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Division III
State of Washington
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No. 361519

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

In re:

MEGAN DOMPIER,

Respondent,

and

SEAN PARKER,

Appellant.

BRIEF OF RESPONDENT/APELLEE

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A. ASSIGNMENT OF ERROR

The trial court did not abuse its discretion in finding that Sean Parker, the father, voluntarily consented to the integration of the children into Ms. Dompier's home. The trial court did not abuse its discretion in finding that the modification was necessary and in the best interests of the children.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

As stated above, the issue on appeal is whether the trial court committed an abuse of discretion in finding that:

1. The father voluntarily consented to the integration of the children into the mother's home in substantial deviation from the prior custody order, and
2. The modification was in the best interests of the children and was necessary.

C. STANDARD OF REVIEW

The mother is satisfied with appellant's recitation of the standard of review based on *In re Marriage of Zigler*, 154 Wn.App. 803, 808, 226 P.3d 202 (2010).

D. STATEMENT OF CASE

The parties have four children together: Connor, Aubrey, Alissa (Alli), and Olivia. CP 35 p1, RP 10. Their ages are now 18,

17, 15, and 11 years old. CP35 p1. The parties were divorced in February 2010 pursuant to a Decree of Divorce and Judgment from the Third Judicial District Court of Tooele County, State of Utah.

CP 3. The Decree states in relevant part:

Both parents are awarded joint legal custody of the minor child(ren), but [the father] is awarded sole physical custody of the child(ren), subject to [the mother's] right to parent-time with the children at reasonable times and places.

CP 3 p4. The Decree further states that if the parents are living within the same state and 150 miles of each other, then the mother has the children from Monday at 7:00 p.m. to Friday at 7:00 p.m. every week, and the father has the children the rest of the week. CP 3 p6. The decree goes on to state that if the parents live more than 150 miles from one another or in separate states, then the children live with the father, and the mother gets visitation for major holidays and half of the summer. CP 3 p7-8.

a. Factual History

(1) Relocation of the Children

The parents continued to cohabitate from the February 2010 entry of the decree until April 2010. RP 89. In April 2010 the mother moved to Spokane with Olivia, the youngest child. RP 153-154. In July 2010 the middle two children, Aubrey and Alissa

moved to live with mother. RP 67. The parties' son, Connor stayed in Utah throughout that summer. RP 67. In August 2010 Connor moved out of his father's home and into his grandparents' home. RP 68. In November 2010, Connor also moved to Spokane to live with his mother while the father remained in Utah. RP 67-69.

(2) Father's Work and Visitation History

The father testified it was his intent "to find a job that would support [his] family in Spokane and get to Spokane as soon as [he] could." RP 155. He testified

The informal agreement we would have is I would have whatever visitation I could -- I could provide in my schedule. I could have them whenever I wanted or was able to have time with my kids." RP 155-156.

The father testified that he requested his employer transfer him to Washington or as close to it as possible. The father secured a transfer to Helena, Montana at the end of 2010. RP 156-157. He lived in Helena for three-and-a-half years. RP 157. During this time, he visited the children for "a weekend or long weekends with the school breaks" RP 157.

In October 2014, the father moved to Spokane. Petitioner's Trial Ex P12 p1; RP 159. His schedule was sporadic, but the parents worked together to facilitate visitation and accommodate

the father's schedule. RP 159. The father testified that when he moved to Spokane, the parties followed their "informal agreement" regarding his visitation. RP 197.

(3) History of Visitation

In anticipation of litigation, the mother prepared a record of the father's visits with the children. RP 70, and Ex P12 p1-5. The record was based on the mother's family calendars, and on text messages with the father dating back to 2014. RP 70. There were gaps in the mother's source calendars/messages, and this was reflected in the trial exhibit. RP 70-71, Ex P12 p1-2.

With the assistance of this record, at trial the mother testified that after the father moved to Spokane in October 2014, he had a total of three overnight visits with the children that year. Ex P12 p1-2. She also testified that in 2015 the father's visitation ranged from three overnights to seven overnights per month. Ex P12 p2. The mother testified that in 2016 the father's visits ranged from five to eleven overnights per month. Ex P12 p2-4. The mother testified that in 2017 the father had seven overnight visits in January and six overnight visits in February. Ex P12 p4-5. Temporary orders were entered in April 2017. CP 17.

The father testified that the mother's testimony was

“ballpark” accurate. RP 213. He stated:

“I think that there’s a few more that we had that -- especially the times that she couldn’t recall or didn’t have her phone, I think I had them a lot. But I’m not trying to argue that.” RP 213.

The father testified he never tried to enforce the residential schedule from the Utah Decree. RP 213. The mother testified the father began insisting on having the children every weekend, and this was her motivation to file to modify the parenting plan. RP 217-218.

