

FILED

Dec 1, 2014

Court of Appeals
Division III
State of Washington

No. 32431-1-III

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

In re the Custody of

Z.C., Child

MELISSA ENGLAND
Appellant

and

DALEENA AND RICHARD VAUGHN
Respondents

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The mother does not contest her historical drug use, though she disputes many of the Vaughns' assertions in respect of that history. The mother also disputes the Vaughns' claim that she abandoned her child, a claim plainly inconsistent with their acknowledgement that Melissa has never stopped trying to parent her own child. Melissa disputes other of the Vaughns' accusations, as well, but this case is not a fight over the facts. Rather, this case challenges the statutory impediment to the reunification of this mother and child. The Vaughns do not dispute the fact pertinent to this challenge: that for years, since Z.C. was two and a half, Melissa has been and remains perfectly capable of caring for her own son. The problem is that the statute declares this fact irrelevant.

II. STATEMENT OF ISSUES IN REPLY

1. The fact of the mother's fitness is undisputed.
2. The nonparental custody statute is unconstitutional if it applies a modification standard that fails to credit a parent's substantial change of circumstances.
3. Moreover, the modification standard should not apply here, where the trial court never independently evaluated the facts

nor applied to them the relevant legal standard.

4. When a parent remedies the reason that led to her agreeing to nonparental custody, there has been a substantial change in the child's circumstances.

5. Where a petitioner alleges facts in support of modification on the basis of a detrimental environment, the court must view the facts in the light most favorable to the petitioner, which it appears the trial court here did not do.

6. If the facts, viewed in this light, show a longstanding obstruction of the parent-child relationship and an ongoing effort to impede that relationship, has the petitioner established adequate cause for modification as a matter of law on the detrimental environment prong?

7. The mother should receive her fees on the basis of her need versus the custodians' ability to pay.

III. ARGUMENT IN REPLY

A. THE FACT OF THE MOTHER'S "PROLONGED SOBRIETY AND IMPROVED LIVING SITUATION" IS NOT DISPUTED.

The mother's constitutional challenge to the modification standard raises a pure legal issue. The facts relevant to this claim are undisputed. Indeed, the custodians did not challenge the trial court's finding of the mother's "prolonged sobriety and improved

living situation.” CP 255. This finding is a verity on appeal.

McCleary v. State, 173 Wn.2d 477, 514, 269 P.3d 227 (2012)

(“Unchallenged findings of fact are verities on appeal”).

Straightforwardly, this case asks whether this fact should satisfy the mother’s burden to prove a substantial change of circumstances in order to modify the custody decree. As the trial court described it, Melissa asks this Court to “plow new ground.”

B. THE MODIFICATION STANDARD AS APPLIED TO THE FACTS HERE UNCONSTITUTIONALLY INFRINGES ON A PARENT’S FUNDAMENTAL RIGHT.

The Vaughns assert that the “mere showing” of a parent’s rehabilitation cannot support an order changing custody. Br. Respondent, at 12. As support for this assertion, they cite to a case involving a custody dispute between parents. *Id.*, citing *McCray v. McCray*, 56 Wn.2d 73, 350 P.2d 1006 (1960). They flatly equate a nonparent and a parent in the modification context. Br. Respondent, at 23. As Melissa has argued, the standard that applies between parents cannot be constitutionally applied between parents and nonparents, at least not under facts such as presented here, for the simple reason that 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 here tantamount to an order terminating parental rights, insofar as it is a permanent impediment to reunification of this family, as proven by six years of Melissa’s efforts. Indeed, the Vaughns argue a “decision to award custody to a nonparent is, for all practical purposes, a final one ...” Br. Respondent, at 27. While the order may be final, jurisprudentially speaking, it does not confer a permanent right on the Vaughns.

