

FILED

JUN 20 2019

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 365816

COURT OF APPEALS, DIVISION THREE
OF THE STATE OF WASHINGTON

In re the Custody of:

Children:

EE and MW

Appellants,

Brandi Smithers, Cheri and Peter Johnson, and Jana Johnson

And

Sarina and Michael Pirkey,

Respondents.

ON APPEAL FROM DOUGLAS COUNTY SUPERIOR COURT
Cause No. 18-3-00082-09 Honorable John Hotchkiss, ret.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The sole issue on appeal is whether the trial court erred, and abused its discretion, when it ordered that there was not adequate cause to proceed with a modification of a nonparental custody action.

The trial court decided that the declarations submitted by the appellants did not rise to the level of adequate cause. The trial court then repeated that ruling after a reconsideration action filed by the appellants.

The Court should affirm the trial court's decision on adequate cause and its order on reconsideration.

II. RESTATEMENT OF ISSUES

1. Did the trial court exercise proper discretion when it found that there was not adequate cause to proceed with the modification action?

III. RESTATEMENT OF THE CASE

The respondents, Sarina and Michael Pirkey filed nonparental actions against the biological parents of the two children in 2014 in Grant County Superior Court. CP 153.

Filed with the Pirkey's nonparental petitions were supporting declarations from, amongst others, Cheri Johnson and Joyce Fahrner. CP

153. The next month, November of 2014, Jana Johnson filed a supporting declaration for the Pirkeys in Grant County. CP 155.

The respondents were granted custody of EE based on an Agreed Order re Nonparental Custody entered in Grant County on July 31, 2015. CP 13-16. The respondents were granted nonparental custody of MW under a Final NonParental Custody order entered in Grant County on February 3, 2017.

The biological mothers of the children are asking for a change of custody of their minor children however neither parent is asking for placement with them but rather placement with Cheri and Peter Johnson. CP 1-21, CP 122-130. Both biological mothers make many statements regarding the violation of their rights in the current custody arrangement but have taken no effort to file any contempt or modification actions over the last five years. CP 153-157.

Ms. Pirkey denies that she has done anything but raise these children as her own and with their best interests. CP 158-159. She has limited contact with her family based on their vile and gross allegations as well as the recommendations of the children's counselors. CP 158-159.

The same family group that was supportive of the placement with the Pirkeys and wrote supportive declarations of the Pirkeys in 2014 and

2015 is the same family group that has now written a plethora of lengthy allegations against mainly Sarina Pirkey. CP 153-157.

The trial court did not find adequate cause and entered a decision stating as such on December 20, 2018. CP 160-166. The trial court then denied reconsideration on January 25, 2019. CP 187.

The Johnson family now appeals, assigning error to the trial court's discretionary decisions to not find adequate cause. App. Brief at 1 (Assignments of Error 1).

IV. STANDARD OF REVIEW

The moving party in this case, the Johnsons, have the burden of demonstrating that the trial court manifestly abused its discretion. *In re Marriage of Griffin*, 114 Wash.2d 772, 776, 791 P.2d 519 (1990). “Here, there is no evidence the court abused its discretion. A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.” *In re Marriage of Littlefield*, 133 Wash.2d 39, 46-47, 940 P.2d 1362 (1997). Here, the court reviewed the declarations and determined that they did not rise to the level of adequate cause on their face which was a reasonable decision.

RCW 26.09.260 outlines the procedures for a modification of parenting plans. “[T]rial court decisions in a dissolution action will seldom be changed upon appeal.” *In re Marriage of Landry*, 103 Wn.2d

at 809. The trial court “is in the best position” to assess the assets and liabilities of the parties and determine what is “fair, just, and equitable under all the circumstances.” *Brewer v. Brewer*, 137 Wn.2d 102 at 769, 976 P.2d 102 (1999). Therefore, “[a]ppellate courts should not encourage appeals by tinkering with [dissolution decisions]. The emotional and financial interests affected by such decisions are best served by finality.” *Landry*, 103 Wn.2d at 809.

Here, the trial court did not abuse its discretion when it did not find adequate cause. Based on the evidence present in the appellate record and the unpersuasive arguments presented in the Appellate Brief, “no reasonable judge” (*Landry*, 103 Wn.2d at 809–10) could reach a different conclusion. The trial court considered the written declarations of the parties and determined that adequate cause did not exist to proceed with a modification action. The trial court’s order denying adequate cause and order on reconsideration should be affirmed.

V. ARGUMENT

B. The trial court applied the proper legal standard and weighed the evidence presented and then concluded there was not adequate cause.

The controlling statute for a modification of a parenting plan action is RCW 26.09.260. The statute provides that “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.” RCW 26.09.260(1).

