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SUPREME COURT OF COLORADO

Case No. 85SA433

FILED IN THE SUPREME COURT OF THE STATE OF COLORADO
MAR 17 1986
Mac V. Danford, Clerk

PETITIONER'S RESPONSE TO CONSOLIDATED MOTION TO DISMISS APPLICATION FOR PERROGATIVE WRITS

SHARYN ASHLOCK, n/k/a SHARYN ALDEN,

Petitioner,

v.

DISTRICT COURT, 5th JUDICIAL DISTRICT, COLORADO and HONORABLE WILLIAM JONES, Chief Judge Thereof,

Respondent.

Sharyn Ashlock, n/k/a Sharyn Alden ("Ms. Alden") responds to Respondent's Consolidated Motion to Dismiss Application for Perrogative Writs by submission of the following responsive brief.

SUMMARY

The critical issue presented to this Court for review is whether the trial court, in response to a request for a contempt citation, should be permitted to change custody of a minor child, without (1) due process or (2) consideration of the statutory provisions intended for the protection of the child's interests.

In the present action, the trial court erred in both respects, where: (1) the original change of custody occurred at the March hearing, which took place without notice to Ms. Alden, without supporting affidavits as required by C.R.S. § 14-10-132 and where custody was changed as a form of punishment of the

mother in response to the request for contempt citation;[1] and (2) even at the subsequent hearing in November of 1985, no showing or finding was made as to the best interest of the child, as required by C.R.S. § 14-10-124, resulting in the child's interest being ignored.

RESPONSE

I. THE TRIAL COURT SUBSTANTIALLY EXCEEDED ITS JURISDICTION AND AUTHORITY BY THE TRANSFER OF TEMPORARY CUSTODY FROM MS. ALDEN TO MR. ASHLOCK.

Respondent maintains that the trial court acted within its jurisdiction to enforce its earlier custody order. It is unquestionable that a court has the authority to provide for enforcement of its prior orders. Dockam v. Dockam, 522 P.2d 744 (Colo. App. 1974). Without such authority, judicial orders would have no consequence and, therefore, no meaning. However, this is not the issue before the Court.

While the trial court certainly has the authority to enforce its prior custody order by issuance of a contempt citation, the trial court went far beyond mere enforcement to modify and reverse its prior custody order. When the court went from enforcement to modification, it exceeded its authority. C.R.S. §§ 14-10-124 and 131 provide certain minimum procedural

[1] In reviewing Respondent's Motion and Memorandum Brief, it is uncontroverted that Ms. Alden received no notice of the March hearing, was not present nor represented by counsel before the trial court ordered custody changed. For this reason, and where the issue has previously been briefed on behalf of Ms. Alden, the issue of due process will not be briefed again herein.

standards which must be met before a court may, perhaps unalterably, affect the rights of a child. Throughout the Colorado statutes for custody modification are guidelines clearly intended to protect the child's interest and afford the child security, stability and continuity, both during and after the difficult adjustment to the family divorce.[2]

In keeping within this intent, before custody of a minor child may be changed, the court must make findings consistent with the best interest of the child, which findings must include:

1. The wishes of the child's parents as to his custody;

2. The wishes of the child as to custodian;

3. The interaction and interrelationship of the child with his parents, his siblings, and any other person who may significantly affect the child's best interests;

4. The child's adjustment to his home, school and community;

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[2] C.R.S. § 14-10-131 specifically provides that, where a motion to modify sole custody has been filed, whether or not it was granted, no subsequent motion may be filed for at least two years after the original filing, absent a showing of physical endangerment or significantly impaired emotional development. Further, C.R.S. § 14-10-132 provides that a party <u>must</u> submit a supporting affidavit when seeking modification of custody, to which affidavit the opposing party may respond. Importantly, the statute provides "the court <u>shall</u> deny the motion unless it finds that adequate cause for hearing the motion is <u>established by the affidavits</u>." [Emphasis added.] These statutory provisions clearly reflect the intent of the legislature to avoid changes of custody on a frequent basis, to permit the child continuity and stability, and in the case of affidavit practice, to avoid spurious claims intended solely to harass a custodial parent at the expense of the child.

