

FILED
Court of Appeals
Division III
State of Washington
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No. 371620

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

In re)	
)	COA No: 371620
JUAN AND DENA STEWART,)	
)	Spokane Sup. Ct.
Petitioners/Appellants)	No. 19-3-00065-32
vs.)	
)	
JOSEPH STEWART, III AND)	
JENNIFER KASTELEIN,)	
)	
Respondents)	

PETITIONER/APPELLANT'S
OPENING BRIEF

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ASSIGNMENTS OF ERROR

- A. Did the appellants rebut the presumption, therefore requiring the court to consider the nonexclusive factors? Yes. The appellants should have been found to rebut the presumption based on the record.
- B. Did the court properly assess and award fees? No. The court did not consider the financial resources of the appellants to determine if fees were just.

STATEMENT OF THE CASE

The appellants, Juan and Dena Stewart, have one biological son Joseph Stewart. Joseph Stewart met Jennifer Kastelein, appellee. One child was produced of the relationship, C.S., born in 2006. After C.S. was born, he lived with Appellant's from October 2006 until late 2018. *CP 7*. The only disagreement is if the child C.S was with the appellant's until August 2018 or October 2018. *CP 58*. The appellees lived with the appellants and C.S. for an undetermined amount of time. *Id*. It is undisputed that CPS was involved in 2006 and the appellee Kastelein had moved out. *Id; See Also CP 237-239*. C.S. was placed "out of the home" with the appellants; by agreement of both appellants. *Id*. Joseph did tell CPS that he wanted the appellants to take temporary custody of C.S. *CP 237*.

The appellants had the child C.S. in their care and became the primary caretakes for the child from 2006. Joseph then signed over guardianship to Juan Stewart on October 8th 2009. *CP 241-251*. The appellants established the child in school and with doctors. *CP 257-345*. The child was enrolled in speech therapy beginning 2010. The primary person to get this established was the appellant Dena Stewart. *CP 300*. C.S. was taken to St. Luke's for Speech Therapy *CP 291-292, 295-297*. C.S. was as well on and IEP due to his speech, the parents are listed as the appellants. *CP 134 - 138*. The child was referred to a counselor in October of 2018 due to psychological issues due to abandonment by both parents. *CP 279*. C.S. was "worried about "dad" taking him he has recently shown up at school." *Id.*

The appellants had placement of C.S. and provide for his needs. C.S. was integrated in the family home and saw the appellants and his parents. *CP 11-17*. He viewed the other child in the home as his sister. In 2018, the appellee, Joseph, came back and wanted to take C.S. to his home. The appellants filed for third party custody on August 28th 2018. Adequate cause was denied on October 10th, 2018 for failure to find the appellee, Joseph Stewart unfit. *CP 71*. The court found that C.S. did not have his biological father acting in that capacity. *Id.* The court further stated that the bond was clearly there between the grandparents and C.S. *CP 73*.

The appellants filed a petition for visitation in January 2019, 3 months after the denial of adequate cause. *CP 3-10*. It is undisputed that the appellee, Jennifer Kastelein was served by mail on February 25, 2019. *CP 38-41*. However, she has not appeared or responded in any of the actions. Joseph Stewart was served on February 25, 2019. *CP 25-26*. The court entered an order after review of the petition on January 18th, 2019. *CP 18-22*. The order states that after the review of the petition it is likely that visits would be granted. *CP 19*.

The appellee responded on May 13th, 2019 and requested fees. The parties agreed in June to dismiss the petition. *CP 191-192*. The court had not reviewed any financial information from the appellants but entered an order to pay fees. The appellants then sought to move forward and have the court decide the matter on visitation. The court vacated the agreed order on July 11th, 2019. *CP 224*. The parties had a hearing without testimony on September 30th 2019 and the petition for visitation was denied based on not finding clear and convincing evidence that the child would likely suffer harm if the visits did not occur. *RP 29, Lines 14-24*. The court entered an order on fees the appellants were to pay \$4,546.60 to appellee. The court came to the decision after implementing a two part test. The court states that the statute bifurcates two questions. *RP 27*. The court asks, “whether granting visitation if it finds the child would likely

suffer harm or substantial risk of harm if visitation between the petitioner and the child is not granted and that granting visitation between the child and the petitioner is in the best interest of the child. *RP* 27-28. The court found that it would be able to find that it was in the best interests of the child based on the statutory factors; “however element one is missing.” *RP* 30, *Lines 1-5*.

