

FILED
Court of Appeals
Division III
State of Washington
1/23/2019 4:36 PM

No. 361519

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

In re:

MEGAN DOMPIER,

Respondent,

and

SEAN PARKER,

Appellant.

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The trial court erred by finding that Mr. Parker voluntarily consented to the integration of the children into Ms. Dompier's care. The trial court further erred in finding that granting Ms. Dompier's modification was in the best interests of the children.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did the trial court err in finding that there was a substantial change in circumstances that justified a modification of the prior 50-50 custody decree between the parties based on integration?

Did the trial court err in granting the modification by finding that it was in the best interests of the children and necessary?

C. STANDARD OF REVIEW

On review, the Appellate Court carries out consideration of a trial court's decision modifying a final parenting plan based on an abuse of discretion. *In re Marriage of Zigler*, 154 Wn.App. 803, 808, 226 P.3d 202 (2010).

D. STATEMENT OF THE CASE

The parties were married in 1999 in Utah and divorced in Utah with a custody order was entered on February 14, 2010. (CP

3, 32; RP at 150, 153). This decree awarded 50-50 custody, but awarded Mr. Parker primary residential placement of the children, with Ms. Dompier having reasonable visitation. (RP at 5-6, 63-64). The custody decree also included a provision that if either party moved more than 150 miles or across states then the arrangement would remain with Mr. Parker having primary placement. (RP at 6, 64, 88). Despite their divorce, the parties continued to live in the same household until April of 2010. (RP at 89).

Ms. Dompier moved to Spokane in April 2010 with the youngest child Olivia. (CP 32; RP at 67, 153-54). Ms. Dompier is originally from Spokane and also pursued a relationship here with her current husband, Mr. Phillip Dompier, whom she married on December 5, 2010. (RP at 9, 25). Ms. Dompier did not take the other children because they were still in school at the time and she had no real stable place to live yet. (RP at 67, 154). It was Mr. Parker's intent to send all of the girls all to Spokane and shortly thereafter transfer to a position with his then employer in Spokane as well. (RP at 67, 155-56).

Per the parties' agreement, Mr. Parker continued to have Conner, Aubrey, and Alissa residing with him full time in Utah and going to school. (CP 32; RP at 67, 153-54). Later in

September 2010, Aubrey and Alissa went to live with Ms. Dompier. (RP at 67, 154). The plan at that time was for Conner to live with Mr. Parker while the girls all stayed with Ms. Dompier, however shortly thereafter he thought that it would be better for Conner to be with his sisters instead of being separated. (RP at 67-68, 154). Conner was having anger issues that stemmed from before the divorce but were getting worse. (RP at 67-68, 154).

Conner continued to live in Utah until winter break of 2010 when Conner then moved to Spokane to live with Ms. Dompier. (RP at 67-69, 154). Mr. Parker put in a transfer to move closer to the children in February of 2011 by taking the closest opening in Helena, Montana with the parties' understanding that he was still trying to move to the Spokane area to be closer to the children. (CP 32; RP at 69, 155-57). Mr. Parker's visitation schedule while in Montana was about 1 weekend a month and then 6 weeks in the summer for visits. (CP 32; RP at 69). During these years until 2014, Mr. Parker did all of the transportation to Spokane for the weekends and back to Montana – except for the summer visitation when Ms. Dompier would meet him halfway for exchanges. (RP at 157-58).

Despite Mr. Parker's continued efforts, he remained in Montana for about 3.5 years in total due to a lack of job openings for trucking in Spokane with any companies. (CP 32; RP at 157). While there he also worked a second job to financially provide for his children in Spokane. (RP at 163).

In 2014, there was still no openings in the Spokane area for managerial jobs in the trucking industry, so Mr. Parker eventually took a pay cut for a job as a truck driver in Spokane just to be with his children. (CP 14, 32; RP at 69, 157-58, 162-65). Later in June of 2015, Mr. Parker was able to obtain a job with his previous company in Spokane. (CP 14, 32; RP at 160-61). A month after taking the new position Mr. Parker was promoted to Terminal Manager back at the same salary as he had been previously. (CP 32; RP at 160-61, 210).

