



Denison v. Leewright

129 Wash.App. 1033 (2005) | Cited 0 times | Court of Appeals of Washington | September 20, 2005

JUDGES Concurring: Dennis J. Sweeney Kenneth H. Kato

UNPUBLISHED OPINION

In this third-party custody dispute, Loren Denison, the maternal grandfather of D.M. and H.S., appeals an order returning custody to the children's mother, Alena Denison. He contends the court's action was inconsistent with prior court orders granting him and his former wife Reba Denison, now known as Leewright, custody of the children. Mr. Denison objects to several prior court rulings, asks this court to supplement the record with documents he was unable to obtain, and requests reimbursement of legal fees expended on his lawyers below. We affirm.

FACTS

Mr. Denison and Ms. Leewright were awarded third-party custody of their two grandchildren in 1998. The children were found dependant mainly due to Alena Denison's drug abuse, but the mother's parental rights were not terminated. Mr. Denison and Ms. Leewright later separated and dissolved their marriage. Ms. Leewright was awarded primary residential placement of D.M. and H.S. The parenting plan, however, allowed both Mr. Denison and Alena Denison to have visitation with the children. No child support was ordered. Prior to entering the parenting plan, the court reviewed an August 6, 2001 guardian ad litem report, recommending Ms. Leewright have primary custody, but establishing the children's desire and need to spend time with their mother.

On September 16, 2002, Ms. Leewright filed a notice of her intent to relocate with the children from Washington to Idaho due to an employment transfer. Both Mr. Denison and Alena Denison objected. At an October 14, 2003 hearing, the court heard testimony from Dr. E. Clay Jorgensen, a clinical psychologist who had been working with the parties since 2001. He testified he was in favor of the children being reintegrated with their mother given her positive lifestyle changes. Dr. Jorgensen believed both grandparents favored eventual reintegration with the mother.

On December 8, 2003, the court entered an order allowing the children to relocate with Ms. Leewright to Idaho until December 26. Then, they would be brought back to Washington and be 'fully reintegrated into the primary care of the mother.' Clerk's Papers at 379. Mr. Denison appealed.

ANALYSIS



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A. Placement Decision

The issue is whether the trial court erred by abusing its discretion in awarding placement of D.M. and H.S. with their natural mother, Alena Denison.

Mr. Denison contends he should have been awarded third-party custody of the children because it is in their best interest to be with him instead of their mother.

We review a trial court's custody decision for abuse of discretion. In *re* Marriage of Kovacs, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). Abuse of discretion requires a showing that the discretionary decision is based on untenable grounds or untenable reasons or is a manifestly unreasonable decision. In *re* Parentage of Schroeder, 106 Wn. App. 343, 349, 22 P.3d 1280 (2001). Untenable reasons mean 'the court applie{d} the wrong legal standard or the facts do not establish the legal requirements of the correct legal standard.' *Id.*

Parental rights are constitutionally protected. *Chapman v. Perera*, 41 Wn. App. 444, 446, 704 P.2d 1224 (1985). Consequently, the court may award custody to a non-parent 'only if (1) the parent was unfit, or (2) 'the child's growth and development would be detrimentally affected by placement with an otherwise fit parent.'" In *re* Custody of Shields, 120 Wn. App. 108, 121, 84 P.3d 905 (2004) (quoting *In re* Marriage of Allen, 28 Wn. App. 637, 647, 626 P.2d 16 (1981); see also *In re* Custody of RRB, 108 Wn. App. 602, 614, 31 P.3d 1212 (2001) (emphasizing that 'nonparental custody cases have consistently followed Allen's two-part test.').

In 2001, the children's GAL recognized D.M. and H.S.'s need and want to spend time with their mother. Further, Dr. Jorgenson recommended during the 2003 custody hearing that the children be reintegrated with their mother given her lifestyle changes and her being clean and sober for a significant period of time. Dr. Jorgensen stated it was his belief both grandparents favored this as well.

Significantly, Alena Denison's parental rights were never terminated and she has established her recovery from drug abuse. The record does not show Alena Denison is an unfit parent or that the children's growth and development would be detrimentally affected by placement with her. The evidence supports the court's reasoning that the mother is fit and the children are likely to thrive in the mother's care. State policy favors parental rights over third-party rights (see *In re* Custody of Smith, 137 Wn.2d 1, 969 P.2d 21 (1998), *aff'd* sub nom. *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed. 2d 49 (2000)). Thus, a tenable basis exists for the court's custody ruling.

Mr. Denison objections regarding prior court custody rulings between him and Ms. Leewright and child support reimbursement requests are untimely. A party has 30 days from the date of an adverse ruling to file a notice of appeal or notice for discretionary review. RAP 5.2(a), (b). The time period to appeal the decisions Mr. Denison assigns error to has passed. Regarding temporary orders, if Mr.



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Denison wanted review by this court of temporary orders, he should have requested discretionary review within 30 days of order entry. Mr. Denison's child support overpayment concerns are better left for response by the support enforcement office.

While Mr. Denison is concerned about lawyer payments to his counsel below, we have no jurisdiction over such disputes in this placement review. Thus, supplementation of the record on that point would serve no purpose. Further, it is the appellant's responsibility to designate the clerk's papers wanted for review. RAP 9.6. When additional documents are needed for review, RAP 9.10 spells out the process. Notably, Mr. Denison perfected the necessary record for meaningful placement review. Finally, attorney competence, professionalism, and ethics concerns are within the province of the Washington State Bar Association and the Washington Supreme Court.

B. Attorney Fees

In the last sentence of the respondent's brief, Ms. Leewright and Alena Denison request attorney fees and costs under RAP 14. RAP 18.1(b) requires a separate section in the party's brief devoted to a fees' request. This requirement is mandatory. *Wilson Court v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998). Moreover, their request is unsupported by argument. They cite to RAP 14, but this section relates solely to costs on appeal, not attorney fees. Since Ms. Leewright and Alena Denison's request does not comply with RAP 18.1, their request is denied.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Kato, C.J.

Sweeney, J.

