause existed for Corry's petition to modify to go forward.

V. ARGUMENT

In Timmons v. Timmons, 94 Wn.2d 594, (1980), our Supreme Court held:

Petitioner further asserts that to allow consideration of pre-decree facts will subject the majority of decrees to virtually de novo hearings as soon as a custody dispute arises, and will thus create a tentativeness that is at odds with the policy of discouraging modification proceedings. However, the statutory preference for custodial continuity remains whether or not pre-decree facts are considered. The court must still find that modification is "necessary to serve the best interests of

the child(ren),” and shall “retain the custodian established by the prior decree” unless agreement, integration, or detriment to health is shown. RCW 26.09.260(1).

The current statute embodies the policy allowing the modifying court to consider previously undisclosed facts. Unlike the prior statute, RCW 26.09.260 specifically sets forth what facts the court may consider, including facts “unknown to the court.”

Our task is to give effect to the intent and purpose of the legislature, as expressed in the statute. E.g., Streng v. Clarke, 89 Wash.2d 23, 29, 569 P.2d 60 (1977). We find an intent to moderate the harshness of res judicata, regardless of whether or not the decree was contested, due to the public interest in the welfare of children. See 24 Am.Jur.2d Divorce and Separation s 819 (1966). We therefore hold ***600** that when a dissolution was uncontested, on a subsequent petition to modify, pre-decree facts are “unknown” within the meaning of the statute and can be considered by the trial court. Cf., McDaniel v. McDaniel, 14 Wash.App. 194, 539 P.2d 699 (1975) (facts which petitioner became aware of after entering default stipulation were “unknown”).

The statute further requires that a “change has occurred in the circumstances of the child or his

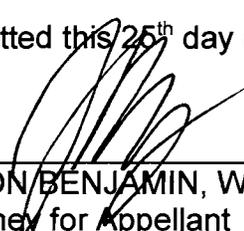
custodian ..." RCW 26.09.260. Principles of statutory construction require that we give effect to all of the language used. Publishers Forest Products Co. v. State, 81 Wash.2d 814, 505 P.2d 453 (1973). In order to give meaning to the words of the statute allowing consideration of "unknown facts," and give weight to the precedent of Rankin, we interpret this section to mean that a change must have occurred from circumstances only as were previously known to the court. See Boggs v. Boggs, 65 Ill.App.3d 965, 22 Ill.Dec. 645, 383 N.E.2d 9 (1978).

This is exactly such a case where the court should consider facts that arose prior to the entry of the previous final parenting plan that were unknown to the court at the time the last parenting plan was entered.

IV. CONCLUSION

For the foregoing reasons, Corry Martin's appeal should be granted and the matter remanded back to Superior Court for entry of orders consistent with this court's ruling.

Respectfully submitted this 25th day of October, 2010.



JASON BENJAMIN, WSBA 25133
Attorney for Appellant

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Court of Appeals, Division II
State of Washington

In re the Marriage of:)
CORRY MARTIN,) NO. 40559-8-II
Petitioner,) DECLARATION OF MAILING
and)
CRYSTAL MARTIN,)
Respondent.)

I, W. Dian Rogers, declare that on Monday, the 25th day of October, 2010, I mailed, via U.S. Mail, true and correct copies of the Brief of Appellant dated 10/25/10, and this Declaration of Mailing, via first class mail, postage prepaid, in properly stamped and addressed envelopes, to the following persons:

Crystal M. Martin
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Corry Martin
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Lacey, WA 98513

I declare under penalty of perjury that the foregoing
is true and correct to the best of my knowledge and belief.

DATED this 25th day of October, 2010, at Lakewood,
Washington.


W. Dian Rogers