Mr. Parker then had residential time with the children almost every weekend, after moving to Spokane in 2015 with pick up after work on Friday around 5:30-6:00pm until drop off on Sunday night at 8:30pm, with at least 1 additional week day visit from 5:30pm to 8:30pm. (CP 14; RP at 114-15). After moving to Spokane, Mr. Parker was providing all transportation and feeding the children dinner at least 4 nights per week. (CP 14). This

schedule of 8 overnights per month continued until Ms. Dompier pressed for more time in the end of 2016/beginning of 2017. (RP at 117-18). The time schedule Ms. Dompier submitted to the Court in regard to Mr. Parker's residential time over the years was disputed as to the accuracy – although it was close. (RP at 126).

Ms. Dompier disputes that amount of time that she claims Mr. Parker had with the children, yet in her exhibits there are large gaps of time missing, including: January to September 2015 and January to April 2016. (RP at 70-71). For the remainder of 2015 Ms. Dompier claims Mr. Parker had an average of 3-5 overnights a month and for the remainder of 2016 she claims he did have more overnights than he did previously. (RP at 70-71). These visits were not set on certain days and changed according to the children's schedule. (RP at 72). By 2017 Ms. Dompier claims that Mr. Parker was only having the children 4-8 nights per month. (RP at 72).

Ms. Dompier throughout the time since the parties' divorce in 2010 has not done hardly any transportation, although she states that she has offered and Mr. Parker has denied. (RP at 65). Mr. Parker's work schedule is now consistent, although he did want to

adjust some of his hours to not be so early in the morning. (RP at 174-75).

Mr. Parker met Ms. Katherine Eckenberg (now Parker) at their church in 2015 and they were later married on July 30, 2016. (CP 32; RP at 96, 101-02, 114). Katherine was very dedicated and involved in her stepchildren's lives and had a good marriage to Mr. Parker. (RP at 107-09). Things were relatively normal with Ms. Dompier at this time, however something changed by the fall of 2016. (RP 118-19, 179).

In the fall of 2016, Mr. Parker opposed a dress Ms. Dompier bought for their daughter, Aubrey for prom. (RP at 179). Mr. Parker believed the dress was inappropriate and stated that to Ms. Dompier. (RP at 179, 211-12). Mr. Parker states that this started the larger problems with Ms. Dompier and is also when she started asking for more weekend time with the children for herself. (RP at 179, 212, 216-18). Although Mr. Parker asked Ms. Dompier for more time, that was continually denied in her favor of sticking to the schedule. (RP at 140, 145-46, 178, 219-21). He was admittedly relatively passive in these requests and did not make an attempt to enforce the Utah order. (RP at 213, 223).

Shortly thereafter, Ms. Dompier filed for Modification of the Parenting Plan on January 13, 2017 alleging both a minor and major change justifying her requests to award her primary residential placement. (CP 1; RP at 72, 76). Mr. Parker filed his Response to the Petition on February 1, 2017. (CP 7). No further action took place until March 24, 2017 when Ms. Dompier filed for Temporary Orders and for an Adequate Cause Decision. (CP 9, 10). Mr. Parker argued that there was no basis for a modification of the Utah plan and that he should be allowed more time with the children. (CP 14; RP at 182-92).

Adequate Cause was granted on April 19, 2017 by the Honorable Commissioner Pelc due to integration of all 4 children into Ms. Dompier's home and that a substantial change in circumstances between the parties had occurred since the entry of the Utah order.¹ (CP 17). These Temporary Orders granted Mr. Parker visitation on the 1st, 3rd, and 5th weekends each month with an average of 5 overnights. (CP 17; RP at 175-76). Mediation was ultimately unsuccessful in this matter. (RP at 119-20, 213-14).

¹ The adequate cause order was initially filed in April 2017 under the wrong cause number and was re-filed on September 18, 2017.