For example, Division One contrasted a parent’s right with the right conferred by a nonparental custody decree and described the latter as follows:

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. 416, 426, 191 P.3d 71 (2008). The Vaughns argue *J.A.B.* is inapposite because the case involved a de facto parent claim. Br. Respondent, at 13-14. This misses the point, which is that “nonparental custody is not the equivalent to parentage.” *In re Custody of A.F.J.*, 179 Wn.2d 179, 186, 314 P.3d 373, 376 (2013). Recently, in *A.F.J.*, our Supreme Court expressly disagreed with the Vaughns’ permanency claim and expressly approved the *J.A.B.* court’s description of nonparental custody as temporary. *A.F.J.*, 179 Wn.2d at 186.

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, e.g., *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.*, -- Wn. App. -- 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. The Vaughns cite 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). Melissa contends application of the parent v. parent modification standard to nonparental custody modifications fails that standard.

For these reasons, the analogy Melissa draws to dependency and termination proceedings remains viable, and the Vaughns fail to demonstrate otherwise. They argue dependencies, unlike nonparental custody actions, contemplate a “return home.”

Br. Respondent, at 22. Precisely, and the dependency statute requires the state to assist in achieving this goal. Melissa and the trial court sought to channel her case to that path, an effort the Vaughns opposed. At this point, all Melissa asks is that the modification standard not impede a “return home” of her child.

The Vaughns also argue a dependency in this case would have resulted in Melissa losing her parental rights. Br. Respondent, at 7, 12-13; but, see, Br. Respondent, at 24 (would have achieved a return of Z.C. to her home). This is not even a fair inference from the facts, given that Melissa entered treatment immediately after entry of the custody decree and has been drug-free since. Certainly, the Vaughns’ argument reveals their intent to supplant Melissa. However, it ignores again that, in the dependency context, the state must assist the parent in correcting any parental deficiencies. By contrast, here, Melissa has not only had to engineer her recovery on her own, she has had to fight her sister for access to her own child. It is a fair inference that had Melissa received the state’s services when she requested (and the court ordered) them, she and Z.C. would have been reunited years

ago. He would not have been “sitting on a shelf,” as the Vaughns claim.¹ He would have been home with his only living parent.

This case arises because the mechanism for reuniting a fit legal parent with her child is apparently broken. As argued in Melissa’s opening brief, the constitution requires the mechanism be fixed.

C. THE VAUGHNS FAIL TO DISTINGUISH *T.L.* ON ITS FACTS AND HERE, AS THERE, THE MODIFICATION STANDARD SHOULD NOT APPLY BECAUSE A COURT NEVER INDEPENDENTLY ADJUDICATED NONPARENTAL CUSTODY.

Melissa raises a separate challenge based on the proposition that the modification standard should not apply where a court has not resolved a contest between the parties by independently evaluating the evidence and the relevant legal standard. See *C.M.F.*, 179 Wn.2d at 434-437 (and cases cited therein) (Fairhurst, J., dissenting). For this proposition in this context, Melissa relies on *In re Custody of T.L.*, 165 Wn. App. 268, 268 P.3d 963 (2011). The Vaughns spend a considerable amount of time attempting to distinguish *T.L.* on the facts. Br. Respondent,

¹ It is difficult to ignore the implication of this pejorative for all parents who, for a variety of reasons, must rely on others to help in the care of their children. A child is not “sitting on a shelf” just because his or her father or mother spends most of two or more years deployed overseas, working away from home, battling to overcome a medical problem, or otherwise struggling to regain her or his footing. Families can and do endure and survive such hardships.

at 14-21. But the cases are very similar and what variations there are fail to alter the fact that the custody decrees in both cases were entered by agreement. CP 60. Unquestionably, here, the parties' disputed the facts, before and after the agreement and still. But the court never resolved this dispute, which is obvious from the factual contest that continues in this court.

