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Court of Appeals
Division II
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IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

No. 53774-5-II

Laura Todd,
Petitioner,

v.

Travis Millar and Desiree Todd,
Respondents/Appellants

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

RESPONSE BRIEF

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Introduction

Laura Todd filed a Petition for Non-Parental Custody Order, on September 19, 2018 regarding the minor child, BM. BM was born on February 1, 2017 to Desiree Todd¹ and Travis Millar. Laura Todd (DOB 1/31/1969), is the maternal grandmother of BM.

BM has extraordinary medical needs related to a congenital club foot. Desiree experienced periods of homelessness after BM's birth, failed to maintain steady employment, steady housing, or financial support for BM. Desiree failed to maintain adherence to prescribed medical treatment for BM and failed to meet her medical needs, resulting in the need for BM to undergo an additional surgery and medical treatment. Desiree has engaged in illegal drug use and failed to cooperate with the requirements of drug testing issued in temporary orders.

The trial court concluded that Desiree was unfit, and that even if she were fit, BM would suffer actual detriment to her growth and development if placed in Desiree's custody. The trial court made findings specifically that Desiree has a long-term chemical dependency problem which interferes with the performance of parenting functions, that Desiree has a chaotic living environment with long term housing, employment, and transportation instability, that Desiree has engaged in a long term substantial refusal to perform parenting functions, that

¹ Given both the Appellant and Petitioner are Ms. Todd, and Mr. Millar is similar to Ms. Miller, first names are used for the ease of the reader, no disrespect is intended.

Desiree has engaged in substantial medical neglect regarding BM's club foot treatment and failure to provide regular preventative care and that Desiree has not exercised reasonable judgment regarding BM's welfare.

Statement of Issues

1. The trial court did not abuse its discretion by denying Desiree's request for trial continuance. On June 11, 2018, this matter was called to trial. Desiree brought an oral motion for continuance. The trial court denied Desiree's request. Desiree now asks the court to review that denial. Did the trial court abuse its discretion in denying Desiree's request for continuance?
2. On June 11, 2018 at 8:50 a.m., Department 17, the assigned trial department, notified court administration that the department judge was unavailable for trial. Did the trial court violate local rule and abuse its discretion in reassigning the matter to Department 18 for trial?
3. Petitioner's witness Misty Stephenson provided testimony at trial and the court referenced her testimony in its final ruling. Did the trial court abuse its discretion regarding the credibility of Ms. Stephenson?
4. Was the trial court's decision that Desiree failed to substantially perform parenting functions defined by RCW 26.09.004 and was therefore unfit supported by substantial evidence when multiple witnesses testified to a consistent pattern of drug use, housing instability, employment instability, transportation instability, and inappropriate

judgment regarding the child's medical needs, health, and welfare?

5. Was the trial court's decision that Desiree suffered from a long-term substance abuse issue that impacted her ability to parent supported by substantial evidence when multiple witnesses testified to Desiree's drug use, Desiree failed to cooperate with court ordered drug testing, and Desiree's residence contained significant evidence of drug paraphernalia?

6. Was the trial court's decision that Desiree engaged in medical neglect of BM supported by substantial evidence when BM's medical records indicate significant failure to adhere to treatment protocols, including failing to bring the child to scheduled appointments, comply with casting and bracing, or post-surgical instructions?

7. Was the trial court's determination that BM would suffer actual detriment if left in the custody of Desiree supported by substantial evidence given the medical records indicating medical neglect, testimony of witnesses as to housing instability, employment instability, and transportation instability, and failure to substantially perform parenting functions?

Statement of the Case

The child, BM, was diagnosed in utero with club foot. Ex. 5, RP 43, RP 322. A treatment plan was established shortly after birth. *Id.*, Ex. 2, RP 44. The parents did not comply with the treatment plan and BM suffered relapse multiple times. Ex. 2, RP 44, Ex. 5, RP 51, RP 53-56, RP 60-62, RP 291, RP 322. BM arrived in Arizona for a pre-planned trip in

September 2018, where Laura resided, for a visit without the prescribed brace. RP 322-333. Laura thereafter filed a petition for nonparental custody and the court issued adequate cause October 18, 2018 on the basis of unfitness due to medical neglect. CP 8-11. BM was placed in the temporary custody of Laura. CP 12-15. The parents were ordered supervised visitation and to comply with drug testing. *Id.*, Ex. 36. Desiree did not comply with drug testing Ex. 41 (Finding page 3). Desiree filed a motion for summary judgment asking for the case to be dismissed, and said motion was denied on May 17, 2019. CP 89-105. Just before trial, Desiree filed a motion for continuance of trial but failed to note her request before the court. CP 152-153. Trial was held on June 11, 2019, with Desiree requesting a continuance at the last minute, the court denied her request. RP 3-5, 9.