5. The mental and physical health of all individuals involved; and

6. The ability of the custodian to encourage the sharing of love, affection, and contact between the child and the non-custodial party.

C.R.S. § 14-10-124 (1.5)(a-f); see, In re Harris, 670 P.2d 446 (Colo. App. 1983).

Further, the statute addresses the analogous situation to that presented here where it states:

> If a parent is absent or leaves home because of spouse abuse by the other parent, such absence or leaving shall not be a factor in determining the best interests of the child. For purposes of this subsection (4), "spouse abuse" means that proven threat of or infliction of physical pain or injury by a spouse on the other parent.

C.R.S. § 14-10-124 (4).

Despite the clear statutory requirement of findings consistent with the best interest of the child, none were made in this instance. To the contrary, the trial court clearly sought to punish Ms. Alden (and therefore the child) for having removed the child from the State of Colorado despite prior notice to the court of her intent to leave. As the trial court found at the time of hearing:

> If it comes to pass that it's in the best interest of the child to return the custody to the mother you may be assured that the Court will do so but she has violated the Court's order and because of that violation of the Court's order I have ordered that the child shall be returned to the father.

Transcript of Hearing, attached hereto as Exhibit A. [Emphasis added.]

There is no provision in the statutes for transfer of custody as punishment for the alleged violation of a prior court order. In fact, Colorado case law has clearly held to the contrary in admonishing our trial courts to avoid basing custody modification upon the acts of a parent which do not affect the child. In re Moore, 35 Colo. App. 280, 531 P.2d 995 (1975), see, Deines v. Deines, 402 P.2d 602 (Colo. 1965).

It is clear that the court exceeded its jurisdiction and authority by transfering custody from Ms. Alden, with whom the child has resided since birth, to Mr. Ashlock, without the required statutory findings. Although the trial court is empowered to enforce its earlier custody orders, the specific statutory guidelines for modification of custody cannot be ignored under the guise of enforcement.

II. RESPONDENT'S ASSERTION OF UNCLEAN HANDS IS AN IMPROPER REVERSAL OF THE BURDEN OF PROOF

Respondent asserts that the requested relief should be denied based upon a theory of unclean hands. For unclean hands to apply would require that the burden of proof be reversed.

As more fully set forth in the amicus brief submitted by the American Civil Liberties Union, Colorado law does not prohibit custodial parents from changing residence from the state following the entry of a decree of dissolution. Instead, it is incumbent upon the party opposing the change of residence to apply to the court for relief and demonstrate why the

contemplated or accomplished move should not be permitted. In re Casida, 659 P.2d 56 (Colo. App. 1982).

Here, Ms. Alden notified the trial court on February 26, 1985 of her intent to leave the State of Colorado because of her fear of continuing threats by Mr. Ashlock.[3] Although Ms. Alden satisfactorily met the procedures for removal of the child from the State of Colorado, she nonetheless found herself in November in a trial court setting (1) where custody had already been changed eight months earlier and (2) which had completely reversed the procedural and substantive requirements for modification of custody. Ms. Alden had the right, as does any other litigant in a contested modification action, to the following:

1. A properly filed motion for modification of custody, with a required supporting affidavit;

2. A finding by the court that the affidavits provided sufficient evidence to proceed to hearing;

3. A full and fair hearing in which findings are made with respect to all statutory elements of the best interest of the child.[4]

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[3] Respondent has erred in the recitation of important facts regarding this issue. On February 26, 1985 Ms. Alden wrote to the trial court, stating her reasons for leaving the state and providing the court with a new address. Subsequently, Mr. Ashlock submitted his Motion for Contempt on February 28, 1985. Respondent states "in response to the contempt motion, Ms. Alden mailed a letter to the court." Respondent's Motion to Dismiss, p.2. The evidence is uncontroverted that Ms. Alden had no notice of Mr. Ashlock's Motion until after the March hearing and therefore did not contact the trial court in response thereto.