The mother testified in great detail about each of the children’s school (RP 27, 37-38, 48-49, 54-62), academic performance (RP 29, 38-39, 49, 54-62), extracurricular activities (RP 29, 40, 50, 54-62), friendships (RP 29, 48, 53, 54-62), personalities (RP 29-30, 39, 51, 54-62), emotional health/needs (RP 30, 39-41, 51, 54-62), and physical health/needs (RP 41-44, 51-52, 54-62).

(4) History of Parenting Functions

The mother testified she has always been the one to make appointments and take the children to their doctors. RP 45. She testified she informs the father about the appointments ahead of time by text message or email, but the father does not generally come to the appointments. RP 45. The mother testified she tried

several dentists near the children's home, but they "didn't find a good fit." RP 46. Based on the recommendation of a friend, the children have been seeing one dentist across town for about four years. RP 46.

The mother testified all of the children need glasses, and that she takes them to Shopko optometry. RP 46. She testified the children's health insurance is primarily through the father, and secondarily through the state, but that she has all the insurance cards. RP 47.

The father acknowledged the mother has primarily met the daily needs of all four children, and confirmed she has primarily been the one to attend to their education. RP 198. The father testified he has "a really passive personality," and he "kind of let [the mother] deal with this [referring to parent-teacher conferences] for a long time." RP 182. When referring to the children, the father spoke of "their house" in reference to where the mother lived. RP 181.

b. Procedural History

The mother filed her petition to modify on January 17, 2017. CP 1. The father responded timely. CP 7. The mother motioned for Adequate Cause on March 24, 2017. CP 9. Adequate

cause was granted on April 19, 2017 based on integration into the mother's family with the father's consent and a substantial change in circumstances. CP 17. The order on adequate cause included temporary orders. CP 17.

Trial was held on April 3, 2018 in front of Judge Ellen Kalama Clark. CP 29, RP 1. Following the one-day trial, Judge Clark issued a memorandum decision on April 11, 2018. The court found, inter alia, that, "The children have been integrated into the mother's home with the consent of the father and the modification is appropriate." CP 32 p2 lines 10-11.

The court made specific findings on each of the statutory factors listed in RCW 26.09.187(3)(a). CP 32 p2 line 15 to p4 line 10. After consideration of those factors, the court found that, "to drastically change the routine of the last seven years would be detrimental to the children. The children are familiar with this routine and doing well." CP 32 p4 lines 16-18.

E. ARGUMENT

RCW 26.09.260 provides the statutory authority for modifying a custody decree. Subsection 1 establishes the policy or standard that custody orders will not be modified unless new or previously unknown facts support a finding that a substantial

change has occurred in the circumstances of the children or non-moving party. RCW 26.09.260(1).

a. Washington Law Authorizes a Modification of Custody Order Based on Integration

RCW 26.090.260(2)(b) authorizes a change of custody when “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.”

“Custodial changes are viewed as highly disruptive to children, and there is a strong presumption in favor of custodial continuity and against modification.” *In re Marriage of Taddeo-Smith and Smith*, 127 Wn.App. 400, 404, 110 P.3d 1192 (2005) (quoting *In re Marriage of Shryock*, 76 Wn.App. 848, 850, 888 P.2d 750 (1995)). “With this policy in mind, RCW 26.09.260 was designed to favor continuity and disfavor modification.” *Taddeo-Smith*, 127 Wn.App. at 400 (citing *In re Marriage of Thompson*, 32 Wn.App. 418, 421, 647 P.2d 1049 (1982)). Integration must be consented to by the parties, a “voluntary acquiescence to surrender of legal custody”. *Thompson* at 240-421 (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 *Thompson* the child's five months with the non-custodial parent because of the mother's financial difficulties and summer vacation was not integration. *Thompson* at 420-421. In *Taddeo-Smith*, the mother was hospitalized following a serious car accident in which she was paralyzed from the chest down. *Taddeo-Smith* at 403. The parents agreed the father would care for the children "while [the mother] was hospitalized." *Id.* Just three weeks after the accident, however, the father filed a petition for modification of the parenting plan seeking to change the primary residence of the children, claiming they had been integrated into his home with the mother's consent. *Id.* The superior court granted the petition. *Id.* at 403-04. But this decision was reversed upon the finding that the superior court had mistakenly believed that "consent to temporary care was sufficient." *Id.*

In the present case, there was no consent to temporary care and no indication the care was ever intended to be temporary. The Utah custody order was entered on Feb 14, 2010 but was never

followed. CP 3, 32; RP at 150, 153. The parties continued to cohabitate until April of 2010. (RP at 89.) Olivia and the mother relocated to Spokane in April of 2010. (CP 32; RP at 67, 153-54). In Sep 2010 Aubrey and Alissa also relocated to Spokane. (RP at 67, 154). Conner, the last child remaining in Utah, began experiencing behavioral/anger issues to the degree he left his father's home, stayed with his grandparents for a period of time, and then ultimately relocated to Spokane during November 2010. (RP at 67-68, 154). The father relocated to Helena, Montana in Feb of 2011 and began visiting with the children once per month, and for six weeks during the summer. (CP 32; RP at 69). In Oct 2014 the father relocated to Spokane but only had a weekend overnight visitation schedule with the children thereafter. (CP 14, 32; RP at 160-61). This was never identified as a temporary arrangement and, seven years could not be reasonably considered a temporary period in the life of a child.

