1-6-1986

Ashlock v. District Court, Fifth Judicial Dist.

SUPREME COURT, STATE OF COLORADO
Case No. 85 SA 433

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION

SHARYN ASHLOCK, N/K/A ALDEN,

Petitioner,

v.

DISTRICT COURT, 5TH JUDICIAL DISTRICT, STATE OF COLORADO and HONORABLE WILLIAM JONES, Chief Judge thereof,

Respondent.

Having been granted leave by this Court on December 10, 1985 to file a Brief as Amicus Curiae in this proceeding, the American Civil Liberties Union respectfully submits this brief for the Court's consideration. Sharyn Alden is referred to as "mother", Rex Ashlock is referred to as "father", and Orin Ashlock as "child".

I. SUMMARY

The undisputed, relevant facts are that the mother was awarded custody of the child in February, 1983. In February of 1985 the mother took the child to Illinois and filed notice with the Court, attached as Exhibit A. The mother alleges abusive behavior by the father which is not yet in evidence or at issue because of the procedure used by the District Court.

On March 7, 1985, the District Court held a hearing on a handwritten pleading denominated "Motion for contempt Citation" and granted the relief requested in that pleading by modifying the permanent custody of the child from the mother to the father "on a temporary basis." No pleading or paper of any sort was

served on the mother prior to this hearing. On November 4, 1985 a hearing was held on the same Contempt Citation and arguments of counsel were heard concerning setting aside the previously entered Order changing custody. The Court upheld it's prior order changing custody and ordered a study of the father's home to determine if it was safe to place the child there.

The substantial interest and right of the child in this case is to have his custody determined only as dictated by his best interests. The actions of the mother were questionable, but the use of custody modification as punishment of the parent is impermissible. While there exist circumstances and procedures under which custody may be changed notwithstanding the wrongful absence of custodian and child, the procedure in this case did not comply with the statute and therefore did not adequately recognize or protect the child's interests.

The procedure utilized by the District Court was deficient in that the affidavit requirement of C.R.S. 14-10-132 was not complied with, the mother had no notice of the hearing at which the change of custody was ordered, and there were no findings as required by C.R.S. 14-10-131 concerning change of custody.

II. LEGAL ARGUMENT

That the interest of the child is the focal point of any custody dispute is unchallenged in Colorado statute or case law. Conduct of a parent which does not affect the child is not to be considered by the court. In re Moore, 35 Colo. App. 280, 531

P.2d 995 (1975). The troublesome question faced in the case of deprivation of contact between the non-custodian and the child is to segregate the behavior of the custodial parent and it's impact on the child.

To place this case in perspective, it is necessary to review the allocation of responsibility when a custodian moves from the state with the child as established by In re Casida, 659 P.2d 56 (Colo. App. 1982). The burden of seeking judicial relief is placed upon the party who is protesting relocation and the custodian is not required to obtain a judicial order modifying extant vistation rights prior to such a move. In short, it is not clear that the mother was even in violation of any order since she filed a notice of her leaving with the court as contemplated by the Child Custody Agreement and was not required to seek an order changing visitation prior to leaving.

Furthermore, the child is entitled to certain protections prior to having his life altered drastically by a change in his custody. An affidavit must be filed setting forth facts supporting the requested modification. C.R.S. 14-10-132. There must be notice to the custodial parent of a hearing and opportunity to be heard. Olson v. Priest, 564 P.2d 122, (Colo. 1977). There must be evidence that a change of circumstances has occurred and that the modification is necessary to serve the best interest of the child and that there is agreement, integration to the home of the other parent or that the present environment endangers the child's physical health or significantly impairs

his emotional development and the harm likely to be caused by a change is outweighed by the advantage of the change to the child. C.R.S. 14-10-131. In this case there was no such affidavit, no notice prior to the order and no findings sufficient to support the change of custody.

In fact the decision was used as punishment for the mother's conduct in leaving the state. The Court stated, "...she has violated the Court's order and because of that violation of the Court's order I have ordered that the child should be returned to the father." (Included in partial transcript, attached as Exhibit B.) The deprivation of contact between a child and the non-custodial parent is not to be condoned but does not constitute sufficient grounds for change of custody. Deines v. Dienes, 402 P.2d 602 (Colo. 1965). This rule is based upon the sound principle that custody orders must be premised on the children's needs no matter how repugnant the conduct of the parent may be.

These rights inure to the benefit of the child. One of the reasons that it is difficult to separate the child's interest from that of the parents is that there was no independent voice for the child in this proceeding. Especially where the conduct of the parent may be subject to question, it would be good practice to utilize C.R.S. 14-10-116 to appoint an attorney to represent the interest of the child. Independent representation simplifies the analysis of the various rights involved by providing an advocate loyal solely to the child and his needs.

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CERTIFICATE OF DELIVERY

I hereby certify that a true and complete copy of the foregoing BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION has been sent this 7th day of January, 1986, by U.S. Mail postage pre-paid correctly addressed to the following:

Bruce Teichman
3801 E. Florida
Suite 601
Denver, CO 80210

Jeanne Elliott
1614 Gaylord
Denver, CO 80206

Vicki Gula

EXHIBIT A

SHARYN L. ALDEN
Upper Bear Creek Canyon
P.O. Box 3412
Evergreen, Colorado 8043[illegible]

Feb. 26, 1985

Dear Judge Jones,

Due to a wide set of circumstances, I am addressing to Court that any future correspondance should take place through my new address, P.O. Box 683, Addison, Ill., 60101.

My home has been on the real estate market for 2½ years, and recently sold, and I also was offered excellent job opportunities in Ill. Also my two daughters who live there have continually expressed a desire to be with their Mother more often.

But probably most important in my reasons to move is the continuous destructive atmosphere in which my Son Orin Simeon, ("Sim" aged 5 is exposed to while visiting his Father, Rex Ashlock. Sim even at his age expresses his concern for the drugs at his Dad's house, the gun his Dad carries concealed in his jeans, and the other degrees of violence to which he's been exposed. Add since Rex only pays child support if he's planning to file something or is put in jail, I have had to live without that, while at the same time picking up the phone from one to two dozen

It was a week hearing him harrass and threaten us. And that is not to say anything about his constant surveillance of my home. I have felt extremely fearful while living in Evergreen, and Jim repeatedly advises me to move away so we can start a new life.

I hereby certify that a true and correct copy of the above change of address was mailed this 26th day of February, 1985 by depositing same in the U.S. Mail, postage prepaid and addressed as follows:

The Hon. William L. Jones
Box 597 Eagle County
District Court
Eagle, Co. 81631

Respectfully Submitted,

Sharyn Allen

wanting to use, the way of necessity. That's not the right term for doctrine. That's in property. It's a similar type of a defense and the Court has already ruled where this evidence has been already ruled on it's a collateral estoppel problem.

MS. ELLIOTT: It has not been ruled on. The testimony in the contempt citation was where simply my client's perception of the threats she thought existed; that the testimony that I'm now offering are the threats that other people have observed; that the father's contact with this child represents to the child and I cannot --

THE COURT: I've got letters here which are from various members of Ms. Alden's family. I recognize they express a concern but George Alden and Wayne Alden and these other persons are not this child's father.

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 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 should be returned to the father. It won't take us a year and a half to have another hearing on this subject. It will probably only be a few months.

You may file a formal motion for change of custody alleging -- that you're doing it in less than the two year period alleging you're doing so because the Court didn't have