

No. 41562-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

In Re the Marriage of Diana Sushak v. Bobby Beasley, Jr.

Bobby Beasley
Appellant

Diana Sushak
Respondent

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR THURSTON COUNTY

CAUSE NO. 10-3-00740-8

BRIEF OF RESPONDENT

J. Anne Redford-Hall
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I. INTRODUCTION and PROCEDURAL HISTORY

COMES NOW the Respondent, Diana Sushak, by and through her attorney, J. Anne Redford-Hall of The Redford Law Firm, and requests that this Court AFFIRM the Superior Court of Thurston County's Interim Order. Ms. Sushak brought a motion for clarification regarding the final parenting plan as the final parenting plan entered in 2009 directed the father to receive a weekday visit on Wednesdays and every other weekend from Friday after school until Sunday evening. Motion to Clarify, filed 12-1-2010, Clerk's sub-number 80.

The child at issue was born with a chronic kidney condition which required transplantation to occur before the age of 3. The condition and specific medical concerns regarding this child were at issue at the time of trial in which Modification was granted, thereafter placing the child in the majority care of the mother. Final Parenting Plan, filed 3-17-2009.

The mother sought modification following trial for the father's failure to obtain a State Certified Domestic Violence Assessment with collateral contacts and for his failure to participate in necessary nutritional counseling regarding the child with Children's Hospital in Seattle. Adequate cause was denied by the Court and the mother was instructed to file a Motion for Clarification regarding further needs of the child related to his medical condition.

When the child's transplanted kidney failed, the mother sought an Order Clarifying the terms of the Final Parenting Plan, as it became impractical with respect to the child's dialysis schedule. Motion to Clarify, filed 12-1-2010, Clerk's sub-number 80; Declaration of Diana Sushak, filed 12-1-2010, Clerk's sub-number 82. At that time dialysis was occurring on Tuesday, Thursday and Saturday of each week and interfered with the residential schedule for the father as delineated in the Final Parenting Plan. *Id.* The dialysis schedule was subsequently changed to every Monday, Wednesday and Friday, which also interfered with the residential schedule for the father. *Id.* The mother sought Clarification in order to avoid further high-conflict circumstances with the father that have historically led to protracted litigation. *Id.*

The Court clarified the parenting plan under those dire conditions to allocate residential time with the child in conjunction with the child's dialysis schedule.

II. STANDARD OF REVIEW

Generally, a trial court's rulings dealing with the provisions of a parenting plan are reviewed for abuse of discretion. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 136 (1997). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Id.*

III. LEGAL ARGUMENT

A. The Court's Ruling Regarding Visitation During Dialysis Was a Permissible Clarification

A modification of a parenting plan may occur by agreement, petition to modify, or temporary order. *In re Marriage of Christel*, 101 Wn. App. 13, 22, 1 P.3d 600 (Div. I 2000). Prior to modification, the court must find a substantial change of circumstances has occurred since entry of the final parenting plan. If there is no substantial change of circumstances then a modification shall not occur.

A party may file a motion for clarification regarding a parenting plan when the party seeks to understand exact duties or limitations on one or both of the parties, but does not want to change the parenting plan. A modification extends or reduces a party's rights, whereas a clarification clearly and specifically defines a party's existing rights. *In re Marriage Holmes*, 128 Wn. App. 727, 17 P.3d 370 (Div. 2005). A clarification is a permissible action by a court without the need for establishment of adequate cause. *Id.*

In *Holmes*, the parties entered into a final parenting plan following a modification caused by the mother suffering a mental breakdown. *Id.* at 731. The final parenting plan provided the mother with weekend visitation until 9:00am or school beginning on Monday. *Id.* The parenting

plan also included a section that if a dispute arose the guardian ad litem would make a recommendation that would be followed until further order of the court. *Id.* A dispute arose over the return time of the child on Monday. *Id.* at 733. The guardian ad litem recommended that the transfer occur on Sundays at 7:00 p.m. *Id.* The mother rejected this recommendation and the father filed a petition to modify. *Id.* The trial court found that a modification was improper because there was a mechanism for resolving the dispute. *Id.* Instead the court entered a temporary order that adopted the guardian ad litem recommendation (changing the mother's residential time to 7:00pm on Sunday) until further recommendation by the guardian ad litem. *Id.* The Washington Court of Appeals, Division I, held that the trial court's temporary order authorizing the reduction in time per the guardian ad litem recommendation was merely a clarification, not modification. *Id.* at 736.

Similarly, Ms. Sushak did not request the Superior Court change any aspect of the parenting plan. Instead, Ms. Sushak requested that the Superior Court clarify how the residential plan should be applied with the onset of dialysis; which parent would attend, and transportation arrangements. The child in this matter had the chronic kidney condition at the time of the modification trial and had already received one transplanted kidney in order to maintain his life. The parties were aware

of the need for a subsequent transplant in the future, although not certain as to when this might occur. Kidney failure was anticipated. Therefore, like *Holmes*, there was not a substantial change in circumstances. Instead the court merely needed to specify the exact duties of each parent in relation to the child's dialysis. This required specific dates and times as to which parent would be bringing the child to dialysis and what days and times the father would have his mid-week visit. This was a specific temporary order that was to remain in place only while the dialysis was ongoing.

B. If the Superior Court's Interim Order Is a Modification It Is an Appropriate Exercise of Judicial Power and Does Not Violate the Modification Statute

WA RCW 26.09.260 states that the court may only modify a parenting plan when there is an agreement of the parties or the court has specifically found that a substantial change of circumstances exists that requires a change in the plan. *In re Marriage of Possinger*, 105 Wash. App. 326, 19 P.3d 1109 (Div. I 2001). However, when the issue before the court is one regarding the welfare of a child the court derives its authority from common law as well as statutory. *Id.* Therefore, the court may step outside of the exact statutory language when it is in the best interest of the child.

