4-29-2014

Cook v. Arias Respondent's Brief Dckt. 41745

IN THE SUPREME COURT OF THE STATE OF IDAHO

DALRIE COOK
Appellant,

v.

HUGO ARIAS CASTRO

Respondent.

Docket No. ~~4175~~ 41745

RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT FOR BONNEVILLE COUNTY

THE HONORABLE STEVEN A. GARDNER
Presiding Magistrate Judge

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STATEMENT OF THE CASE

To best understand this case and the issues that are presented before this Honorable Court the prior procedural history of the case in chronological order with relevant court rulings and orders are provided.

February 4, 2011. The Honorable Earl Blower enters his Findings of Fact and Conclusions of Law after a three-day trial. At trial Appellant averred that it was in the best interest of the children that she be allowed to relocate with them to Salt Lake City, Utah. At the time of trial it was her intentions to marry her then fiancé who also lived in that area. The children were born and raised in Idaho Falls, ID. The Court in its Findings of Fact and Conclusions of Law found that it was in the children's best interest for them to remain in the Idaho Falls area and awarded primary physical custody of the children to the Respondent subject to a visitation order that would be forthcoming. The Honorable Earl Blower said, "Upon weighing all of the factors, the court concludes that the parties should share joint legal and physical custody of the children and that they should reside primarily with Hugo and have reasonable visitation with Dalrie unless Dalrie abandons her plan to move the children away, in which event the court would order the children to reside primarily with Dalrie and have reasonable visitation with Hugo." R Vol. I, p. 99, L. 7-12.

February 11, 2011. Appellant filed with the court a document entitled "Statement of Unequivocal Desire." In that document the Appellant unequivocally states, ". . . Plaintiff hereby provides notice that Plaintiff will **not** be relocating to Salt Lake City, Utah." R Vol. I, p. 108, L.

5-6. The word "not" in the preceding quote is highlighted and bolded as it appeared in Appellant's original pleading.

February 18, 2011. Despite unequivocally filing a "Statement of Unequivocal Desire" that the Appellant would not be moving from the Idaho Falls area she, one week later, filed a "Motion to Reconsider" and a "Second Motion to Reconsider" asking the court to, in fact, move to Salt Lake City, Utah. The entry of the Appellant's pleadings oddly do not appear in the record on appeal but the same appears in the District Court's Register of Actions and are Referenced by the Court in its "Memorandum Decision Including Amendments to Findings of Fact and Conclusion of Law" in the record before this Court. R Vol. I, p. 116, L. 3-4.

April 29, 2011. Judge Blower signed a "Supplemental Order' wherein he says, "Because Dalrie filed her Statement of Unequivocal Desire on February 11, 2011 – advising the court that she will continue to reside in the Idaho Falls area – the children shall reside with Dalrie . . . ." R Vol. I, p. 125, L. 4-7.

August 11, 2011. The Appellant files a "Verified Petition to Modify Prior Court Orders." Appellant cites that there is a material change in circumstances and that she has now married her fiancé and desires to move with the children to Salt Lake City, Utah. It is important to note that this comes less than four months after the court's supplemental order and six months after she had filed her "Statement of Unequivocal Desire." The court denied the petition which the Appellant appealed to the District Court and The Honorable Judge Dane H. Watkins, Jr. affirmed the lower Court decision that there was not a material change in circumstances in that it was contemplated in the original decisions of Judge Blower. It should be concerning to this

Honorable Court that if Appellant believed she had full custody of the children then why would she need to modify the prior court orders in the first place? She could have moved to Salt Lake City without hindrance[1] until Respondent filed a petition to modify based upon her not complying with her own Statement of Unequivocal Desire. R Vol. I, p. 133.

November 25, 2011. The Honorable Steven A. Gardner enters an order denying Appellant's Verified Petition to Modify Prior Court Orders. The court became cognizant of Appellant's strategy involving her ability to move back to Salt Lake City with the children. "It appears that Dalrie has filed this petition because she regretted signing the "Statement of Unequivocal Desire" or thought to work around it after a very short period of time by changing her circumstances." R Vol. I, p. 140, L. 6-12.