For example, it is a verity that the child was exposed to meth because the parties agreed to that finding. CP 60. Exposure could have occurred through environmental/casual contact with a user. CP 38. No one suggests any lasting harm to the child. Indeed, Melissa abstained from drug use during her pregnancy and gave birth to a healthy child. The child remained healthy while in her care for the first year, approximately, of his life, as the medical reports corroborate, and remains healthy today. Certainly Daleena's claim that the drug exposure level in the child was higher than in an adult is offered without any context or corroboration. Br. Respondent, at 17, citing CP 392-400, 579-580. The G.A.L. provided some of that, including critiques of the drug-test and the lab, matters that would have been fully developed in a trial. CP 36-38. For the purpose of these proceedings, Melissa does not contest her historical drug use, but that does not mean she

concedes the accuracy of the Vaughns' characterizations. Even the drug tests performed in 2008 corroborate Melissa's efforts toward recovery, consistent with the evaluations by treatment providers. CP 30, 356 ("not high levels" in 2008); compare 354 and CP 597 (widely disparate results from two tests done within six days of one another).

In short, for the present purposes, the fact of Melissa's historical drug use is settled. The extent of it – and whether it could have been proved to be sufficient for a finding of unfitness – is not settled. In reaching an agreement, the parties left these facts unresolved.

Not only did the trial court make no independent evaluation of the evidence and or undertake an independent analysis of the proper legal standard, the decree does not include the requisite findings and conclusions. CP 58-62. Rather, the order is predicated on a finding of "best interest" alone, arising from the fact of the child not being in either parent's physical custody (the father's because he is dead and the mother's because of her drug use). CP 60. Thus, the order reflects an erroneous understanding of the legal standard, which our Supreme Court clarified four years later in *E.A.T.W.*, *supra*. The order's other reference to the

mother's drug use appears as a reason to temporarily limit her visitation, not to deprive her of custody. Id.

The Vaughns are simply wrong when they claim Melissa was found to be unfit. See, e.g., Br. Respondent, at 16, 19, 21, 28. Given the constitutional dimension of the test, this order simply does not satisfy. While the Vaughns frequently pay homage to the high burden of proof and persuasion placed on nonparental custodians, they must also acknowledge they were never held to this burden

Not only is this the law, it is sensible. Parents in need of assistance should not be discouraged from seeking it by the draconian effect of agreed orders, especially where the order fails to articulate the proper factual and legal standard. By merely admitting they need help, parents should not be stripped of their parental rights and forever deprived of their children.

D. MELISSA ESTABLISHED ADEQUATE CAUSE BASED ON THE SUBSTANTIAL CHANGE OF CIRCUMSTANCES IN THE CHILD.

While Melissa has argued that in nonparental custody proceedings the modification standard should credit a parent's substantial change of circumstances, another way of looking at this issue is through the child. Z.C. has a parent who has remedied the

circumstances that led to her agreeing to nonparental custody. This is a change in Z.C.'s life as well as in Melissa's. See Br. Appellant, at 32. Appellant can find no authority, pro or con, beyond the statute, but submits this is a fair reading of the statute in the context of nonparental custody, where constitutional rights are at stake and policy favors reunification of families.

E. MELISSA ESTABLISHED ADEQUATE CAUSE BASED ON THE DETRIMENTAL ENVIRONMENT IN WHICH THE CHILD RESIDES.

The final challenge Melissa raises to the court's order denying adequate cause involves a mixed question of law and fact. The Vaughns contest the standard of review as stated by Melissa. Compare Br. Respondent, at 29, with Br. Appellant, at 15. However, they do not cite authority in support of their argument. By contrast, for the proposition that in review of the trial court's adequate cause order, the alleged facts should be viewed in the light most favorable to the petitioner, Melissa cites *In re Marriage of Lemke*, 120 Wn. App. 536, 541-542, 85 P3d 966 (2004). Therefore, Melissa's allegations regarding the detrimental environment must be viewed in that light. It does not appear the trial court here applied this proper measure; nothing in the findings suggests so. Rather, the court simply declared there to be "no

substantial change of circumstances” in regard to the allegations of detriment. CP 255. Assuming the facts as stated by Melissa are true, they do prove detrimental environment. See Br. Appellant, at 31-32. Either the court reached the wrong conclusion because it applied the improper measure to the facts, or it reached the wrong conclusion as a matter of law.

