

FILED
11/3/2017 10:56 AM
Court of Appeals
Division III
State of Washington

COA No. 35160-2-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Custody of:

R.S. and E.S.,

Children.

JAMES BANGARD and REBECCA BANGARD,

Appellants,

and

BORIS SHVED and OLGA SHVED,

Respondents.

BRIEF OF APPELLANTS

Kenneth H. Kato, WSBA # 6400
Attorney for Appellants
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR.....1

 1. The trial court erred by entering its “Order re: Dismissal Strike Pet. Pleadings”.....1

Issues Pertaining to Assignments of Error

 A. Did the trial court abuse its discretion by dismissing the non-parental custody and de facto parentage petition and striking pleadings for failure of petitioners Bangard (1) to appear at the status conference per court rule, (2) to establish adequate cause in a timely manner per scheduling order dated 10/24/16, (3) to attend parenting seminars per court rule pursuant to court order dated 10/24/16, and for (4) failure to establish jurisdiction?.....1

 B. Did the trial court err by dismissing the petition striking the Bangards’ pleadings?.....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT.....3

 A. The court erred by dismissing the petition and striking the pleadings when its reasons for doing so were unsupported by the record and were not supported in law.....3

TABLE OF AUTHORITIES

Table of Cases

Allied Fin. Servs. Inc. v. Mangum, 72 Wn. App. 164, 864 P.2d 1, 871 P.2d 1075 (1993).....4

| | |
|--------------------------------------------------------------------------------------------------------------------------------------|---------|
| <i>Apostolis v. City of Seattle</i> , 101 Wn. App. 300, 3 P.3d 198 (2000)..... | 4, 8 |
| <i>In re Custody of M.S.</i> , 194 Wn. App. 1033 (2016)..... | 5, 7 |
| <i>In re Dependency of E.H.</i> , 158 Wn. App. 757, 243 P.3d 160 (2010)..... | 7 |
| <i>In re Marriage of Spreen</i> , 107 Wn. App. 341, 28 P.3d 769 (2001)..... | 5 |
| <i>Rivers v. Wash. State Conference of Mason Contractors</i> , 145 Wn.2d 674, 41 P.3d 1175 (2002)..... | 5 |
| <i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971)..... | 7 |
| <i>White v. Kent Med. Ctr., Inc., P.S.</i> , 61 Wn. App. 163, 810 P.2d 4 (1991)..... | 5 |
| <i>Woodhead v. Disc. Waterbeds, Inc.</i> , 78 Wn. App. 125, 896 P.2d 66 (1995), <i>review denied</i> , 128 Wn.2d 1008 (1996)..... | 4, 5, 8 |

Statutes

| | |
|------------------------|---|
| Ch. 13.34 RCW..... | 6 |
| Ch. 26.44 RCW..... | 6 |
| RCW 13.34.030-161..... | 6 |
| RCW 13.34.030(1)..... | 5 |
| RCW 13,34,155(1)..... | 6 |
| RCW 26.10.030..... | 7 |
| RCW 26.10.030(1)..... | 6 |

Rules

GR 14.1.....5
LCR 4.1(d).....5
LCR 94.04W.....7

I. ASSIGNMENT OF ERROR

1. The trial court erred by entering its “Order re: Dismissal Strike Pet. Pleadings.”

Issues Pertaining to Assignment of Error

A. Did the trial court abuse its discretion by dismissing the non-parental custody and de facto parentage petition and striking pleadings for failure of petitioners Bangard (1) to appear at the status conference per court rule, (2) to establish adequate cause in a timely manner per scheduling order dated 10/24/16, (3) to attend parenting seminars per court rule pursuant to court order dated 10/24/16, and for (4) failure to establish jurisdiction?

B. Did the trial court err by dismissing the petition and striking the Bangards’ pleadings?

II. STATEMENT OF THE CASE

James and Rebecca Bangard filed a nonparental custody and de facto parentage petition on October 24, 2016. (CP 2). The Bangards’ relationship to the children, R.S. and E.S., was as foster parents. (*Id.*). Boris and Olga Shved are the birth parents of the children. (CP 3). When the petition was filed, R.S. and E.S. were not living with either birth parent and had been living with the Bangards in Minnesota since February 17, 2007. (*Id.*). The

children were subsequently returned to the Shveds' care after the dependency court ordered the foster placement terminated and returned R.S. and E.S. to their birth parents. (CP 37).