[4] The Memorandum of Law filed by Respondent drifts far afield of legal argument, digressing into only the most unfocussed vitriolic attacks on a segment of society which even (footnote continued)

Absent application of the correct burdens of proof and the same safeguards as our legislative and judiciary intended, the rule should be made absolute.

III. RESPONDENT'S HYPOTHESIS FOR THE UNDERLYING RATIONALE FOR THE TRIAL COURT'S DECISION IS UNSUPPORTED SURMISE, WHICH SHOULD BE IGNORED BY THIS COURT.

Respondent suggests several reasons for the trial court's change of custody which are unsupported by the evidence and fail to meet the statutory requirement for a finding of best interest of the child before such a change of custody occurs.

First, Respondent suggests that, since Ms. Alden had sold her residence in Colorado, the trial court had to order change of custody to permit a custody evaluation. The mere sale of a residence and even a move out of state does not warrant change of custody to perform an evaluation. Although changes of

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(footnote continued from previous page)
our legislature has recognized requires substantial assistance. Respondent states:

> Ms. Alden's rationale requests trial and adjudication by fad. If the headlines on battered wives are current, Colorado courts, according to her, should summarily issue the loudest, screaming person who cries that she is a battered wife, whatever relief is approved and developed by the media. . . Next week, when battered wives are not newsworthy and the fern bar advocates are on to a new issue, this Court will be asked to indulge, sans facts and law, the new proponents, perhaps vegitarians or pedophiles, if they should become popular media darlings.

Respondent's Memorandum of Law, pp. 18-19. Ms. Alden's request is for no more assistance than is afforded any other individual litigant in the idential situation: a full and fair hearing, after notice, which complies with at least the minimum procedural standards prescribed by law.

residence are common today, custody is not ordinarily changed from the primary caretaker of the child merely because that caretaker has sold their residence.

Second, Respondent maintains that the trial court's order is not actually a change of custody, but, in essence, "makeup visitation". Respondent's Memorandum of Law, p.8. Modification of visitation is provided for in C.R.S. § 14-10-129. If additional or modified visitation is deemed reasonable by the trial court in light of the child's change of residence, the trial court can make such determination, again based upon the best interest of the child. However, to suggest that a change of custody was ordered where the court intended to merely provide for "makeup visitation", is to suggest judicial excess in its greatest degree.

Third, Respondent states that the trial court's order, despite its clear language, is not intended as punishment, but as a way to reestablish the father-son relationship prior to a custody evaluation. Again, restablishing the father-son relationship is a goal easily provided under a variety of circumstances, including supervised visitation, without the extraordinary step of changing custody of the child.

Respondent's speculation is entirely unsubstantiated and fails to support the required statutory finding before transfer of the child's custody.

CONCLUSION

It is no doubt clear to the Court that there is a child, deserving of society's protection, at the center of this controversy. Where a child's interests are at stake, absent the appointment of a guardian ad litem, our courts may be the only protection the child has against frivolous, spurious or unnecessary changes of custody. To guide the court, our statutes are specific regarding the findings which must be made, after notice and showing of adequate circumstances to warrant judicial review, before custody may be modified.

Here, the die was cast in March when the court originally changed custody to Mr. Ashlock. Without further hearing on the issue of the child's best interest, the March decision to improperly change custody was reaffirmed in November, causing the request to this Court for intervention.

If even the minimal standards for review are not met before an order affects a child's life so profoundly, our statutory framework is meaningless. Ms. Alden and the parties' minor child deserve all the protection our statutes and case law have to offer, not only because they have been harassed or battered, but because they are citizens of the State of Colorado.

If a trial court can change custody based upon a motion for contempt, without even minimum findings, no custody order nor child's stability, security and continuity is safe.

JEANNE ELLIOTT
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CERTIFICATE OF MAILING

I hereby certify that on this 17th day of March, 1986, a true and correct copy of the foregoing PETITIONER'S RESPONSE TO CONSOLIDATED MOTION TO DISMISS APPLICATION FOR PERROGATIVE WRITS was deposited in the U.S. mails, postage prepaid, addressed to the following:

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