In *Possinger*, the court entered an interim, year-long, parenting plan following a trial that named the father as primary residential parent. *Id.* at 329. After the year-long period, the trial court entered a final parenting plan naming the mother as the primary residential parent. *Id.* at 331. The father appealed on a variety of bases, including that the trial court improperly modified the parenting plan and that the court had no authority to enter an interim plan as the statute did not provide that option. *Id.* at 332. The Division One Court of Appeals held that where the legislature has not expressed intent to change an existing law and where the language of a new act is consistent with past policy then it is presumed that the legislature wishes for the court to continue to follow its past policy. *Id.* at 334.

The legislature has clearly expressed the policy that the court is to use when crafting a parenting plan found in WA RCW 26.09.002:

Parents have the responsibility to make decisions and perform other parental functions necessary for the care and growth of their minor children. In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities. The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests. Residential time and financial support are equally important components of parenting arrangements. 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.

In this case, an interim order is in the child's best interest. The child was born with a life-threatening and congenital kidney problem. He currently does not have a kidney as the transplanted kidney he received as a toddler failed following the entry of the Final Parenting Plan. The child has been on the transplant list for approximately one year as a result. The child attends dialysis three times per week. Just as circumstances have changed since the child no longer has a kidney and is completely reliant upon dialysis for his survival, circumstances will change again when the child receives another transplanted kidney and is subject to an extended recovery period with specific and incumbent medical needs. In addition, if the child's health deteriorates further then he may have to be hospitalized as well, causing yet another possible change of the residential schedule. It is in the child's best interests for the court to craft interim orders during this period of constant transition and change. Interim orders are the only way to deal with health problems of this magnitude.

C. The Court Has Full Authority to Appoint an Attorney to Represent a Child Regarding Custody Disputes

WA RCW 26.09.110 allows the court to appoint counsel for a minor child. This was properly done by Judge Casey and was especially needed in this case due to the child's medical needs and at the child's request. Furthermore, this objection is untimely as the child's counsel, Ms. Bishopp, was previously appointed in this case on July 22, 2010 during the hearing for a domestic violence protection order that was consolidated with this matter.

D. The Petitioner's Appeal Should be Dismissed as It Has Never Been Perfected and Suffers from Several Deficiencies

The Notice of Appeal was filed on December 13, 2010 and was not properly served on the Petitioner. Mr. Finlay filed an Affidavit of Service that same day stating that he served Ms. Sushak's attorney by first class mail, but not Ms. Sushak (the party). This is not proper service. There was no agreement allowing for service by mail or any other means. Further, no attempts were made to contact the Petitioner or her attorney to notify her regarding an appeal. According to the Appellate court rules the party filing the Notice of Appeal shall on the same day serve a copy of the notice on each party of record and file a copy of the proof of service with the appellate court designated in the notice. RAP 5.4(b). Every order

required by its terms to be served shall be served upon a party in the manner provided for service of summons in civil rule 4. Civil Rule 5(a). A copy of the Summons shall be personally served on the person whose name is signed on the summons. Civil Rule 4.

This appeal is littered with Letters of Sanctions filed by the court against Mr. Beasley's attorney, Mr. Finlay. *Court's Motion for Sanctions for Failure to file and Letter of Sanctions, Failure to File Statement of Arrangements March 17, 2011; Failure to File Designation of Clerk's Paper's March 17, 2011; Failure to File Clerk's Papers June 6, 2011; Failure to File Report of Proceedings June 6, 2011; and Failure to File Appellant's Brief August 10, 2011.* Again, Mr. Finlay did not properly serve the Brief. Counsel has been in constant violation of appellate procedure and continues to fail to abide by appellate rules.

Mr. Beasley filed his first Designation of Clerk's Paper's on March 29, 2011 in which he made no reference to the Parenting Plan filed March 17, 2009 or the transcript of the hearing held on March 26, 2010. Both of these documents were then improperly attached as exhibits to his brief. He then filed an Amended Designation of Clerk's Papers on April 28, 2011 and again he made no reference to said documents. The original Designation of Clerk's Papers was filed a month late and again never served upon the Petitioner. Mr. Finlay has refused to abide by appellate

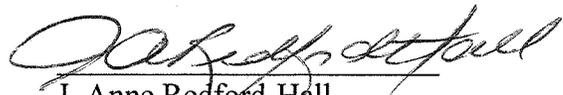
rules from the beginning of this appeal and the court should not allow him to continue do so. Mr. Finlay should be held to the same standards that all other attorneys are held to when making the choice to enter into the Appeals Court.

III. CONCLUSION

This Court should either dismiss this appeal or affirm the trial court's interim order and appointment of Ms. Bishopp as the child's attorney. The clarification was proper and was issued at the request of the Respondent. It was issued in the best interests of the child as necessitated by the child's physical health and was narrowly tailored to deal with the current dialysis. If the court rules that this was a modification of the parenting plan then the court should uphold the modification and allow the petitioner/mother to file a petition for modification to supplement and correct the procedure as that is in the best interests of the child due to the child's life-threatening condition.

Submitted by

The Redford Law Firm:



J. Anne Redford-Hall
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REDFORD LAW FIRM

September 21, 2011 - 10:24 AM

Transmittal Letter

Document Uploaded: 415623-Respondent's Brief.pdf

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- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Respondent's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
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- Letter
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