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No. 52283-7-II

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

IN THE MATTER OF

JACOB HOCKING,
Petitioner/Appellee

&

CHESTER D. FLAGGARD
Respondent/Appellant

BRIEF OF APPELLANT

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INTRODUCTION & BACKGROUND FACTS

On February 20, 2015, Judge Orlando of the Pierce County Superior Court entered a Decree of Custody (CP 145 - 149) and Findings of Fact and Conclusions of Law (CP 135-144) in regards to Pierce County Cause # 13-3-04306-7, and awarded Non-Parental Custody of Mr. Hocking's daughter to the Maternal Grandfather, Chester Flaggard. This "Decree" and "Findings" were entered at the conclusion of a trial in which Judge Orlando found Mr. Hocking to be unfit as a parent.

In the Decree of Custody dated February 20, 2015, the court ordered that Mr. Hocking would have no visitation with his daughter. (CP 146)

In the Findings of Fact and Conclusions of Law dated February 20, 2015, the court made specific requirements as a "precondition" for Mr. Hocking to file for a minor modification of the parenting plan. Those requirements are as follows:

- A. "Submit to a full forensic psychological evaluation with an agreed upon, or court authorized Ph.D. level, state licensed, psychologist. Such evaluation must include full collateral contacts including Chester Flaggard, the petitioner,; Jennifer Knight, the child's counselor; all court records filed herein

or referenced herein; and all police reports filed herein or referenced herein and all CPS reports filed herein or referenced herein. Such evaluation to be solely at the expense of Mr. Hocking. The full evaluation must be filed in the court file (under confidential coversheet) and Mr. Hocking must have begun participating in any treatment recommendations as a condition precedent to filing a petition for minor modification of the parenting plan.

B. Mr. Hocking must obtain a statement from the child's counselor, Jennifer Knight, and file it in this court file about whether reunification counseling should or should not commence between Mr. Hocking and the child and whether or not it is in the best interests of the child (this is merely a recommendation and not binding on this court) as a condition precedent to filing a petition for a minor modification of the parenting plan.

C. Submits to a full state-certified domestic violence and chemical dependency evaluation by Castele Williams and Associates, or other agreed upon agency. Such evaluation must include same full collateral contacts as required by the forensic psychological evaluation described in A above.

Mr. Hocking shall successfully be at least half way through completion of any treatment recommendations contained in said evaluations as a condition precedent to filing a petition for a minor modification of the parenting plan.

- D. Completes an 8 week parenting class through Catholic Community Services or the equivalent, as a condition precedent to the filing of a petition for minor modification of the parenting plan.
- E. Successfully completes at least 12 week of consecutive clean bi-weekly observed random 11 panel UA's (including ETG). He must provide proof under a confidential coversheet into the court file of six months of clean consecutive random weekly observed 11 panel U.A.'s + ETG as a condition precedent to the filing of a petition for a minor modification of the parenting plan.” (CP 142 – 143).

On December 12, 2017, Mr. Hocking filed a “Petition to Change a Parenting Plan; Residential Schedule or Custody Order (PTMD).” (CP 175 – 185) In the “Petition,” Mr. Hocking requested that the Non-Parent Custody Order should be modified and alleged that RCW 26.09.260(1) & (2) were inapplicable. (CP 178 – 180) In the “Petition,” Mr. Hocking stated as the reasons for the request to Modify the Non-Parent Custody

Order as follows:

“When a nonparent custody order is entered pursuant to a finding of unfitness or actual detriment, the moving party must demonstrate by a preponderance of evidence a substantial change in his or her circumstances since the entry of the prior order, specifically related to the basis for the custody order including completion of evaluations, treatment, parenting, or other classes.

A parent who is required by the existing residential schedule to complete evaluations, treatment, parenting, or other classes may seek expansion of residential time and to change a final, nonparent custody order when that parent has fully complied with such requirements.

I have completed those requirements and there has been a substantial change in my circumstances.