F. THIS IS NOT A TRIAL, BUT THE MOTHER CORRECTS SOME OF THE VAUGHNS’ FACTUAL ASSERTIONS.

There has never been a trial on the merits in this case, either with respect to the original custody decree or the modifications. The parties obviously dispute the facts; they even dispute their significance. See, e.g., Br. Respondent, at 11 (referring to Melissa’s claim of detrimental environment as “petty and common family law allegations”). While Melissa refrains from extensive rebuttal on the facts, it bears noting that the Vaughns appear to owe no great allegiance to accuracy or consistency. For example, they claim Melissa saw her son “roughly four to five times” from 2008 to 2010. Br. Respondent, at 18. But in 2010, when Melissa sought to enforce the parenting plan through contempt, alleging the Vaughns were withholding Z.C. from her (CP 370-376), Daleena responded that Melissa had spent every major holiday and all of Z.C.’s birthdays with him. CP 394. In the Vaughns’ joint

declaration in 2012, they state Melissa visited with Z.C. through 2009 and 2010 “sometimes twice a month.” CP 514. By any measure, that is more than four to five times over several years. See, also, CP 420-21 (Melissa saw Z.C. three times while in treatment, then traveled regularly to Clarkston for visits).

Similarly, in their brief, the Vaughns claim Z.C. began living with them in December 2005. Br. Respondent, at 23. They cite to Daleena’s declaration, which states merely that beginning in January 2006, Z.C. “spent a majority of his time at my home when he was not with his mother.” CP 392 (emphasis added). In her 2014 declaration, she states “we have lived with Z in the same household since he was 10 months old” CP 215.

To Melissa’s complaint that the order provided for increased visitation pursuant to LR 15, Daleena argues that Melissa’s move to Seattle rendered that order a nullity. Br. Respondent, at 18; see CP 395-396 (Daleena claiming LR 15 no longer applies because Melissa has moved). Daleena nowhere explains why the distance makes “impracticable if not impossible” long summer visits (e.g., half of summer) or long breaks, as the rule provides, nor does she acknowledge her own refusal to let the child travel by air. See Br. Appellant, at 30; see, also CP 393 (denying visits because she did

not like where Melissa lived but would not agree to inspect the residence). Simply, Daleena consistently acts to keep mother and child apart. See, e.g., CP 184, 250-252.

At the risk of being repetitive, the trial court never resolved the parties' factual disputes. Obviously, those disputes continue. For the purposes of this appeal, the facts are undisputed. Melissa entered treatment in 2008 and has been drug-free ever since. She has persistently sought to reunite with her son and has consistently been obstructed in that effort by the Vaughns and by the legal standard. She argues above that the legal standard should be changed.

G. THE MOTHER SHOULD RECEIVE HER FEES.

The Vaughns call the mother's efforts to regain custody of her son "harassment." Br. Respondent, at 33. They ignore that not only have they impeded Melissa's relationship with her son, the law has lacked the proper mechanism: a standard permitting modification on a parent's change of circumstances. Melissa's request for fees is based on her need versus the Vaughns' ability to pay, a matter to be settled by financial declarations.

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IV. CONCLUSION

For the reasons stated above and in Appellant's Opening Brief, Melissa England again asks this Court to vacate the order denying adequate cause and to remand this case to the trial court for dismissal of the nonparental custody order or remand to King County Superior Court for further proceedings. She asks further to be awarded attorney fees.

Respectfully submitted this 1st day of December 2014.

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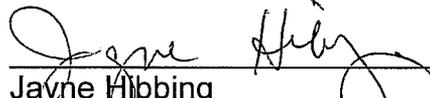
DECLARATION
OF SERVICE

Jayne Hibbing certifies as follows:

On December 1, 2014 I served upon the following true and correct copies of the Appellant's Reply Brief, Response to Motion on the Merits, and this Declaration, by depositing with the United States Postal Service, postage paid, addressed to:

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