# Marriage of Spring v. Spring

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Unpublished Opinion

A parent seeking to modify a parenting plan must overcome a strong presumption favoring custodial continuity over modification. Accordingly, a full modification hearing will be held only if the parent first establishes "adequate cause." RCW 26.09.270. Because the superior court did not abuse its discretion in concluding that adequate cause was not established in this case, we affirm.

FACTS

Michelle and David Spring divorced in 2004. An agreed parenting plan gave them equal residential time with their daughter S.S. In 2005, the parties entered an agreed modified parenting plan based on an extensive report of a guardian ad litem (GAL). The report stated in part that one of David's sisters claimed he molested her when she was 8 and he was 16. The GAL concluded that while this allegation could not be dismissed, it was "impossible to corroborate." Clerk's Papers (CP) at 513. The modified parenting plan maintained the schedule of equal residential time.

In June 2006, Michelle filed notice of her intent to relocate her residence.[1]

David opposed relocation and moved, unsuccessfully, for summary judgment. We granted discretionary review and ultimately reversed and remanded for further proceedings.

In December 2006, while discretionary review in the relocation matter was still pending, Michelle filed a petition to modify the parenting plan and to restrain David from having contact with S.S. The petition relied on declarations alleging that David had molested two of his sisters and a family friend 20 to 40 years ago. The molestation allegedly occurred when David was 14, 16, and 34 years old and the victims were between 8 and 10. Also, Michelle alleged that S.S. told her she doesn't wear pajamas at David's house and that David sometimes sleeps in her bed.

David countered with psychological testing indicating that he does not fit the profile of a pedophile, evidence that S.S. wears pajamas at his house, and evidence that Michelle and his sisters have a history of making false accusations. He also argued that the sisters' allegations were not a change in circumstances since the allegations of one sister had been reported by the GAL during earlier proceedings. David alleged that Michelle was bringing the current modification action in a bad faith.

S.S.'s longtime counselor, Dr. Earline Anderson, submitted a declaration concerning the allegations.

Dr. Anderson stated that she conducted 27 sessions with S.S. over two years. S.S. told her that David lies down and reads a story with her when she is going to sleep. He is fully clothed when he does this. S.S. sleeps alone on the top bunk of a bunk bed and her grandmother sleeps on the bottom bunk. Dr. Anderson asked S.S. if either parent had touched her inappropriately and S.S. said no. When asked what kind of visitation schedule she would like, S.S. said without hesitation that she wanted to continue alternating weeks with both parents.

Dr. Anderson stated that she has "never had any reason to believe [S.S.] is being abused, neglected or threatened by either of her parents, nor do I have any reason to suspect this will happen in the future." CP at 189. She added, "Because of the trusting relationship I have built with [S.S.] over time, I am confident she would tell me if any kind of abuse was threatened or took place." Id. She recommended that S.S. have "unfettered access to both parents." Id.

A Superior Court commissioner ruled that there was adequate cause for a full modification hearing. The commissioner found that a substantial change in circumstances had occurred because S.S. was now "close in age to the age of the alleged victims" and the new declarations set forth additional incidents of abuse. CP at 423.

David moved to revise the commissioner's ruling and the superior court granted the motion. Emphasizing the "significant threshold" that must be met to order a full hearing, the court stated, "There's got to be something more than possibilities in general." Motion for Revision (Feb. 16, 2007) at 20. The court noted there was no evidence of any sexual abuse during the entire seven years S.S. lived with her father and no evidence that she was more likely to be molested now than she was at the time of the original parenting plan.

First of all, in order to agree to that risk, I would have to conclude that . . . a seven-year-old is more likely to be a target for a pedophile than a three-year-old. The child has gotten from birth to seven and has not been molested. No one has claimed she's been molested. There's no indication she's been molested. There's no behavior that suggests she's been molested. There's been no reports that she's been molested. And I have the impression that everybody is scrutinizing the situation from both sides of the family. . . . So there is no scientific evidence that I'm aware of and nothing to cause me to believe that she's any [more or] less vulnerable at seven than she was at three . . . .