I submitted to a full forensic psychological evaluation with a Ph.D. level, state licensed, psychologist. I have complied with all treatment recommendations and the evaluation has been filed under separate seal.

I have submitted to a state-certified domestic violence and chemical dependency evaluation. The evaluation, as well as the forensic psychological evaluation, included full collateral contacts. I have

completed all treatment recommendations from the domestic violence and chemical dependency evaluation.

I completed an eight (8) week parenting class.

I have successfully completed at least 12 weeks of consecutive clean bi-weekly observed random 11 panel UA's (including ETG).

He must provide proof under a confidential coversheet into this court file of six months of clean consecutive random weekly observed 11 panel UA's and ETG, they were bi-weekly (once every 2 weeks) random observed UA's for 12 weeks.

Further, I completed the requirements of a dependency filed out of King County Superior Court under cause #'s 14-7-02729-8 SEA and 14-7-02730-1 SEA.

I am asking the court to hear and review my petition to change a final, nonparent parenting plan, custody order, visitation order, or other order governing the residence of a child; to expand visitation, and to include possibly terminating the order to return the child to the care of myself as the child's parent, and conduct any proceedings concerning a relocation of the residence where the child resides a majority of the time. “ (CP 178 – 180)

In support of Mr. Hocking's "Petition," sealed confidential reports were filed that detailed Mr. Hocking's compliance with the court's

“Findings” and were filed in support of the position that Mr. Hocking had addressed his “unfitness” as a parent. (CP 1 – 81) Included within the sealed confidential reports was a “Parenting Psychological Evaluation with Parenting Observation” performed by Dr. Mary E. Hoppa, MSW, LCSW, NAMSII, Ph.D. (CP 50- 65)

Mr. Flaggard filed a response and among other things stated that the evaluation of Dr. Hoppa did not meet the requirements of the psychological evaluation because she was not a licensed psychologist in the State of Washington. In reply, Mr. Hocking provided Dr. Hoppa’s Vitae which detailed her qualifications and credentials. (CP 231 – 235)

A hearing on adequate cause was held on February 28, 2018. Commissioner Lindsay of the Pierce County Superior Court found that “Judge Orlando was very clear about the conditions that needed to be addressed and Respondent has not satisfied the conditions of Judge Orlando’s order.” (CP 256)

Mr. Hocking filed a Motion for Reconsideration and provided an additional Psychological Evaluation with Parenting Component performed by Dr. Gary Wieder, PhD. (CP 90 – 104).

On March 30, 2018, Commissioner Lindsay denied the motion for reconsideration and reiterated her prior ruling. (CP 280 -281)

On April 9, 2018, Mr. Hocking filed a Motion for Revision and after argument before Judge Kirkendoll, a briefing schedule was set. After receiving submissions from counsel for Mr. Flaggard and Mr. Hocking, Judge Kirkendoll issued a letter of decision dated July 17, 2018 in which Judge Kirkendoll affirmed the decision on reconsideration and denied the motion for revision. (CP 359 – 360)

Mr. Hocking timely noted this matter for appeal and submits this brief in support of his position that he has addressed his parental deficiencies as required by Judge Orlando’s order and that it was an error and an abuse of discretion to deny his request to proceed to trial to modify the non-parental custody decree entered on February 20, 2015.

II. ASSIGNMENT OF ERROR

Mr. Hocking identifies two sources of error in Pierce County Superior Court’s dismissal of his Petition for Modification:

1. The Court erred in finding that Mr. Hocking had not satisfied the conditions of Judge Orlando’s order in dismissing his “Petition to Change a Parenting Plan; Residential Schedule or Custody Order (PTMD)” dated December 12, 2017; and
2. The Modification standard of RCW 26.10.190(1) as applied

in Mr. Hocking's Petition for Modification unconstitutionally infringes on Mr. Hocking's right as a parent.