Appellant was fully on notice of the court's orders as they are re-iterated in this November 24, 2011 Order. The court said, "This court is not, in any way, suggesting that the marriage by Dalrie to Mr. Cook is without merit as between the two of them, but it was entered into by Dalrie with full knowledge of the prior orders herein and how her custody would or could be effected." R Vol I, p. 140, L. 13-15.

March 25, 2013. Appellant filed her Second Petition to Modify Prior Court Orders. Plaintiff's second Petition mirrored the first and did not provide any substantial change in circumstances other than the fact that the Plaintiff wanted the children in Salt Lake City.

[1] Appellant in fact moved to Salt Lake City pending her Verified Petition to Modify, the court forced her to come back with the children upon which she filed a second "Statement of Unequivocal Desire."

June 6, 2013. Respondent filed his Motion to Dismiss Plaintiff's Petition to Modify Prior Court Orders.

August 30, 2013. The court dismissed the second Verified Petition to Modify. Importantly, the court said, "By her own conduct, it is clear that Dalrie never really intended to remain in Idaho Falls and that statements to that effect were not true. This is clearly demonstrated by the fact that since the time of the original orders herein Dalrie has twice petitioned to be relieved of her obligation to stay in Idaho Falls despite the fact that there are no changes of circumstances not previously litigated by the parties and contemplated by the court.

Dalrie is desperately seeking to substitute her current husband into the lives of children in place of Hugo. Nevertheless, Hugo is the father of the children and such attempted substitution is not only inappropriate but troubling." R Vol. II, p. 267, L. 1-8.

September 5, 2013. Respondent filed his Motion for Expedite Hearing as to Custody.

October 3, 2013. The Court issued its Order Granting Motion for Expedited Hearing as to Custody. Much of this order will be discussed further within this document. The court found, among other things, that the court's supplemental order was dependent upon the Appellant repudiating her intention to move to Salt Lake City with the children, which she in fact never did. Consequently, the Court was enforcing its prior court orders and awarding custody back to the Respondent.

Despite the Appellant's blatant intent to not follow her own pleadings with the court or its order, she saw it as an opportunity to skirt the orders of the court. She presents that the issues on appeal are:

1. Whether Judge Gardner committed error by granting a change of custody to the Respondent when there was not a petition to modify pending.
2. If Judge Gardner did not commit error whether he erred by not defining Appellant's visitation with the children.
3. Whether Judge Gardner erred by awarding Respondent Attorney fees pursuant to Idaho Code (I.C.) § 12-120.
4. Whether Appellant is entitled to attorney fees and costs on this appeal.

ADDITIONAL ISSUES ON APPEAL

5. Whether Respondent is entitled to attorney fees and costs on this appeal.

ARGUMENT

The law in Idaho is clear that orders affecting the custody and support of children are subject to the continuing control of the court and do not become final. Jones v. State, 85 Idaho 135, 376 P.2d 261 (1962); Smith v. Smith, 67 Idaho 349, 180 P.2d 853 (1947). The awarding of the custody of minor children, and the modification of decrees which award custody of minor children to one or both divorced parents involves judicial discretion which is to be exercised by the trial court, in the absence of an abuse of discretion it will not be disturbed on appeal. Thurman v. Thurman, 73 Idaho 122, 245 P.2d 810 (1952); Smith v. Smith, supra; Idaho Code § 32-705.

Child custody are questions for the trial court and it has been held, repeatedly, that the appellate court will not attempt to substitute its judgment and discretion for that of the trial court except in cases where the record reflects a clear abuse of discretion by the trial court. McGriff v. McGriff, 140 Idaho 642, 99 P.3d 111 (2004), Strain v. Strain, 95 Idaho 904, 523 P.2d 36 (1974). Idaho gives its requirements to show an abuse of discretion. A custody award will not be an abuse of discretion so long as the trial court: (1) recognized the issue as one of discretion; (2) acted within the outer limits of its discretion and consistently with the legal standard applicable to the available choices; and (3) reached its decision through an exercise if reason. Dani v. Dani, 146 Idaho 929, 204 P.3d 1140 (2009).