The petition recited the history of the children following concerns of physical harm to them:

ERS and RBS were taken into protective custody and ultimately found to be dependent pursuant to RCW 13.34. *et seq.* After a complex factual and legal history, including an order terminating the Shved's parental rights that was vacated. The children remain subject to an existing finding and order of dependency. (CP 4).

The court entered a domestic case scheduling order on October 16, 2014, pursuant to LCR 94.04W(c)(4). (CP 14). Among other things, it required a mandatory status conference/parenting seminars/order re: adequate cause on January 9, 2017. (*Id.*). The Bangards filed a motion for adequate decision on October 24, 2016. (CP 12) An additional status hearing was scheduled for March 6, 2017, with trial on August 2, 2017. (CP 14).

On March 6, 2017, the Shveds filed a motion and declaration for dismissal and for sanctions. (CP 32). Although untimely notice was given, no objection was lodged. The basis for the motion was that with the pending dependency action on the children, "there had been no grant of concurrent jurisdiction by the juvenile court" so the

family court lacked jurisdiction to hear the Bangards' petition. (CP 35; RP 6). The Franklin County Court Commissioner dismissed the petition and struck the Bangards' pleadings. (CP 40). This appeal follows. (CP 43).

III. ARGUMENT

A. The court erred by dismissing the petition and striking the pleadings when its reasons for doing so were unsupported by the record and were not supported in law.

The order dismissing the petition and striking the pleadings entered findings:

Requests for sanctions are reserved and court retains jurisdiction for that purpose. Petitioners have failed to appear [for] the status conference per court rule. Petitioners have failed to establish adequate cause in a timely manner per scheduling order dated 10/24/16. Petitioners have failed to show proof of attending parenting seminars per court rule pursuant to court order dated 10/24/16. Petitioners have failed to establish jurisdiction. (CP 40).

From these findings, the court ordered dismissal of the case and struck the Bangards' pleadings. (*Id.*).

Three of the findings relate to the Bangards' failure to comply with local court rules and/or the October 24, 2016 scheduling order. A trial court's order dismissing a case for

noncompliance with court orders or rules is reviewed for abuse of discretion. *Apostolis v. City of Seattle*, 101 Wn. App. 300, 303, 3 P.3d 198 (2000). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds and reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 27, 482 P.2d 775 (1971).

Under Washington policy, courts do not resort to dismissal lightly. *Woodhead v. Disc. Waterbeds, Inc.*, 78 Wn. App. 125, 129-31, 896 P.2d 66 (1995), *review denied*, 128 Wn.2d 1008 (1996). But when a court finds a party acted with willful and deliberate disregard of reasonable court orders and has thus prejudiced the other side, dismissal may be warranted. *Id.* at 30. Violation of a court order without reasonable excuse will be deemed willful. *Allied Fin. Servs. Inc. v. Mangum*, 72 Wn. App. 164, 168, 864 P.2d 1, 871 P.2d 1075 (1993). A trial court using its discretion to dismiss a case for violation of court orders and rules must expressly find that a party's failure to comply was willful and prejudiced the opposing party. *Woodhead*, 78 Wn. App. at 132.

Here, the court did not follow this established law before dismissing the petition. Although finding three instances of the Bangards' noncompliance with the scheduling order and local court

rules, it did not make the required express finding that their failure to comply was willful and prejudiced the Shveds. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 684, 41 P.3d 1175 (2002). This was an error of law and was in itself an abuse of discretion. *In re Marriage of Spreen*, 107 Wn. App. 341, 349-50, 28 P.3d 769 (2001). Indeed, the court faulted the Bangards for not physically appearing at the status conference per court rule, but LCR 4.1(d) does not require them to attend in person. They were represented by counsel, who was present. (RP 7-8). Furthermore, the court did not consider whether a lesser sanction would suffice to address the noncompliance with the scheduling order and court rules. *White v. Kent Med. Ctr., Inc.*, P.S., 61 Wn. App. 163, 176, 810 P.2d 4 (1991). This must be done before dismissal is warranted. *Woodhead*, 78 Wn. App. at 132.

