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Thompson v. Bybee Appellant's Reply Brief Dckt. 44113

IN THE SUPREME COURT OF THE STATE OF IDAHO

JON THOMPSON, Petitioner-Respondent, vs. KEL-LEE BYBEE, Respondent-Appellant.	)	Case No. CV-DR-1998-2366D Supreme Court No. 44113

APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE GERALD F. SCHROEDER

District Judge

JOHN R. SHACKELFORD
Ada County Public Defender
200 W. Front, Suite 1107
Boise, Idaho 83702

ATTORNEY FOR RESPONDENT-APPELLANT

ANTHONY PANTERA
Moore, Smith, Buxton & Turcke, Chdt.
950 W. Bannock Street, Suite 520
Boise, Idaho 83702

ATTORNEY FOR PETITIONER-RESPONDENT

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I. Ms. Bybee Cannot be Held in Contempt for Violating I.C. § 32-717B(3) Because it is Not a Clear and Unequivocal Command of the Court.

Mr. Thompson contends Ms. Bybee was correctly convicted of criminal contempt because the definition of joint legal custody is a "clear and unequivocal command that the parties must at a minimum discuss matters relating to health, education, and general welfare of their children." (Resp't Br. 5.) This argument is wrong because: (1) I.C. § 32-717B(3) is not a "judgment, order or process of the court," and (2) I.C. § 32-717B(3) does not clearly and unequivocally proscribe Ms. Bybee's alleged misconduct.

A. The definition of "Joint Legal Custody" at I.C. § 32-717B(3) is not a command of the court and cannot be enforced pursuant to I.C. § 7-601(5).

Mr. Thompson prosecuted Ms. Bybee on the theory that she disobeyed "a lawful judgment, order or process of the court." I.C. § 7-601(5). As previously argued in Appellant's Brief, the plain language of the Order's joint legal custody award does not command the parties to do or refrain from doing anything. It appears that Mr. Thompson concedes this point and instead argues that Ms. Bybee was properly held in contempt because the definition of joint legal custody, codified at I.C. § 32-717B(3), is *itself* a clear and unequivocal command of the court. (Resp't Br. 5.)

Mr. Thompson fails to cite to any authority for the novel proposition that I.C. § 32-717B(3) is a "lawful judgment, order or process of the court" rather than a creation of the legislature. The only support Mr. Thompson draws upon is the following slippery slope fallacy:

> "If Ms. Bybee's position were taken to its local conclusion, one could not be found in contempt unless each word used in an order or judgment were defined, and/or the entire universe of potential issues and decisions that impact a child's health, education or general welfare were defined in an order or judgment for a party to the agreement to have any contempt remedy."

(Resp't Br. 6.) This argument presupposes that the language of I.C. § 32-717B(3) was crafted to provide a contempt remedy for parties awarded joint legal custody by court order. There is no authority supporting this belief. Mr. Thompson's *reductio ad absurdum* argument also ignores the possibility that the verbatim definition of joint legal custody could easily be written directly into the Order and supplant the ineffectual "award" of joint legal custody. Nonetheless, the magistrate agreed with Mr. Thompson, (Tr. p.56, Ls.10-25—p.57, Ls.1-10) as did the district court. (R.98.)

The rulings of the lower courts undermine Idaho's bright-line rule that a respondent cannot be held in contempt unless the court order actually commands or enjoins specific conduct. *Bald, Fat & Ugly, LLC v. Keane*, 154 Idaho 807, 303 P.3d 166 (2013); *Albrethson v. Ensign*, 32 Idaho 687, 186 P.911 (1920). If adopted, these rulings would create a loophole in existing case law whereby a respondent could be convicted of violating a court order that does not contain a command, so long as the order employs a term of art that is defined by statute in such a way that it can be construed as a command. Whether someone could be held in contempt in such cases would then turn on the manner in which the legislature drafted the statute. Idaho Code § 7-601(5) punishes violations of court orders—not state statutes—and court orders cannot be "expanded by implication or intendment." *Terminal R. Ass'n of St. Louis v. United States*, 266 U.S. 17, 29, 45 S.Ct. 5, 8 (1924). This Court should vacate the judgment of the district court simply because the allegedly-violated provision of the Order does not command the parties to do or refrain from doing anything.

B. The definition of "Joint Legal Custody" at I.C. § 32-717B(3) does not clearly and unequivocally prohibit Ms. Bybee's alleged misconduct.

Assuming *arguendo* that the court's award of joint legal custody implicitly commands the parties to "share the decision-making rights, responsibilities and authority relating to the . . .

general welfare of a child," this language is too vague to be enforced with the contempt power. *Cf. Carr v. Pridgen*, 157 Idaho 238, 335 P.3d 578 (2014); *State v. Rice* (*In re Elliott*), 145 Idaho 554, 181 P.3d 480 (2008).