ARGUMENT

A. APPELLATE REVIEW

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 339, 858 P.2d 1054 (1993). If the trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis it necessarily abuses its discretion. *Id.*; *State v. Kinneman*, 155 Wash.2d 272, 289, 35, 119 P.3d 350 (2005). Thus, the abuse of discretion standard gives deference to a trial court's fact-specific determination on enforceability of a forum selection clause, while permitting reversal where an incorrect legal standard is applied. If, however, a pure question of law is presented, such as whether public policy precludes giving effect to a forum selection clause in particular circumstances, a de novo standard of review should be applied as to that question. *See Ang v. Martin*, 154 Wash.2d 477, 481, 9,

114 P.3d 637 (2005) (questions of law are reviewed de novo); *Motor Contract Co. v. Van Der Volgen*, 162 Wash. 449, 454, 298 P. 705 (1931) (question whether a contract is against public policy is a question of law).

This case falls in a unique position as the statute is new. There is no relevant case law on the issue. The only comparable case law is from before the previous grandparent's rights statute was deemed unconstitutional in 2006. In the case at hand, the court read *RCW* 26.11.030 and interpreted it establish a 2-part test for the court to grant visitation rights. The court did not make findings on the nonexclusive factors, but instead stated that the factors would lead to a finding that was in the child's best interest to have visitation. The appellants contend that the court improperly interpreted the statute and there was an error of law. Further, the appellant believes the record was clear and convincing that the child would suffer harm if not granted visitation, therefore rebutting the presumption. The appellants believe the trial court abused its discretion and improperly applied the statute.

B. DID THE APPELLANTS REBUT THE PRESUMPTION, THEREFORE REQUIRING THE COURT TO CONSIDER THE NONEXCLUSIVE FACTORS? YES. THE APPELLANTS SHOULD HAVE BEEN FOUND TO REBUT THE PRESUMPTION BASED ON THE RECORD.

The applicable Statute is RCW 26.11.040 which directs the court for orders on visitation and factors for consideration by the court. The court must conduct a hearing pursuant to RCW 26.11.030(8), the court shall enter an order granting visitation if it finds that the child would likely suffer harm or the substantial risk of harm if visitation between the petitioner and the child is not granted **and** that granting visitation between the child and the petitioner is in the best interest of the child. *RCW 26.11.040(1)*.

The court has to find clear and convincing evidence the child would likely suffer harm or the substantial risk of harm if visitation between the child and the petitioners did not occur. In looking to risk of harm it has been defined as a child has actually been abandoned, abused, or neglected, or finds himself in circumstances that constitute a danger of substantial damage to his physical or psychological development. Satisfaction of this factor equates to finding harm or risk of harm to the child. *In re Dependency of I.J.S.*, 128 Wash. App. 108, 118, 114 P.3d 1215, 1220 (2005). Here, the court should have looked to the circumstances that constitute a danger to the child's psychological development. The child went into his primary care doctor on September 20, 2018. The doctor was concerned about his mental health to the point that extensive counseling was recommended. *CP 279*. The child had issues

with abandonment and fear that that his “dad” would take him. Further it is undisputed that the child had spent his entire life with the appellant’s and little involvement from the appellees. It is undisputed that the child saw the appellants as his parents. Ripping a child away from the people he as his parents with no further communication is in is self-detrimental to the child. The child was having difficulty with his biological father coming back into his life and needed counseling, cutting off the only family he knew only exacerbates the issues. Further, another judicial officer found that it would be in the child’s best interest to maintain contact with the appellants. *CP 76, Lines 16-25.*

The court then had to look at the best interest of the child. The court found that it would be in the best interest of the child to continue to have visitation with the appellants if it applied the factors. *RP 30 Lines 1-5.* However, at the end of the decision, the court disregarded the best interest component, putting the risk of harm as the only factor.

The appellants believe that the courts should have applied the factors as well. The statute asks the court to look to non-exclusive factors if the petitioners rebut the presumption that the parent is denying visitation and it is in the best interest of the child. The court was silent on the presumption or the reasons. The only argument that was made by the appellee was that the appellants called the police for well child checks and

were harassing. The appellee does not even state how often he was residing in the home or how many years he actually spent with the child. The appellee was not acting in the best interest of the child by denying visits; he was acting in the best interest of himself due to his own feelings about the appellants.