Both parents in this case are good and loving parents, with spouses who also love and support the parties' 4 children at issue in this case. (RP at 6, 9-13, 17-18, 60-61, 77-79, 104-11, 179-81, 184-85, 232, 235-36). Mrs. Parker stressed the importance of her and Mr. Parker co-parenting with Ms. Dompier and her husband, but even Mr. Dompier acknowledged her never met Mrs. Parker until just before trial. (RP at 22, 111-12). Mr. Parker and Mr. Dompier however met many times and had a relatively good relationship. (RP at 22). However, Ms. Dompier and her husband have never really been interested in getting to know Mrs. Parker, but neither has Mrs. Parker reciprocated to get to know them either. (RP at 112, 137). Better communication was recognized as important to Mr. Parker moving forward for both parents and stepparents together. (RP at 192-94).

Trial in this case took place on April 3, 2018 in front of the Honorable Judge Ellen Kalama Clark. Ms. Dompier argued based on the grant of adequate cause that the prior custody order could be modified due to an integration of the children into Ms. Dompier's home with Mr. Parker's consent. (RP at 6, 223-24). Ms. Dompier also argued this agreement between the parties for the integration was informal in nature. (RP at 227). Ms. Dompier went to trial

having not submitted a proposed parenting plan other than with her temporary orders motion and essentially asked the Court to maintain the status quo. (CP 32; RP at 6, 231). Mr. Parker argued that ultimately his work and involuntary actions in regard to his schedule caused this problem, and thus does not constitute an integration under the modification statute. (RP at 78-79, 231-33).

The Court found that based on the evidence presented that Mr. Parker was exercising approximately 6-7 overnights every month from September 2015 until trial in April 2018. (CP 32). In the Court's Memorandum Decision filed April 11, 2018, the Court granted Ms. Dompier's petition to modify custody under the Utah order. (CP 32).

First Judge Clark noted that Mr. Parker never exercised the full amount of residential time that he was allotted under the Utah 2010 Decree. (CP 32 at 4). Judge Clark ultimately ordered that the children remain with Ms. Dompier for a majority of the residential time (as they had been for the 7 years prior), except when they were to reside with Mr. Parker every other weekend from pickup Friday after school until Sunday evenings at 7:30pm. (CP 32 at 4). Additionally, the Court also ordered Mr. Parker to have every Wednesday from pick up afterschool until Thursday morning drop

off to school. (CP 32 at 4). This schedule as calculated gives Mr. Parker only approximately 8 overnights per month.

As shown in trial and supported by the entire record in this case, Mr. Parker's actions in agreeing to Ms. Dompier's move to Spokane in 2010 and then his continuous efforts over the next 5 years to move to Spokane as well to be with his children support this notion that his intent was never to integrate the children into Ms. Dompier's primary care and he never voluntarily did so. As such, this Honorable Court must reverse the decision of the trial court and remand this case with instructions due to Ms. Dompier failing to meet her statutory burden proving the children had been integrated into her home with Mr. Parker's consent.

E. ARGUMENT

a. Washington Law Regarding Modification of Custody Order due to Integration Clear as to Requirements but Gives no Adequate Basis to aid the Trial Courts in Establishing the Extension of Consent.

In modifying a Final Parenting Plan, the applicable statute here involves integration, 1 of the 4 factors in RCW 26.09.260, which states that:

(1) the court **shall not modify** a prior custody decree or a parenting plan unless it 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. . . .

(2) In applying these standards, the court shall retain the residential schedule established by the decree or parenting plan unless: . . . (b) The child has been **integrated** into the family of the petitioner with the consent of the other parent in substantial deviation from the parenting plan;

(emphasis added).

Integration must be consented to by the parties, a “voluntary acquiescence to surrender of legal custody”. *In the Matter of Thompson v. Thompson*, 32 Wn. App. 418, 420-421, 647 P.2d 1049 (Div. III June 29, 1982) (citing *In re Marriage of Timmons*, 94 Wn.2d 594, 601, 617 P.2d 1032 (1980)). This can be shown by a parent’s intent to relinquish or by expectations of permanency. *Id.* Moreover, a child’s determination of “home” is significant, and although important to consider time spent with each parent as well, it is not determinative. *Id.* at 421.