The Johnsons’ challenge the trial court’s decision based on their belief that the trial court in Grant County did not have all the information that is now present in their declarations and if the trial court would have had that information the Grant County court would not have made the same decisions. App. Brief at 9-10. The Johnsons’ argument is unpersuasive.

The Johnson’s, nor any other of the other parties that now filed declarations on their behalf, have made no attempts to explain why all this pertinent information that they have had for over 35-40 years was not made available to the trial court. The position of Ms. Pirkey was that the allegations were not factually accurate. CP 158-159. Further, if you assume the allegations they have now filed against Ms. Pirkey are accurate then it calls into question their mindset and veracity when they filed their declarations in 2014 and 2015. They are lying now, or they lied then.

The trial court was not incorrect in finding that this “case involves custody that was agreed to by the parties or ordered by the Court in Grant

County proceedings.” CP 160-166 at 160-161. Cheri and Peter Johnson did not move to intervene in the matter, did not attempt to seek custody in anyway, and Cheri Johnson and Peter Johnson filed supporting declarations for the Pirkey’s. CP 153-157, at 155.

Neither mother of the children is even asking for custody of the children. CP 1-21. The mothers are attempting to change the custody to Cheri and Peter Johnson. CP 1-21. The trial court was confused as to whom is even seeking custody of these children and how the custody arrangement would work. CP 160. Further, the trial court correctly ruled that all parties to this action had ample opportunity to provide the Grant County Court with any and all evidence they felt was important at the time. CP 161-162.

The appellants now argue that since they were not a party to the original nonparental custody actions that they are not bound by the findings and conclusions. App. Brief at 10. Cheri and Peter Johnson have offered no information as to why they did not seek custody of the children at that time nor why they didn’t make sure the Court had all this supposed information about the Pirkey’s. Further, the appellants state neither mother was represented by an attorney. App. Brief at 11. This is incorrect as Jeremy Huberdeau represented Ms. Wilshire for roughly 8 months. CP 162. The Court correctly found that if this information was actually true

then an attorney representing the mother would have been able to bring this to the attention of the Court.

The appellants' brief spends many pages dealing with the lack of contact that the Pirkey's supposedly have allowed the biological mothers and how they are attempting to cut off all contact with the mothers. App. Brief 13-16. However, as noted above neither biological mother is seeking custody of these children. CP 1-21. Further, neither biological mother has sought any type of sanctions such as contempt against the Pirkey's for these supposed violations of their rights. CP 153-157.

The last main contention by the appellants is that the court disregarded the declaration of Dr. Dietzen. App. Brief 16-19. As outlined by the court in the order denying adequate cause Dr. Dietzen has never met the children, never met the Pirkey's, and is relying on counseling notes from another therapist that she has also never spoken with. CP 162-163. Her declaration is based entirely on the statements of the appellants and is conditioned on those statements being accurate. Further, she also does not address why she would rely on these new declarations without some explanation on why these same individuals did not provide this information in the numerous declarations they wrote in the Grant County matters nor why they didn't testify about these issues nor further why they didn't try to intervene in the matter.

None of the appellants or their supporters took any action in this case until the Pirkey's followed the advice of the children's therapist and limited the contact with them based on the behaviors of the children following those visits. CP 158-159. Dr. Dietzen's statement that the children are suffering from emotional trauma does not have a foundational basis. CP 40-64, at 52. There are no findings and/or conclusions in her report that are based on any information other than what she has been presented by the appellants whom have hired her and are paying her for this report. She did not attempt to contact the children's counselors, the school, the children, the Pirkeys, nor any other interested party. She prepared a report based on exactly what Cheri and Peter Johnson provided her and parroted their information under the guise of providing an opinion.

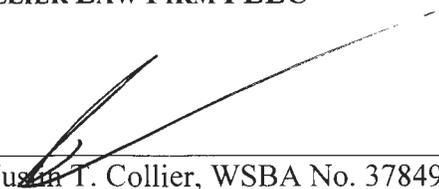
VI. CONCLUSION

The Court should affirm the trial court's December 20, 2018 Order on Adequate Cause (CP 160-166) and January 25, 2019 Order on Motion for Reconsideration (CP 187).

Respectfully submitted the 17th day of June, 2019.

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By



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CERTIFICATE OF SERVICE

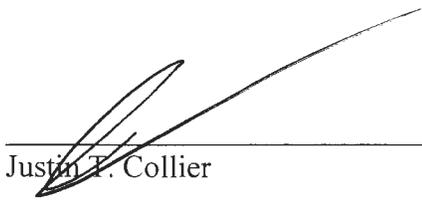
I hereby certify that on June 17, 2019, I faxed filed the foregoing with the Clerk of the Court using the fax number for the Court of Appeals.

I emailed a copy of the filing and mailed a copy of the filing to:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

SIGNED and DATED at Wenatchee, Chelan County, Washington,
this 17th day of June, 2019.



Justin T. Collier