The trial court found that Desiree was unfit, that BM would be subject to actual detriment if left in her care, and that she had subjected BM to medical neglect. CP 170-178.

Argument

- 1. The standard of review regarding a request for trial continuance is whether the trial court's decision was manifestly unreasonable or based on untenable grounds.**

The appellate court reviews a decision to deny a continuance for a manifest abuse of discretion. *In re Dependency of V.R.R.*, 134 Wn. App. 573, 580-81, 141 P.3d 85 (2006). A court abuses its discretion when its

decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)

Desiree asks this court to review the trial court's decision to deny her request for continuance on the basis that it violated her due process rights. When denial of a continuance request allegedly violates due process rights, the appellant must show either prejudice from the denial or that the trial result would have been different had the continuance been granted. *State v. Tatum*, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994).

In the matter of *In re Custody of C.D.*, the court noted the important distinction between the fundamental liberty interests involved in termination proceedings vs nontermination cases as it relates to due process. 188 Wn. App. 817, 828-829, 356 P.3d 211, 217-218, quoting *In re Welfare of R.H.*, 176 Wn. App. 419, 425-26, 309 P.3d 620 (2013). Given that the matter of BM's custody was not a termination case, just as in *In re Custody of C.D.*, it is appropriate for the court to review the trial court's denial of the continuance under the general standard of abuse of discretion which gives deference to the trial court. Desiree brought a Motion for Summary Judgment on April 2, 2018, which should be interpreted as readiness for adjudication. CP 89-105. Desiree waited until the morning of trial, on June 11, to place her request for continuance before the court. RP 3-5, 9. Desiree's request was made after the Petitioner, her husband, and another out of state witness had traveled to Washington for trial and after the Petitioner's

other witnesses had cleared their scheduled for trial that day. *Id.* The Court outlined these considerations and denied Desiree's request. RP 10. The trial court did not abuse its discretion.

2. The trial court acted properly in reassigning the case to a different judicial department when the assigned department was unavailable for trial.

Pierce County Superior Court administration reassigned the matter from Department 17 to Department 18 at 8:50 a.m. on the morning of trial due to Judge Kirkendoll's unavailability. CP 87. Pierce County Local Rule 40(e) states as follows:

Reassignment for Inability to Hear.

(1) Preassigned Matter. If the assigned judicial department is unable to hear a preassigned matter, the Court may transfer that case to the Court Administrator for reassignment.

(2) Trial Date. In the event the judicial department is unable to hear a case on the date set because of a conflicting schedule, the case may be transferred to the Court Administrator for reassignment.

(3) Remain Available. While awaiting such reassignment, litigants and their witnesses shall remain available until such time as they are excused by the Court Administrator or designee.

(4) No Available Judicial Department. If it is not possible for the Court Administrator to reassign a case due to the lack of an available judicial department, the case shall be returned to the previously assigned trial department. The court shall issue an Order Amending Case Schedule which shall only contain the following dates: Joint Statement of Evidence, Pretrial Conference and Trial Date. Additional

dates may be added to the Order Amending Case Schedule upon order of the court.

Judge Blinn's department was available for trial and thus the case was reassigned in accordance with that rule. Given the clear adherence to established local rule regarding reassignment, this issue does not appear to fall within a reviewable issue. However, even if it were, it is clear that the trial court did not abuse its discretion. Further, Desiree provides no support for her supposition that family court judges have any superior experience in the issue of family court. All Pierce County Superior Court judges rotate criminal, civil, and family assignments, and those scheduled rotations are available via the Pierce County government website.

Furthermore, if Desiree believed that Judge Blinn lacked the expertise to hear this case, she had the option of filing a motion for disqualification of him. RCW 4.12.050, Pierce County Local Rule 40(f). She failed to do so.