In the present case Judge Blower awarded custody of the children to the Respondent. Based upon his observations at trial as well as the observation of the experts he was concerned that the Appellant was attempting to sever connections the Respondent had with his children and

that by allowing the Appellant to move to Utah he would be effectively segregating father from the lives of the children. Consequently, in his Findings of Fact and Conclusions of Law from the custody trail Judge Blower said, "The Court has attached significant weight to Dalrie's plan to move away and the consequences that would accompany such a move. The court has given careful consideration to the opinions of court-appointed expert . . . . they shall reside primarily with Hugo unless Dalrie abandons her plans to move the children away . . . ." R Vol. I, p. 99, L. 5-14. Appellant, of course, filed her unequivocal statement of desire to remain in Idaho Falls in order to retain custody of the children.

From the record it is apparent that Appellant never intended to give up her plans to move to Utah. In fact, she filed two motions for reconsideration of Judge Blower's decision within one week of her filing her unequivocal statement to remain in Idaho Falls. Within four months the Appellant had filed her first Verified Petition for Modification of Prior Court Orders. Websters online dictionary defines "unequivocal" as, "admitting of no doubt or misunderstanding having only one meaning or interpretation and leading only to one conclusion." See www.websters-dictionary.org/definition/unequivocal.

Appellant had married and moved to Utah within the four months that it took for Judge Blower to make its decision regarding custody. In any wedding there is planning, etc. Futher it was evident in the trial that Appellant had planned to move in with her fiancé in Utah. At the time of the filing of her unequivocal statement the evidence that she herself presents before the court shows that her statement was false, and was meant to buy time in order for her to form a

legal strategy to skirt the court's order not allowing her to move to Utah with the children. When that was denied, she tried again based upon the same grounds.

The issue for any sitting court then becomes at what point does it enforce its prior orders. The court clearly found it in the children's best interests that Respondent should retain physical custody of the children should Appellant move to Utah and since actions speak louder than words the Appellant put the trial court in a precarious spot. Should the court continue to allow the Appellant to repudiate her unequivocal intention or should the Court enforce its orders over a rogue party.

Idaho Rule of Civil Procedure (IRCP) 60(b)(6) allows the court to address the predicament in which the Appellant placed the court. It says, "On motion and upon such terms as are just, the court may relieve a party of his legal representative from judgment, order, or proceeding for the following reasons . . . (6) any other reason justifying relief from the operation of the judgment."

The court used IRCP 60(b)(6) to recognize that Appellant had filed a falsehood with the court and or establish custody as the court had original intended, after three days of trial with witness and expert testimony. In Maynard v. Nguyen, 152 Idaho 724, 274 P.3d 589 (2011), this Court said with respect to a court's decision under IRCP 60(b)(6), "A trial court's decision whether to grant relief pursuant to IRCP 60(b) is reviewed for abuse of discretion. The decision will be upheld if it appears that the trial court (1) correctly perceived the issue as discretionary, (2) acted within the boundaries of its discretion and consistent with the applicable legal standards, and (3) reached its determination through an exercise of reason. A determination of a

Rule 60(b) turns largely on questions of fact to be determined by the trial court. Those factual findings will be upheld unless they are clearly erroneous. If the trial court applies the facts in a logical manner to the criteria set forth in Rule 60(b), while keeping in mind the policy favoring relief in doubtful cases, the court will be deemed to have acted within its discretion."

Judge Gardner was mindful of Maynard and cited it in his Order Granting Motion for Expedited Hearing As to Custody. He said, "The court recognizes that whether or not to grant relief under Rule 60(b)(6) is a matter within the court's discretion." R Vol. II, p. 323, L. 10-20. Judge Gardner goes on by delineating the court's position. "The *Supplemental Order* was in the alternative and based upon a deliberate misrepresentation to the court by Dalrie, the court ordered that she should have physical custody of the minor children. The court in its discretion finds that without the deliberate misrepresentation, Hugo would have been granted primary physical custody of the children. The court therefore, based upon the misrepresentation by Dalrie, should order that the primary physical custody of the children should be granted to Hugo." R Vol. II, p. 323, L. 18-23. Rule 60(b)(6) affords the court an opportunity to correct a misrepresentation to the court and do justice and equity.