The court found it was in the best interest of the child to maintain visits with the appellants and therefore should have gone over the nonexclusive factors. The court in this case initially made a determination that that visits would likely occur and to hold a hearing on the matter. After the hearing, the court made a determination that the visits would not be granted due to there not being any evidence on whether the child would suffer harm if the visits were to not take place. The court did surmise that the fact that the child was with the petitioner's was strong evidence to the harm that would occur; but it was only circumstantial. The court made no mention of the medical records or the visit or the need for counseling of the child. The court then went on to say it would be in the child's best interest to have the visits and continue the relationship with the appellants. However, since the court could not find evidence of harm, the court felt it could not move forward; the appellants disagree.

The statute directs the court by stating:

If the court finds that the petitioner has met the standard for rebutting the presumption in subsection (2) of this section, or if there is no presumption because no parent has custody of the child, the court shall consider whether it is in the best interest of the child to enter an order granting visitation.

The petitioner must prove by clear and convincing evidence that visitation is in the child's best interest. In determining whether it is in the best interest of the child, the court shall consider the following, nonexclusive factors:

- (a) The love, affection, and strength of the current relationship between the child and the petitioner and how the relationship is beneficial to the child;
- (b) The length and quality of the prior relationship between the child and the petitioner before the respondent denied visitation, including the role performed by the petitioner and the emotional ties that existed between the child and the petitioner;
- (c) The relationship between the petitioner and the respondent;
- (d) The love, affection, and strength of the current relationship between the child and the respondent;
- (e) The nature and reason for the respondent's objection to granting the petitioner visitation;
- (f) The effect that granting visitation will have on the relationship between the child and the respondent;
- (g) The residential time-sharing arrangements between the parties having residential time with the child;
- (h) The good faith of the petitioner and respondent;
- (i) Any history of physical, emotional, or sexual abuse or neglect by the petitioner, or any history of physical, emotional, or sexual abuse or neglect by a person residing with the petitioner if visitation would involve contact between the child and the person with such history;
- (j) The child's reasonable preference, if the court considers the child to be of sufficient age to express a preference;
- (k) Any other factor relevant to the child's best interest; and
- (l) The fact that the respondent has not lost his or her parental rights by being adjudicated as an unfit parent.

RCW 26.11.040(4)(a)-(l)

The court did not make any findings or inquire about any of the factors despite making the finding that the visits would be in the best interest of the child. The child was so integrated into the home of the appellants that he saw them as his parents. The appellants took care of him and his daily needs. They took care of doctors, dentists, school, activities, and daily care. The biological parents were absent from all aspects of this. The child looked to the appellants for love, affection, security, and to provide for him. The child has his cousin in the home, whom he saw as his sister, and other fundamental relationships. The child only knew his grandparents as his family due to the absence of his parents. The relationship is beneficial to maintain some regularity with a change in living and schooling environment.

The first few factors are important to note here as they discuss the relationship. As the court did not make findings about, or discuss, the factors, they are not before the court; however, it is important to understand the relationship the appellants and the minor child had. The appellants had the child for his entire life; 12 years. The appellants were in the role as the parents. The appellee denied visits due to his personal issues with the appellant's, disregarding the interest of his child or taking

into account the prior 12 years and that he himself asked CPS that his parents take custody in 2006.

The only factor that the court did address is that the child had not made his preference known, however it was in the medical records that the child was having difficulty with the biological father coming into his life and that he was fearful that the father would come and take him. The child had abandonment issues from his biological parents. The child now has to wonder if the appellants abandoned him too. Abandonment was one of the issues that was considered when passage of the statute.

When the senate bill took place the comments on the statute hit this case on the head. There was discussion about the pros of this statute.

This is a very difficult issue that has been unresolved for many years. Many grandparents and other family members have lost the close relationships with children when they had previously spent many happy holidays and special times together. These children are missing the love that grandparents offer and risk losing the treasured sense of family. This bill doesn't dilute the parent's rights. Science supports the value of unconditional love that grandparents can give. We don't want to get entangled with the parent's relationships. However, the positive relationships with non-parent relatives can be an anchor for children in an uncertain world and a stabilizing force in their lives. Grandparents can enrich the child's environment and give unconditional love. We often worry that our young grandchildren do not understand why their grandparents are no longer in their lives and may feel abandoned. We want to see our grandchildren so we know they are all right. Currently, Washington is the only state that does not have a valid law on visitation for non-parent relatives”

S.B. 5598, 2017 Leg., 65th Sess. (Wash. 2018). Here the child was not only enriched by his grandparents, but alive and thriving only because of them. The grandparents were the ones here when everyone else left now without seeing them the child will likely think they abandoned him too, just as the comments on the senate bill discussed.