Id. at 24. The court also noted that any risk was statistically reduced by David's age.

The court ultimately rested its decision on the absence of "new facts or evidence of harm to the child." CP at 443. In its oral ruling, the court stated, "What it really comes down to . . . is not so much credibility and motive, although there are problems with credibility and motive all over the place, but what was known to the court and to the parties at the time the parenting plan was entered." Motion for Revision (Feb. 16, 2007) at 20. The court stated, "[A]ll of the warnings, all of the concerns, all of the risks that [Michelle's] coming to court with concern about now, she could have come to court with

the original parenting plan and not agreed to it and litigated it . . . ." Id. at 24. The court concluded there was nothing before it "that petitioner . . . could not have used to contest this parenting plan when it was entered a couple of years ago and when it was subsequently modified. That's the reason it's denied. No new information." Id. at 25.

DECISION

There is a strong presumption against modifying parenting plans because changes in residential schedules are highly disruptive to children. In re Parentage of Schroeder, 106 Wn. App. 343, 350, 22 P.3d 1280 (2001); In re Parentage of Jannot, 149 Wn.2d 123, 127-28, 65 P.3d 664 (2003) (recognizing that extended litigation can be harmful to children and that the parties' financial and emotional interests are best served by finality). Accordingly, a court will not modify a prior parenting plan unless the party seeking modification demonstrates that a substantial change in circumstances has occurred and that modification is in the child's best interests. RCW 26.09.260(1); In re Marriage of Shryock, 76 Wn. App. 848, 851, 888 P.2d 750 (1995).

To establish that he or she is entitled to a full hearing on a modification petition, the petitioner must first demonstrate that adequate cause exists. RCW 26.09.270; In re Marriage of Mangiola, 46 Wn. App. 574, 577, 732 P.2d 163 (1987); In re the Marriage of Roorda, 25 Wn. App. 849, 851, 611 P.2d 794 (1980), overruled on other grounds by, Jannot, 149 Wn.2d at 126--27. "Adequate cause" has been defined as "'something more than prima facie allegations which, if proven, might permit inferences sufficient to establish grounds for a custody change.'" Mangiola, 46 Wn. App. at 577 (quoting Roorda, 25 Wn. App. at 852). The petitioner must submit affidavits with specific relevant factual allegations that, if proved, would permit a court to modify the parenting plan under RCW 26.09.260. RCW 26.09.270; In re Marriage of Flynn, 94 Wn. App. 185, 191, 972 P.2d 500 (1999). Under RCW 26.09.260(2)(c), the court shall retain the established residential schedule unless "[t]he child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child."

The trial court's adequate cause determination will be overturned only for abuse of discretion. Jannot, 149 Wn.2d at 126. Our review is of the revision court's decision, not the commissioner's. In re Marriage of Rideout, 150 Wn.2d 337, 77 P.3d 1174 (2003).

In this case, the revision court cited two principal reasons for denying a full modification hearing-the absence of "new facts" and insufficient evidence of a risk of harm to S.S. The first reason is factually and legally untenable. As noted above, only one accuser had come forward at the time of the earlier proceedings and the most recent accusations provided both corroboration for the original accusation and evidence of additional incidents of abuse. Thus, contrary to the court's conclusion, Michelle presented new facts below.

The revision court also seemed to conclude that the new allegations did not establish adequate cause

because Michelle could have discovered and presented those facts during earlier proceedings. But that is not the law. By statute, a modification petition may be supported by any "facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan . . . ." RCW 26.09.260(1) (emphasis added). Since it is undisputed that the new allegations were unknown to the court during earlier proceedings, they were properly cited in support of Michelle's current petition for modification.

Nevertheless, the revision court's conclusion that the evidence raised only possibilities of harm to S.S. was a tenable basis for denying a full hearing. We recognize that allegations of sexual abuse and/or sexual deviancy warrant close scrutiny, and our courts have stated that "documented supported claims of physical, sexual, or emotional abuse warrant a full [modification] hearing." Jannot, at 25. They have also stated, however, that short of such documented claims, "these are matters that should be left to the discretion of the trial judge." Id. In this case, there are no allegations that David has abused S.S. Nor is there any evidence of abuse. Instead, Michelle argues that the allegations of past abuse of other girls, together with the fact that S.S. is now approximately the same age as those alleged victims, demonstrates that she is now at risk of sexual abuse; therefore, there is adequate cause to hold a full modification hearing.