If I.C. § 32-717B(3) were actually a criminal statute—as it is being treated here—Ms. Bybee would have been entitled to challenge it as being unconstitutionally vague.[1] *See*, *State v. Kavajecz*, 139 Idaho 482, 486, 80 P.3d 1083, 1087 (2003) (criminal statutes must plainly and unmistakably provide fair notice of what is prohibited and what is allowed in language persons of ordinary intelligence will understand). To succeed on an "as-applied" vagueness challenge, Ms. Bybee would have had to show that I.C. § 32-717B(3) failed to provide fair notice that her conduct was prohibited or that it failed to provide sufficient guidelines to prevent discriminatory enforcement. *See, State v. Kelley*, 361 P.3d 1280, 1285, 2015 Ida. App. LEXIS 116, *4 (Ct. App. 2015) *citing State v. Pentico*, 151 Idaho 906, 265 P.3d 519 (Ct. App. 2011).

Mr. Thompson's own testimony demonstrates that I.C. § 32-717B(3) fails to provide either fair notice of what conduct is prohibited or sufficient guidelines to prevent discriminatory enforcement. He first testified that he believes that joint legal custody requires the parties to come to an agreement on *all* decisions regarding Ashby's well-being. (Tr. p.31, Ls. 7-17.) In addition to being legally untenable (s*ee*, *Carr v. Pridgen*, 157 Idaho 238, 243, 335 P.3d 578, 583, (2014) discussing inefficacy of court order that purported to require the parties to reach an agreement) this understanding also contradicts Mr. Thompson's conclusion that he did not violate joint legal custody by taking Ashby out of state without Ms. Bybee's knowledge or consent. (*See*, Tr. p.34 Ls. 4-24.) In apparent recognition of the contradiction, Mr. Thompson

[1] Ms. Bybee would have also relied upon the Rule of Lenity. *See, e.g.*, *State v. Culbreth*, 146 Idaho 322, 326, 193 P.3d 869, 873 (Ct. App. 2008) ("When it is a criminal statute that is at issue, the court must construe the statute strictly and in favor of the defendant.").

then testified that joint legal custody means that only "major decisions, life-changing decisions be discussed between both parties." (Tr. p.41, Ls. 2-3.)

Ultimately, even if the requirement to "share the decision-making rights" was explicitly included in the Order, that language still does not clearly prohibit the alleged misconduct. This case is not unlike *Carr v. Pridgen*, 157 Idaho 238, 335 P.3d 578 (2014). In *Pridgen*, the magistrate held the respondent in contempt for unilaterally enrolling her child in school in violation of an order stating that major decisions about the child's education, "(such as which school they will attend) will be made by Both Parents." 157 Idaho at 241, 335 P.3d at 581 n1. The magistrate found a violation because "if one person, on their own, unilaterally decides where the child is going to go, that's a violation of the joint legal custody." *Id.* 157 Idaho at 243, 335 P.3d at 583. This Court reversed the magistrate because the allegedly-violated provision was "silent as to the parties' duties in the event of a failure to reach agreement as to [the child's] education." *Id.*

Here, the purported command to share decision-making authority is actually less clear than the order in *Pridgen.* Mr. Thompson interprets this purposed command to mean that the parties sharing joint legal custody must discuss a matter relating to the child's general welfare before any action is taken relative to the matter. He fails to explain, however, why the command does not actually say that. Ms. Bybee cannot be held in contempt for violating Mr. Thompson's interpretation of I.C. § 32-717B(3).

Finally, Mr. Thompson's understanding of joint legal custody has the absurd result of increasing Ms. Bybee's criminal liability: if Mr. Thompson had *sole* legal custody over Ashby, Idaho law still would have empowered Ms. Bybee to consent to her daughter's marriage, but she would not have been subject to the vague requirements imposed by "joint legal custody." I.C. §

32-202 (a marriage license for a person between 18 and 16 years of age "shall not be issued except upon the consent in writing duly acknowledged and sworn to by the father, mother or guardian of any such person if there be either . . ."). In other words, the "award" of joint legal custody in this case only served to punish Ms. Bybee. Even if the definition of joint legal custody, as expressed by the legislature, were somehow incorporated into the Order, Ms. Bybee's conviction must still be vacated because the definition does not clearly and unequivocally prohibit her alleged misconduct.

CONCLUSION

The legislature's definition of joint legal custody is not a judgment, order or process of the court, and it does not provide a "catch-all" command that aggrieved parents can use to prosecute contempt actions. Even assuming, however, that the legislature's definition is fully incorporated into the allegedly-violated Order, it is not sufficiently clear to put Ms. Bybee on notice that consenting to her daughter's marriage could result in the imposition of criminal sanctions. Defendants in contempt actions simply cannot be forced to guess at the meaning of the allegedly-violated order. Ms. Bybee respectfully requests, therefore, that this Court vacate the judgment of the district court affirming the magistrate's finding of contempt. Ms. Bybee also requests that costs be awarded to her pursuant to I.C. § 7-610 so that the cost of this private suit is not borne entirely by the public. Oral argument is not requested.

Respectfully submitted this 29th day of August, 2016.

John R. Shackelford
Attorney for Ms. Bybee

CERTIFICATE OF SERVICE

I certify that I caused to be served a correct copy of the Appellant's Reply Brief on this 29th day of August 2016 by sending it to:

Jon Thompson
c/o Anthony Pantera, Attorney for Mr. Thompson

by fax to the following number: (208) 331-1202

Jessica Vipperman
Ada County Public Defender—Legal Assistant