III. ISSUE AND ARGUMENT REGARDING ASSIGNMENT OF ERROR 1

The Court erred in finding that Mr. Hocking had not satisfied the conditions of Judge Orlando's order in dismissing his "Petition to Change a Parenting Plan; Residential Schedule or Custody Order (PTMD)" dated December 12, 2017.

In regards to the assignment of error number one (1) specified above, Mr. Hocking filed with the court two (2) forensic psychological evaluations (CP 50 – 65) & (CP 90 -104); filed with the court a state-certified domestic violence evaluation and proof of treatment (CP 3 – 27); filed with the court a chemical dependency evaluation (CP 28 – 31); filed proof of a completed parenting class of eight (8) weeks (CP 49); provided proof of 12 weeks of consecutive clean bi-weekly observed random 11 panel UA's (including ETG), as well as six months of clean consecutive random weekly observed 11 panel U.A.'s + ETG (CP 32 – 48); and collateral proof that he had addressed his parental deficiencies by filing with Pierce County Superior Court documentation that his two other daughters were placed with him at the conclusion of a Dependency Action

in King County (CP 66 -79). Despite all of this, the Pierce County Superior Court found that Mr. Hocking's submissions and claim that he is a fit parent were based on "evaluations and reports filed in an unrelated dependency action in a different county, involving different issues, different children, and conducted by evaluators with no access to, or knowledge of, the records and materials pertaining to this case." (CP 359) The Court further found that "the information (provided by Mr. Hocking) fails to address or acknowledge the serious issues presented by the nonparental custody case, including domestic violence, and lacks the quality criteria ordered by the 2015 trial court to protect the child. Thus the evaluations and reports fail to present an appropriate measure of respondent's current fitness." (CP 360)

Mr. Hocking believes that it was an abuse of discretion by the Pierce County Superior Court to make such findings in light of the materials that were provided to the court. A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. In re Marriage of Fiorito, 112 Wash.App. 657, 663-64, 50 P.3d 298 (2002). In the case before this court, it is Mr. Hocking's belief that Pierce County Superior Court's findings are based on grounds that are not supported by the documentation that was submitted and are manifestly unreasonable and based on untenable grounds.

Mr. Hocking believes that it was an abuse of discretion to use as part of its reasoning to dismiss his petition that the “evaluations and reports [were] filed in an unrelated dependency action in a different county, involving different issues, [&] different children.” (CP 359) Quite simply, the evaluations completed by Dr. Hoppa and Dr. Wieder are valid and detailed psychological evaluations that contain discussions and consideration regarding the child involved in this matter, the findings of Judge Orlando, and the input of Mr. Flaggard. (CP 50 – 54) & (CP 91 – 94)

In addition, the finding by Pierce County Superior Court that the evaluations of Dr. Hoppa and Dr. Wieder were performed without “access to, or knowledge of, the records and materials pertaining to this case.” (CP 359) This finding is not supported by a review of Dr. Hoppa and Dr. Wieder’s reports. Dr. Hoppa’s report reflects that it reviewed Judge Orlando’s ruling and Mr. Hocking disclosing his criminal history as well as the events of this matter (CP 50 – 54). Dr. Wieder’s report specifically discussed Judge Orlando’s Findings and Decree (CP 91 – 92), Mr. Hocking’s criminal history (CP 92 & 94 – 95), and a detailed discussion of Mr. Flaggard’s opinions (CP 93).

Further, the finding by Pierce County Superior Court that the submissions of Mr. Hocking fail “to address or acknowledge the serious

issues presented by the nonparental custody case, including domestic violence” (CP 360) is not supported by a review of Dr. Wieder’s evaluation contained under the headings of “Ontario Domestic Assault Risk Assessment (QDARA)” (CP 101); and “Clinical Impressions.” (CP 101 – 103) Under those headings, Dr. Wieder discussed at length Mr. Hocking’s history of domestic violence against the child’s mother in this case, and gave serious consideration and discussion to the potential of Mr. Hocking committing an act of Domestic Violence again over the next five years. Dr. Wieder pointed out that the risk to re-offend in the next five years was seventy percent (70%) but also pointed out that perhaps Mr. Hocking will be one of the thirty percent (30%) in light of “positive factors [which] reflect Jacob’s most recent efforts,” (CP 103) and “deserve significant weight,” and in the opinion of Dr. Wieder “outweigh his more distant history of egregious offenses.” (CP 103) This opinion of Dr. Wieder also dispels Pierce County Superior Court’s finding that the “evaluations and reports fail to present an appropriate measure of respondent’s current fitness.” (CP 360)