But even accepting the allegations as true, there is no evidence supporting a conclusion that S.S.'s current environment is detrimental to her physical, mental, or emotional health. The allegations are of abuse occurring in the distant past. There are no allegations of any recent abuse of any child. In fact, it is undisputed that S.S. not only denied being inappropriately touched by her parents, but had shown no symptoms of abuse during the entire time she lived with her father. Significantly, there is also no evidence from any expert assessing the alleged risk posed to S. S. under all the circumstances, including the remoteness of the alleged prior incidents, David's current age, and the absence of any evidence of abuse during the seven years S.S. has lived with him. Finally, while the number of allegations and their details do lend them some credence, the record also contains evidence suggesting that the accusers have ulterior motives and/or questionable credibility.[2]

On this record, and in light of the applicable presumptions and burdens, we cannot say the revision court abused its discretion in concluding that Michelle failed to establish adequate cause for a full evidentiary hearing.

Michelle also challenges the revision court's supplemental order finding bad faith and ordering Michelle to pay David $8,371 in attorney fees. Under RCW 26.09.260(11), a court must assess attorney fees and court costs if it finds that a modification petition is brought in bad faith. Michelle correctly points out that the revision court orally stated that it found no bad faith on her part. But David later recited "new evidence bearing on the issue of bad faith" in his affidavit and request for attorney's fees. CP at 786. The new evidence was a letter sent to this court by Michelle's counsel on the day of the revision hearing. David argued that, contrary to counsel's representations to the court in the modification proceedings, the letter to this court showed that counsel "was purposely avoiding filing

a brief [in the relocation appeal], claiming the modification action 'suspended' the relocation action, and the modification would make the relocation appeal moot."[3] CP at 786. Despite being ordered to do so, Michelle filed no response to David's request for fees.

The superior court then entered a supplemental order stating in part, "Based on the evidence presented, the court finds that the mother's petition to modify the parenting plan was brought in bad faith, and awards [David] his reasonable attorney's fees . . . ." CP at 477.

Michelle contends the court had no legitimate basis for a finding of bad faith. This argument is not only raised for the first time on appeal,[4] but Michelle nowhere addresses the letter and arguments presented by David in support of his renewed request for a bad faith finding below. In these circumstances, we will not disturb the court's fee award.

David's motion for compensatory damages on appeal is denied. The clerk is directed, however, to set a single hearing under cause numbers 60711-1 and 59711-6 for a court's motion to determine whether additional sanctions should be imposed against attorney Kevin Gibbs under RAP 18.9.

Affirmed.

1. The history of the relocation proceedings is set forth in our June 4, 2007 decision resolving the parties' initial appeal in that case.

2. Contrary to David's assertions, the court did not rest its decision on the credibility of David's accusers. While the court did mention "*problems with credibility and motive," it stopped short of making a credibility determination and rested its decision on other grounds. Motion for Revision (Feb. 16, 2007) at 20.

3. We note that the superior court and this court have previously sanctioned Michelle for causing delays and/or failing to adhere to the case schedules in both the modification and relocation proceedings. In his ruling imposing sanctions in the relocation appeal, a commissioner of this court found evidence that Michelle was delaying the proceedings in a bad faith attempt to preserve the status quo. The commissioner stated, "The delay in the prior [relocation appeal] and the delay in this case inures to Michelle Spring's benefit because the trial court order that David Spring is challenging remains in effect. Based on the lack of response in the prior case, and the lack of action in this case, the inference that the delay is deliberate is strong. Because counsel has not filed a brief or moved for an extension, even though the matter is set for accelerated review, and because counsel has not explained the delay, sanctions of $500 are imposed [.]" Ruling Imposing Sanctions (Jan. 23, 2008).

4. See RAP 2.5(a).