The court should have found that the appellants had the evidence to rebut the presumption that the father was acting in the child's best interest by denying the visitation and that the denial of visitation would create a likelihood of harm, specifically psychological harm. Further, since the court found visits to be in the best interest of the child, the visits should have been granted. The appellants ask the court to reverse the trial court's decision and award visits as anticipated by the statute for this very situation.

The child in the case seems to be who this statute was written for. He not only had a good relationship with the appellants, but that relationship was one of the only ones the child had. The bill contemplated feelings of abandonment by the children if grandparents were removed, and that is what is happening here. This child had issues of abandonment already and denying visitation will undoubtedly take a toll. This case is not just regular grandparents, but they took the child I and raised him for the first 12 years of his life; more than ½ of his minor years. The father thought it was in the

best interest for the child to stay with the grandparents for 12 years, then decided to take that away drastically and without communication between the appellants and the child. The father is not thinking of the child's best interest or the harm that will undoubtedly occur to C.S.

C. DID THE COURT PROPERLY ASSESS AND AWARD FEES?
NO. THE COURT DID NOT CONSIDER THE FINANCIAL
RESOURCES OF THE APPELLANTS TO DETERMINE IF
FEES WERE JUST.

The court under RCW 26.11.050 is to award attorney's fees prior to any hearing, unless the court finds, considering the financial resources of all the parties that it would be unjust to do so. The court here ordered fees at the conclusion of the hearings, some eight months after the petition was filed. Further the court did not take into account the financial resources of the parties to determine if the award was just. The appellants had the full cost of raising the minor child and were on retirement funds the amount of fees awarded in excess of \$4,000 is unjust. The court did not take into account any financial information for the appellants and still awarded the fees.

The court may order fees despite the financial resources of the parties only if the petition was brought in bad faith. The parties were all found not to be in bad faith. The court had stated that the visits were likely

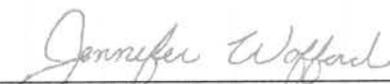
to occur on the onset of the petition, as such, no bad faith. The court should have taken into account, the financial resources of the parties and made a determination if it was just. However, the court signed the order without making any finding or inquiry into the financial resources of each party. We ask the court to reverse the award of fees as they were unjust due to financial resources and the petition was not brought in bad faith.

CONCLUSION

We ask the court to reverse the decisions to deny the visitation and the award of fees. The court should have considered the medical records that were provided. The child had resided with the appellants since birth; for 12 years. Taking the child completely out of the life of the appellants is a substantial risk to the psychological harm to the child in and of itself. Further, the appellants should have been found to rebut the presumption that the father's decision to deny visits was in the best interest of the child. The father and the appellants have their own issues with one another, but we consider the relationship and best interest of the child C.S. Further, the court should have considered the factors. The court did state that it could find it was in the best interest of the child to have the visits if going over the elements; but did not need to. We ask the court to reverse and implement the visitation asked by the appellants.

Finally, we ask that the court reverse the findings of fees. The court found that the petition was not brought in bad faith. Since the court found it was not in bad faith, it was to look at the resources of the parties to make a determination if the award was just. The court failed to look to any financial information of the appellants and make any findings.

Respectfully submitted this 31st day of March, 2020 by:



Jennifer Wofford, WSBA # 48366
Attorney for Appellants

CERTIFICATE OF SERVICE

I certify that on March 31, 2020, I served a copy of the Statement of Arrangements to Joseph Stewart III via first class mail to 3240 E. Park Ridge Loop, Apt. 201, Post Falls, ID 83854.

I certify that on March 31, 2020, I served a copy of the Statement of Arrangements to Jennifer Kastelein via first class mail to 23609 N. West Lake Drive, Nine Mile Falls, WA 99026.



Phillip Cardwell, Paralegal

DINENNA & ASSOCIATES, P.S>

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