And finally, even if it was error to reassign the case to a different judicial department, Desiree has shown no prejudice by the reassignment, nor has she established that a different result would have occurred but for the reassignment. *State v. Tatum*, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994).

- 3. The substantial evidence standard for reviewing a trial court's findings of fact requires a reviewing court to accept the fact finder's**

view on the credibility of witnesses. The trial court is in the better position to evaluate the credibility of witnesses, and the reviewing court will not substitute its judgment for that of the trial court when reviewing the trial court's findings of fact.

The established standard of review requires the review court to accept the trial court's view on credibility of the witnesses. *See Freeburg v. City of Seattle*, 71 Wn. App. 367, 371-72, 859 P.2d 610 (1993). *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369-70, 798 P.2d 799 (1990). We leave credibility determinations to the trier of fact and will not disturb them on review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Desiree alleges that the trial court prejudiced her by considering the testimony of Misty Stephenson. The trial court did not make any finding regarding the credibility of Misty Stephen's, rather the court reiterated that it found Laura Todd to be credible. RP 476. Desiree does not cite to the record regarding her assignment of error. A review of the record does not result in finding any portion of the trial court's ruling including the assertion that it gave "significant weight" to Ms. Stephen's testimony. Furthermore, the trial court's finding regarding substance abuse was not solely dependent upon Ms. Stephen's testimony. This finding was supported by substantial evidence as outlined below in

response to Desiree's assignment of error related to the specific long-term substance abuse finding.

Desiree appears to argue that text messages between herself and Ms. Stephenson establish an issue of credibility of the witness under ER 609. However, while it is clear that Desiree discussed these messages during her cross examination of Ms. Stephenson, those text messages were never marked or admitted as exhibits, and therefore not considered by the trial court. . RP 369. Further, based on the content of cross examination by both parents, voir dire was conducted on Ms. Stephenson ,and the court sustained objection to further investigation into her criminal and civil history for the purpose of impeachment under ER 609. RP 161-162.

4. **For assignments of error 4-9, the standard review is whether, viewed in the light most favorable to Laura, the evidence at trial would persuade a fair-minded, rational person of the truth of the findings made by the trial court, and whether those findings support the conclusions of law.**

The court is asked by Desiree Todd to review certain findings of fact and the conclusions of law drawn from those facts relating to the custody of BM. This is a two-part process. *Tegman v. Accident & Medical Investigations, Inc.*, 107 Wn. App. 868, 30 P.3d 8 (2001).

We first determine whether the trial court's findings of fact were supported by substantial evidence in the record. *Landmark Development, Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). Substantial evidence is evidence which, viewed in the light most favorable to the party prevailing below, would persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). If the findings are adequately supported, we next decide whether those findings of fact support the trial court's conclusions of law. *Landmark Development*, 138 Wn.2d at 573, 980 P.2d 1234. *Tegman*, 107 Wn. App. at 874.

In determining whether there is substantial evidence to support the findings of fact, the court does not review evidence in the record contrary to the findings. *Structurals Northwest, Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 716, 658 P.2d 679 (1983). Instead, the court looks at the evidence favoring the prevailing party to determine if that evidence supports the challenged findings. *Id.*

Finding of Long-term Substance abuse: Drugs have been found in Desiree's bedroom by Laura. RP 390. Photos of Desiree's residence and purse include significant drug paraphernalia including pipes, blow torches, and chemicals. Ex. 33, RP 338. Desiree has admitted to use of methamphetamines to Laura. RP 342. Further, witness testimony provided that Desiree resides with regular drug users, that Desiree has

used methamphetamines in the past. RP 148, 153-154. Ms. Stephenson testified to using methamphetamines with Desiree as recently as December 2018, and at least 10 times in total. RP 165. Desiree was ordered to complete multiple drug tests which she did not complete. Tests ordered on September 18, 2018, and October 18, 2018, went without compliance. Ex. 36, Ex. 37, Ex. 43, Ex. 44, Ex. 49, Ex. 43, RP 79-80. When those tests were not complied with, the court ordered that they be considered positive. Ex. 41. The court observed that given the lack of compliance with drug testing, Desiree's overall instability, and the testimony of family members, that Desiree suffers from a long-term substance abuse issue. There is substantial evidence which supports the court's finding that Desiree has a long-term substance abuse issue which impacts her ability to parent.