Finally, the finding of Pierce County Superior Court that the evaluations “lack[s] the quality criteria ordered by the 2015 trial court to protect the child” (CP 360) is unreasonable in light of the thoroughness of the testing, the depth of analysis, and the completeness of the evaluations

performed by Dr. Hoppa and Dr. Wieder. These evaluations were performed by qualified and experienced evaluators conducting Psychological Evaluations of Mr. Hocking that considered the full length of Mr. Hocking's history, as well as the history involving the child in the matter before Pierce County Superior Court.

For the reasons that have been mentioned, Mr. Hocking believes that it was an error of law for the court to find that he had not satisfied the conditions of Judge Orlando's order in dismissing his "Petition to Change a Parenting Plan; Residential Schedule or Custody Order (PTMD)" dated December 12, 2017. As the evidence shows, the Pierce County Superior Court based its finding on unreasonable, untenable, and unsupportable grounds. Therefore, Mr. Hocking requests that this Court reverse the findings of the Pierce County Superior Court and remand this matter for further proceedings to modify the current nonparental custody decree.

IV. ISSUE AND ARGUMENT REGARDING ASSIGNMENT OF ERROR 2

The Modification standard of RCW 26.10.190(1) as applied in Mr. Hocking's Petition for Modification unconstitutionally infringes on Mr. Hocking's right as a parent.

It is Mr. Hocking's position that the modification statute is unconstitutional, RCW 26.10.190(1) as applied between a parent and a

nonparent. The problem can be traced to the importation of a standard that applies between parents, i.e., the modification standard of RCW 26.09.260, without adequately protecting parents in custody disputes with nonparents.

The Supreme Court noted that, “[t]he nonparental custody statutes are designed to address situations wholly different from a divorce.” In re Marriage of Chandola, 180 Wn.2d 632, 327 P.3d 644, 646 (2014). Despite this substantially different context, the nonparental custody statute merely directs parent-petitioners for modification on a nonparental custody decree to the Parenting Act. See RCW 26.10.190(1), directing to RCW 26.09.260. The Parenting Act prohibits modification unless a court 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 the 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).

This statute implements Washington policy in favor of custodial continuity. In re Marriage of McDole, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993) (custodial changes are viewed as highly disruptive to children). However, because there is an equality of liberty interests as between the parents, the modification statute simply does not account for the superior

right a parent has over a nonparent or for the state's policy favoring reunification of the family unit.

The dependency statute does not make that mistake, but permits modification upon a change of circumstances wherever it arises. RCW 13.34.150. Even the Parenting Act permits a minor modification to proceed on petition of a parent restricted under RCW 26.09.191(2) or (3), so long as the parent "demonstrates a substantial change in circumstances specifically related to the basis for the limitation." RCW 26.09.260(7), and the nonparental custody statute permits an expansion of a parent's visitation on similar grounds. RCW 26.10.160(4).

The nonparental custody statute, as well as the dependency statute, exist to protect the child's welfare when a parent is unable to care for the child. "[T]he paramount goal of child welfare legislation is to reunite the child with his or her legal parents, if reasonably possible." In re Dependency of J.H., 117 Wn.2d 460, 476, 815 P.2d 1380 (1991). "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, at 426, 191 P.3d 71 (2008)

Even where grounds for nonparental custody have been found, based on substantial evidence and according to a judge's discernment, the constitution requires that if the circumstances of the parent change, as they

have with Mr. Hocking, the parent must be permitted to seek reunification of the family without satisfying the Parenting Act's modification standard. However, as has been argued on behalf of Mr. Hocking, the court imposed requirements in its Findings and Decree of Custody from February 20, 2015 that add additional requirements that do not address the basis for the limitations that were found at trial, thereby creating unconstitutional barriers to his reunification with his daughter.