The three findings relating to noncompliance with the scheduling order and court rules did not legally support the dismissal. The court therefore abused its discretion. *Spreen, supra*.

The court's only other finding for dismissal was that the Bangards had failed to establish jurisdiction. (CP 40). The Shveds relied on an unpublished Division III case, *In re Custody of M.S.*,

194 Wn. App. 1033 (2016) as GR 14.1 nonbinding, persuasive authority. The court noted RCW 13.34.030(1) provided that the dependency courts in Washington had exclusive original jurisdiction over all proceedings relating to children alleged or found dependent in Ch. 26.44 RCW and RCW 13.34.030 through 13.34.161. RCW 26.10.030(1) permits a nonparent to petition for custody of a child and provides that, except as authorized for proceedings brought under chapter 13.34 RCW, a child custody proceeding is commenced in the superior court by a nonparent filing a petition seeking custody of the child. RCW 13.34.155(1) authorizes the dependency court hearing a dependency action to hear nonparental custody petitions.

In considering how these statutes interacted, Division III stated:

Partly to prevent multiple courts from entering inconsistent orders, the superior court must determine whether the subject children are involved in a pending dependency action before hearing a nonparental custody petition. If they are, and unless the dependency court grants concurrent jurisdiction to the superior court, the superior court must either dismiss or stay the nonparental custody petition. . . Here, there was a pending dependency involving the subject children, and there is no record that the dependency court ever granted the superior court concurrent jurisdiction. The superior court

did not have authority to hear the nonparental custody petition.

The Shveds argued the Bangards' petition presented the same situation and *M.S.* was persuasive authority for the court to dismiss because the dependency court in the pending dependency never granted concurrent jurisdiction to the superior court. The court agreed. (RP 6; CP 40).

But *M.S.* is unpersuasive and inapposite. Benton/Franklin Superior Court Local Civil Rule 94.04W provides in pertinent part:

(a) Family Court.

(1) Jurisdiction. All cases filed under Title 26 RCW shall be transferred to the Family Court for adjudication.

By its clear and unambiguous terms, LCR 94.04W expressly granted concurrent jurisdiction in the Bangards' case filed under RCW 26.10.030 to the superior court's family court to hear the nonparental custody petition. Indeed, the grant of concurrent jurisdiction is mandatory under the rule. See *In re Dependency of E.H.*, 158 Wn. App. 757, 765-66, 243 P.3d 160 (2010). The court thus erred by determining the Bangards had failed to establish jurisdiction. LCR 94.04W.

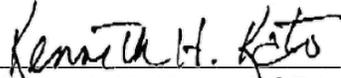
Because neither its findings nor the law supported dismissing the petition and striking the Bangards' pleadings, the court abused its discretion by doing so. *Apostolis*, 101 Wn. App. at 303. Moreover, the court further erred by failing to consider whether any lesser sanction would have sufficed to address the noncompliance with the scheduling order and court rules. *Woodhead*, 78 Wn. App. at 132. The case must be remanded for further proceedings.

IV. CONCLUSION

Based on the foregoing facts and authorities, the Bangards respectfully urge this court to reverse the "Order re: Dismissal Strike Pet. Pleadings" and remand for further proceedings.

DATED this 3rd day of November, 2017.

Respectfully submitted,



Kenneth H. Kato, WSBA # 6400
Attorney for Appellants
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on November 3, 2017, I served the Brief of Appellant through the eFiling portal on Jodi Backlund at her email address.



November 03, 2017 - 10:56 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35160-2
Appellate Court Case Title: James and Rebecca Bangard v. Boris and Olga Shved
Superior Court Case Number: 16-3-50366-3

The following documents have been uploaded:

- 351602_Briefs_20171103105513D3427271_7148.pdf
This File Contains:
Briefs - Appellants - Modifier: Amended
The Original File Name was bangard brief 351602.pdf

A copy of the uploaded files will be sent to:

- backlundmistry@gmail.com

Comments:

changed date of brief and service to 11/3/17

Sender Name: Kenneth Kato - Email: khkato@comcast.net
Address:
1020 N WASHINGTON ST
SPOKANE, WA, 99201-2237
Phone: 509-220-2237

Note: The Filing Id is 20171103105513D3427271