Finding of Unfitness: Multiple family members testified that Desiree has experienced a lack of stable housing and periods of homelessness while caring for BM. RP 203, 207, 208, 210, 286-287, 337.

Multiple family members testified that Desiree has maintained a steady history of transportation instability, including significant traffic infractions and driving without a license or insurance. RP 219, 290-291, 325, 340. Desiree herself testified to driving without a license. RP 74.

Desiree has a history of employment instability. Multiple family members testified that Desiree has failed to maintain steady employment since BM's birth. RP 213, 292, 341. Desiree submitted falsified employment verification to the court. Ex. 31, RP 76.

The Court determined that given this pattern of instability, and the nexus between this instability and substantial non-performance of parenting functions (including necessary medical treatment), that actual detriment would occur to BM if left in Desiree's care and that Desiree was unfit. RP 474-490 , CP 170-178. The court's determination was supported by substantial evidence.

Finding of Medical Neglect: BM was diagnosed in utero with club foot. Ex. 5, RP 43, RP 322 A summary of BM's medical record regarding her club foot treatment indicates noncompliance throughout. Ex. 2, RP 44. BM was fitted with a serial cast intended to correct her club foot, in conjunction with other treatment plans including surgery. Ex. 5, RP 45. There were multiple incidents of Desiree removing the cast from BM's leg early and failing to bring BM to return appointments which were scheduled to replace the serial cast. Ex. 5, RP 46, RP 47, RP 48. After a period of consistent treatment, BM's providers identified that she was improving, only to review her after another failure by Desiree to comply with her treatment requirements, to find that BM had fully relapsed a month later. Ex. 5,RP 48. Desiree elected to take a break from BM's treatment for trips to Arizona and removed BM's cast so that she could swim. Ex. 5, RP 51. Upon return, the provider indicated that the delays in treatment caused by the parents had detrimentally impacted treatment Ex. 5, RP 53.

After BM's first surgical correction on 11/15/17, the medical provider is pleased with the correction and imparted the important of

consistent treatment to the parents. Ex. 5, RP 54. On 12/7/17, the provider indicates that after failure of the parents to comply with casting, BM has experienced a complete failure of the surgical correction. Ex. 5, RP 56. BM's treatment plan was altered to a boot and brace, and the provider indicated to the parents that the brace was to be worn full time. Ex. 5 RP 60. Desiree did not return with BM to the provider for 6 months and indicated that she was only compliant with the brace 25% of the time. Ex. 5 RP 61-62, RP 322. While Desiree was residing with her maternal grandmother (BM's maternal great-grandmother) Desiree frequently would leave the home for days at a time with BM, leaving the require brace behind. Ex. 5, RP 291. Once established with care in Laura's custody, it was determined BM required an additional invasive surgery to re-correct the relapse, but the surgery had to be postponed until further improvement could be made through brace and casting. Ex. 5, RP 170-171, Ex. 6, RP 327.

The court also considered evidence that BM had not been seen for preventative care at any point in her life, with Desiree indicating that BM had not seen a pediatrician because she was never sick. Ex. 5, RP 64, RP 323. There is substantial evidence to support the trial court's finding that Desiree engaged in medical neglect to the actual detriment of BM.

Conclusion

The trial court did not abuse its discretion in denying Desiree's request for continuance or in being reassigned to another judicial

department when the assigned department was unavailable. The trial court did not abuse its discretion regarding its credibility determinations, and the reviewing court is bound by those determinations given the standard of review.

There is substantial evidence in the record to support the trial court's conclusion that Desiree is unfit, has engaged in medical neglect, and that BM would suffer actual detriment if left in the custody of Desiree. For these reasons the trial court's decision should be affirmed and Laura Todd should be awarded statutory costs and fees as the substantially prevailing party.

Respectfully submitted this 18th day of June, 2020.

BLADO KIGER BOLAN, P.S.

Chelsea Miller
Chelsea Miller, WSBA #49651
Attorney for Laura Todd

Certificate of Service

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 18th day of June, 2020, she e-filed a Brief of Petitioner and Certificate of Service for filing with the Court of Appeals, Division II, and true and correct copies of the same for delivery to each of the following parties and their counsel of record:

Desiree Todd and Travis Millar:

Desiree.roni.almonte@gmail.com

Dated this 18th day of June 2020, at Tacoma, Washington.

BLADO KIGER BOLAN, P.S.



Heather D. Alderson
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