The constitution protects the parent - child relationship. In re Custody of E.A.T.W., 168 Wn.2d 335, 343, 227 P.3d 1284 (2010) (courts have "long recognized that a parent's interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment") (internal citations omitted). For this and other reasons, "the integrity of the family unit has been zealously guarded by the courts. In Re Custody of Smith, 137 Wn.2d 1, 15, 969 P.2d 21, 28 (1998). The modification standard, devised for the parenting statute, fails to reflect this protection, rendering the nonparental custody decree that contains requirements unrelated to addressing parental deficiencies, an order terminating parental rights, insofar as it provides impediment to reunification of Mr. Hocking with his daughter.

The point is that because a parent's right is constitutional, it deserves protection in the form of a modification standard different from

the one that applies to disputes between parents. Whereas custodial continuity enjoys a preference in disputes between parents, this policy must yield to the constitutional claim the parent - child relationship makes as between a parent and a nonparent.

Washington's case law on custodial continuity suggests as much. It relies heavily on the statutory standard applicable to disputes between parents, i.e., RCW 26.09.002 ("the best interests 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"). See, In re Parentage of C.M.F., 179 Wn.2d 411, 427, 314 P.3d 1109, 1116 (2013) (citing statute); In re Custody of S.R., 183 Wn. App. 803, 334 P.3d 1190, 1195 (2014) (same).

As between parents, the modification standard of RCW 26.09.260 serves "the interest of stability." C.M.F., 179 Wn.2d at 419. There is no authority declaring this interest superior to the parent's constitutional right or superior to the state's policy in favor of preserving the parent - child relationship. Rather, the state's action in the nonparental custody context, because of the constitutional right at stake, must be narrowly tailored to the further the state's interests. In Re Custody of R.R.B., 108 Wn. App. 602, 615, 31 P.3d 1212 (2001) (where a parent's constitutional right is at issue, a statutory remedy must be narrowly tailored to further the state's interests).

Mr. Hocking contends application of the parent v. parent modification standard to nonparental custody modifications fails that standard. For these reasons, the analogy Mr. Hocking draws between the dependency statute and the nonparental statute is appropriate. The goal of the dependency statute is the reunification of the parent and the child. A modification of a Non-Parental Custody Decree constitutionally requires an examination if the parent has substantially remedied their parental deficiencies to accomplish reunification.

It is for these reasons that Mr. Hocking is asking the court to reverse the decision of the Pierce County Superior Court that denied his motion for revision and affirmed the order denying the motion for reconsideration. Mr. Hocking asks this court to reverse the findings of the Pierce County Superior Court and remand this matter so that it can proceed to trial to determine if he has remedied his parental deficiencies and be reunited with his daughter so that the Decree of Nonparental Custody issued on February 20, 2015 can be vacated.

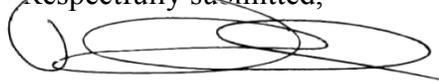
V. CONCLUSION

Based on the errors that have been identified and the arguments contained herein, Mr. Hocking respectfully requests this court to find that Pierce County Superior Court abused its discretion in dismissing his petition to modify the nonparental custody decree entered on February

20, 2015; to remand this matter for further proceedings; and to award any other relief the court deems appropriate and just.

Dated this 28th day of January, 2019

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Desmond Kolke', written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that on the 28th day of January, 2019, in Tacoma, Washington, I caused a true and correct copy of the preceding Brief of Appellant to Division II of the Washington Court of Appeals and to Mr. Jason Benjamin at j.benjamin@envisionfamilylaw.com.

By: 
Desmond Kolke, WSBA # 23563

LAW OFFICES OF DESMOND KOLKE

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