Appellant has not cited any case law or statute which would preclude the court from using its equitable powers in this fashion. Idaho has long held that court's have inherent equitable powers in order to correct a manifest injustice. Despite the Appellant arguing that the Respondent should have brought a motion under Rule 60(b)(6) or should have filed for a modification of custody these are not required under the current state of law. In Campbell v. Kildew, 141 Idaho 640, 646, 115 P.3d 731 (2005) the Idaho Supreme Court stated the standing

law in Idaho which is a district court can *sua sponte* set aside that judgment under the Rule 60(b) powers. Compton v. Compton, 101 Idaho 328, 333, 612 P.2d 1175 (1980); Eliopulos v. Idaho State Bank, 129 Idaho 104, 108-109, 922 P.2d 401 (Ct.App. 1996).

In the present case before this Court although Respondent filed a motion which predicated Judge Gardner's invoking Rule 60(b)(6) he certainly was not required to wait for it. Idaho courts do not put form over function. For the Appellant to argue that the court must wait before it addresses its fraud takes power and equity from the hands of the court and places it squarely in those of the malfeasant.

To argue that Respondent would have to file a petition to modify custody in order to have custody of the children begs the question: then why did appellant file two verified petitions for custody, one in late 2011 and another in early 2013, if she truly believed that she had complete physical custody of the children and that she would have until the Respondent filed a motion with the court. Wouldn't she have just moved with the children and then waited for the Respondent to file his petition?

Appellant argues that even if Judge Gardner's order should stand he, at least, did not adequately order visitation. True or not Judge Gardner order reinforces the Findings of Fact and Conclusions of Law specifically entered by Judge Blower. Judge Blower ordered that should Appellant not file a statement of desire to not relocate then custody rests with Respondent. In that event, the Court ordered that it would be up to the parties to either agree on visitation or bring the matter back before the court for further orders. R Vol. I, p. 99.

Judge Gardner provided a rubric for visitation in its order. This does not preclude the parties from coming back before the court and re-establishing a different visitation schedule. The Appellant is free and has adequate counsel to prefect such a maneuver.

Regarding the issue of attorney fees and costs that were granted to the Respondent by Judge Gardner pursuant to Idaho Code 12-120. While in some civil litigation cases fees may be obtained pursuant to 12-120, in this case the proper code section would have been Idaho Code 12-121. Consequently, it is conceded that this issue should be remanded to the lower court for further consideration and an awarding of fees under the proper code section.

Respondent should be awarded his fees and costs on appeal pursuant to Idaho Rule of Appellate Procedure 41 and 35. The basis for the claim is that the majority of the appeal deals specifically with the issue of whether Judge Gardner had authority to grant relief in the form that he did. Judge Gardner did indeed have that authority, and his actions were based upon the Appellant committing a misrepresentation to the court. For this reason attorney fees and costs for the appeal should be awarded to the Respondent.

CONCLUSION

Judge Gardner acted within his authority to correct an injustice perpetrated by the Appellant upon the Respondent. In so doing he rightfully awarded custody of the children to the Respondent, something that Judge Blower had originally ordered but for the fraud perpetrated by the Appellant. Respondent should prevail as to this issue and be awarded costs and attorney fees associated therewith. The issue of which code section for attorney fees that Judge Gardner should have used should be remanded to the lower court for further determination.

CERTIFICATE OF SERVICE

I hereby certify that I am a licensed attorney in Idaho, with my office in Idaho Falls, that on the 25th day of April, 2014, I served a true and correct copy of RESPONDENTS BRIEF on the party listed below, by hand-delivery.

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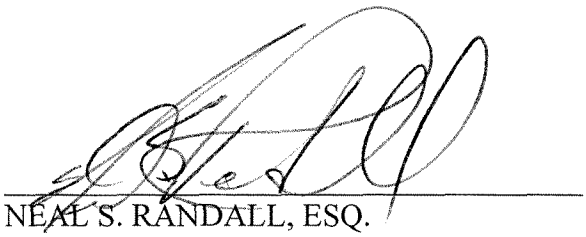

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