“In essence, ‘substantial change’ was established by the ‘integration with consent.’ It would be absurd to not permit the court to compare living circumstances in order to also flesh out the new parenting plan provisions when the parties stipulated to a

substantial change.” *Clark v. Gunter*, 112 Wn.App. 805, 809, 51 P.3d 135 (Div. II 2002).

A period of extended visitation with the non-primary residential parent which is permitted by the primary residential parent believing it is temporary in nature does not qualify as integration under the modification statute. *In the Matter of Thompson vs. Thompson*, 32 Wn. App. 418, 420-21, 647 P.2d 1049 (Div. III June 29, 1982) (a 5-month visitation with non-primary placement at father’s due to mom’s both financial difficulties and summer vacation not integration). There, the mother also continuously attempted to gain back placement of the child and the father did agree before filing for a modification. *Id.*

In totality, the case law in regard to modifying a custody decree based on integration is relatively sparse compared to the other 3 bases for modification. This in turn leads trial courts with little foundation to go off of in considering cases that are not typical or ordinary between the parties, as is true here. Parties attempting to work through their respective situations and a party’s intent to return to the prior plan must be given great weight despite the length of time at issue.

b. This Court Must Reverse the Decision of the Trial Finding that Modification of the Foreign Parenting Plan was Appropriate Based on Integration into the Mother's Home due to a Lack of the Father's Consent.

At the time of trial, Judge Clark erred by failing to properly consider the statutory factors as they apply to this case here involving alleged integration of 4 children into their mother's home despite a prior custody decree giving their father primary placement in consideration of the parties' understanding that Mr. Parker's goal in agreeing to Ms. Dompier's move and residential time with the children was always to return to 50-50 custody.

(1) Facts Arising Since or Unknown to Court at Time of the Prior Order

The Court went through the entire timeline of what occurred between the parties from before their marriage in 1999 all the way through until the time of trial in 2018. (CP 32 (discussing a summation of the trial findings)). This is because the parties entered agreed divorce orders and did not proceed through a contested trial for the Utah Courts to make a ruling.

The facts which could be considered to arise since the prior order was the changes in location of both parties from 2010 until 2018. Ms. Dompier's choice to move to Washington from Utah seriously impacted the ability to carry out the prior custody order.

(RP at 67, 153-54). Moreover, Mr. Parker agreed to the move with the understanding that he was going to move there as well – but circumstances beyond his control prevented an immediate move. Unfortunately this move actually took years to occur due to his job.

There was certainly no expectation of permanency in Ms. Dompier living in Spokane with Mr. Dompier over 150 miles away in another state. The agreement was that Mr. Parker would find a job in Spokane to be with the children – although this took 5 years to do this was because of the job market and unavailability of openings. (RP at 69, 155-58, 162-65). The primary residential parent's consent to integration should not be based on circumstances outside of their control to return to the initial custody decree, such as the job market for Mr. Parker. Adopting such a policy for integration does not take into account that such circumstances are not voluntary at the choice of the party, they are often involuntary choices based on life circumstances.

Moreover, Ms. Dompier even acknowledged that Mr. Parker's schedule changed frequently over the time he was in Montana and at his first job in Spokane, and that there was no set schedule that would be followed – it was often changing. (RP at 72). This variability in the parties' scheduling and division of

residential time evidences a lack of any expectation of permanency in the routine that was established at that point. Ms. Dompier was also aware this entire time of Mr. Parker's intent to move to Spokane. (RP at 69, 155-57).

An extended visitation was not contemplated here between the parties, but this situation could be considered something very similar to the case discussed in the section above. A pre-condition for Mr. Parker's agreeing to Ms. Dompier moving with their youngest child and later taking the remaining 3 was premised on the notion that he would be able to quickly find a job here in Spokane as well. (RP at 69, 155-57). Unfortunately, as life tends to do, it had other plans that derailed the initial intent of the parties. However, this intent to return to the prior custody order should not have been ignored by the trial court when considering whether Mr. Parker voluntarily consented to the arrangement with the children over a period of 7-8 years.