"Consent' refers to a voluntary acquiescence to surrender of legal custody." *Timmons* at 601. "Consent may be shown 'by evidence of the relinquishing parent's intent, or by the creation of an expectation in the other parent and in the children that a change in physical custody would be permanent.'" *Taddeo-Smith*, at 406-

07 (quoting *Timmons* at 601). "The children's views as to where 'home' is, and whether the environment established at each parent's residence is permanent or temporary are significant in determining whether 'consent' and 'integration' are shown." *Timmons* at 601. "While time spent with each parent is not determinative, it is a factor." *Id.*

b. This Court Must Affirm 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 the Father's Consent

The children have resided with the mother in Spokane since 2010. The father finally relocated to Spokane in Oct 2014 but took absolutely no action to attempt to enforce the never-followed Utah custody order. RP 213. The father's very inaction is a reflection of his consent, and it did create an expectation in the mother and the children that the mother would retain physical custody on a permanent basis. *Timmons* at 601.

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

The previous order in this case was a 2010 custody order that was never followed and that the father never attempted to enforce. RP 213.

(2) Substantial Change in Circumstances

“A plain reading of RCW 26.09.260 demonstrates that different thresholds form the basis for a modification because of a substantial change of circumstances; *e.g.* agreement, integration with consent, and present environment being detrimental.” *Marriage of Clark v. Gunter*, 112 Wn.App. 805, 809, 51 P.3d 135 (2002). In this case, the change in circumstances, and the basis for modifying the parenting plan was the agreement between the parties that the children would live with the mother in Spokane. The father made no effort to even request the enforcement of the Utah custody order until after the mother filed her petition to modify in January 2017. This agreed-upon arrangement was in substantial deviation from the Utah custody order.

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

The court considered the best interest standard as follows:

RCW 26.09.002 mandates that that the Court follow the policy as stated therein: “The best interests of the child are served by a parenting arrangement that best *maintains* a child’s emotional growth, health and *stability*, and physical care. Further, the best interest 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 or as required to protect the child from physical, mental, or emotional harm” (emphasis added).

CP 32 p2 lines 15-20. Judge Clark then carefully analyzed

how the facts of the case apply to the statutory factors of RCW 26.09.187. CP 32 p2-4. Specifically, Judge Clark correctly found as follows:

The father has never exercised the amount of residential time he was allowed under the Utah Decree, or that he proposes under either of his Plans. The Court has no doubt that the father is sincere about wanting to spend more time with his children, and to be more involved in their daily lives and all of their activities, and he should be, but to drastically change the routine of the last seven years would be detrimental to the children. The children are familiar with this routine and doing well.

CP 32 p4 lines 13-18.

F. APPELLEE REQUESTS AN AWARD OF FEES AND EXPENSES

The mother asserts the father has brought this appeal in bad faith and requests an award of attorney fees. RCW 26.09.260(13). The Feb 2010 Utah order was never followed by the parties. RP 89. All four children lived with the mother in substantial deviation from the Utah order since at least Nov 2010. RP 68. The father never once took any action to attempt to enforce the 2010 Utah order until the mother filed her January 2017 petition. RP 213. The father's assertion there was not integration with his consent has been in bad faith. His appeal is similarly in bad faith and is "so totally devoid of merit that there is no reasonable possibility of

reversal. RAP 18.9, *Marriage of Tomsovic*, 118 Wn.App. 96, 109-110, 74 P.3d 692 (2003).

In the alternative, in the event the mother substantially prevails, she requests an award of fees pursuant to RAP 14.2, RAP 18.1, RAP 18.9, RCW 26.09.140, and/or RCW 26.09.260(13).

G. CONCLUSION

Ms. Dompier respectfully requests this court deny the appeal, and award her reasonable attorney fees.



Eric A. Leavitt, WSBA No. 47716



Karen G. Schweigert, WSBA No. 35642

AFFIDAVIT OF SERVICE

I, Eric A. Leavitt, under penalty of perjury under the laws of the State of Washington, declare that on this 25th day of April 2019, I served by hand delivery and by email a copy of this Brief of Respondent/Appellee to the following persons at the address indicated below:

Robert R. Cossey
Attorney for Sean Parker
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Signed in Spokane, WA on April 25, 2019.

A handwritten signature in black ink, appearing to read "Eric A. Leavitt", with a long horizontal flourish extending to the right.

Eric A. Leavitt, WSBA No. 47716
Declarant

LEAVITT LAW

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