**(2) A Substantial Change in Circumstances
of the Nonmoving Party**

The father's work schedule here and its prior inconsistency over a period of a few years was a change in circumstances, one

which was based on the mother's intent to move to Spokane, Washington and reestablish her life here.

In considering the parties' respective positions at the time of trial, the Court focused on the length of the parents' current respective marriages with their spouses at the time of trial (father 1.75 years, mother 7.33 years) and the length of each pair in their residential housing (father 9 months, mother 3.58 years), although it did not explicitly state these things as determining factors in its opinion. (CP 32 at 3; RP at 6, 9, 26). This apparent stability in the mother's home that the Court found fails to take into account the lengths that the father here went to in order to provide for his children and his attempts to spend all residential time possible with them – although it was not always possible based on his situation.

Despite repeated requests by Mr. Parker for increased time with the children or reverting back to the Final Parenting Plan filed in 2010, he did admit to the Court in trial that he had been largely passive in requesting this time. (CP 32 at 4). This perceived avoidance of confrontation does not discount the party's intent to return to the prior parenting plan when this party was not in a position at the time to then revert to the prior plan based on circumstances out of their control.

**(3) Modification is in Best Interests of the Children
and is Necessary to Serve Those Interests**

At the time of trial, Judge Clark erred by failing to properly consider what was in the best interests of the children considering the lengths that Mr. Parker went to in order to move to Spokane to be close to his children and return to the prior parenting plan. Judge Clark's interpretation was incorrect as to what constituted consent to integration on behalf of Mr. Parker to the children remaining in Spokane under Ms. Dompier's care, regardless of the time period for circumstances out of his personal control.

The Court recognized that both parents, as well as both stepparents, were good and that there were no limitations on any parenting. (CP 32). Moreover, in discussing parenting functions and participation in day-to-day contact, the trial court stated that "[t]he father wishes to be more involved, and he should be able to do so in the future." (CP 32 at 3). In the interests of finality for parenting plans and for the best interests of the children, the Court's ruling in this regard does not make sense. Moreover, Ms. Dompier's argument and the Court's finding that increasing the children's time with Mr. Parker would negatively affect their well-being is not supported by the evidence. (CP 32).

It was clear from Ms. Dompier's position that she would not allow additional time for Mr. Parker to spend with the children in favor of sticking to court orders. (RP 140, 145-46, 178, 219-21). This is something that will likely continue after trial, and thus does not comport with the Court's comments that Mr. Parker should be able to exercise more parenting functions in the future. Such inconsistent evidence and ruling are not in the best interests of the children, additionally the Court's ruling in this regard was not necessary, as there as nothing compelling the Court to grant Mr. Parker such limited time with the children.

Mr. Parker asks that this Court reverse the decision of the trial court and enter a finding that the modification was not justified due to Ms. Dompier's failure to meet the statutory burden of proof required showing that this request was in the best interests of the children and that Mr. Parker voluntarily consented.

F. CONCLUSION

This Honorable Court should reverse the decision of the trial court in determining that a modification of the Utah custody decree was appropriate based on an integration without consent of the father, Mr. Parker despite the 7-8 years that had passed since the entry of the final custody decree.

Respectfully submitted this 23rd day of January, 2019.

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AFFIDAVIT OF SERVICE

I, BRIANA M. GIERI, upon penalty of perjury under the laws of the State of Washington, declare that on the 23rd day of January, 2019, I served by messenger and by email a copy of the Appellant's Opening Brief to the following persons at the included addresses below:

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DATED this 23rd day of January, 2019.


BRIANA M. GIERI, WSBA #53970
Declarant

ROBERT COSSEY & ASSOCIATES

January 23, 2019 - 4:36 PM

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Appellate Court Case Title: Megan C. Dompier v. Sean D. Parker
Superior Court Case Number: 17-3-00113-7

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