

COURT OF APPEALS, STATE OF COLORADO
2 E. 14th Ave., Denver CO 80203

Douglas County District Court
Case No. 97 DR 0704
The Honorable Kenneth Barnhill, Judge

In re the Custody of:

TWM,
Impartial,

Upon the Petition of :

CAROLYN TAYLOR,
Petitioner / Appellee
And concerning:

GORDON STADNYCK,
Respondent / Appellant

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▲ COURT USE ONLY ▲

Case No. 04 CA 2318

REPLY BRIEF

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Appellant, Gordon Stadnyck, submits the following reply to Appellee's Answer Brief.

STATEMENT OF THE CASE

In her Answer Brief, Appellee ("mother") rewrote the procedural history of the parties' relationship, dating back to 1999 and in voluminous detail, as though it were relevant to the three issues raised in father's Opening Brief (which primarily concern the procedural legality and outcome of a September 2004 contempt proceeding).

Aside from the lack of relevance, her portrayal of the procedural background contains legion misrepresentations of material fact, most of, which are outside the record (thus, impossible for the reviewing Court to consider or confirm). Examples of mother's falsification of the Record include the chronological and factual details of father's employment of counsel, the content of the January 1, 2001 Special Advocate Report, that Judge King issued a minute order on May 7, 2004 requiring only supervised parenting time until the Special Advocate's retainer was paid (Answer at p. 13.), *inter alia*.

Mother alleges that, "the father had told [the Special Advocate that] he had no intention of paying the Court-ordered retainer fee." Answer at p. 6, lines 1 – 2. In fact, as father had already established, father attempted to initiate a payment plan, which the Special Advocate rejected. Op. Brief at pp. 12 – 13. Mother pointed out her foundationless "concerns" regarding father's mental health, yet omitted that the father's psychological testing concluded with, "no pathologies," and also that the outcome of mother's child abuse indictment (Vol. 7, p. 32) was her conviction. Mother omitted that the trial judge's statement that she cited at p. 7 of her Answer that, "there's some real danger to this child," was based solely upon the hearsay

contained in the letter of David Kieffer, MFT (Vol. 2, p. 255 & Vol. 7, p. 138, line 9 – 10,), a Special Advocate who resigned when father requested his notes. Mr. Kieffer's SA Report recommended liberal parenting time and did not find that the child was in any imminent danger. Mr. Kieffer was not present for cross-examination and the statements referred to in Kieffer's Nov. 24, 2003 letter were based on no data.¹

Mother claims that father willfully failed to pay the Special Advocate retainer in one full, lump-sum payment because, she explained, father managed to survive during the six months that he was unemployed; father exercised his First Amendment right to petition to the federal court (in an unrelated matter); and because father complied with Judge Barnhill's order (in a collateral case) to exercise parenting time with his other daughter by making trips (at father's expense) to the East coast. If father had failed to exercise parenting time in that case, mother would now be attempting to introduce evidence (outside the Record) of his alleged disinclination to spend time with his [other] daughter or comply with the order of the [same] trial court. Here, mother has cited father's **compliance** (in the other case) as byproduct-evidence of a deliberate willful failure to comply with orders in the case at bar. Finally, mother's claims that father did (or did not) participate in supervised visitation arrangements is a matter clearly outside the Record and, thus, cannot be considered.

Mother did not dispute in her Answer that: the citation for contempt issued to father was identified as, punitive (not remedial); that the Court (rather than mother) did not direct father to

¹ Section 9.01(a) of the Ethical Principles of Psychologists and Code of Conduct 2002, promulgated by the American Psychological Association states, "Psychologists base the opinion contained in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, on information and techniques sufficient to substantiate their findings."

prepare to answer an issue of remedial contempt; that the trial judge predetermined father's guilt; that alleged contemnors are entitled to all of the same procedural due process standards afforded to a criminal defendants; that father was not advised of his right to have the matter heard before a different judge; that mother's counsel's testimony (Vol. 7 at p. 35) was a violation of the Rules of Professional Conduct §3.4(e); that father was deprived of the opportunity to cross-examine either Mr. Kieffer or Mr. Meehan (upon whose alleged claims the contempt sanctions were, in part, based); that, even if the contempt was remedial in nature, father had already purged the contempt (as set forth in the citation); that the actual reason the Special Advocate had not yet been paid prior to Sept. 21, 2004, was because he refused father's partial payments; or that the significant restriction placed on father's parenting time was based on speculative notions of potential harm. Mother did not dispute that the trial judge's significant restriction on parenting time, including telephone contact, was solely because, "I want to get Mr. Stadnyck's attention," which was an arbitrary, unreasonable and unfair purpose.

ARGUMENT

Mother argued that, because *mother's counsel* (not the court) sent a letter to father threatening jail-time and other possible sanctions, that he had notice of a remedial action, which she implied should substitute for the actual citation issued by the trial court. Answer at p. 10. This faulty reasoning undermines the purpose of the notice provision and the case precedents that hold that the contempt charged must be that appearing thereon the citation. *Eatchel v. Lanphere*, 170 Colo. 545, 463 P.2d 457 (1970). Mother argued that, "Adequate notice is provided by virtue

of the father's knowledge he had an obligation to pay and his willful violation of the existing orders would subject him to the possibility of a contempt action," and, yet, mother did not deny that father had already paid the Special Advocate, thereby discharging or "purging," the remedial contempt that she claims that the father was noticed to address that day. As such, any further imposition of sanctions beyond that was capricious and arbitrary, as a matter of law.

Public policy encourages frequent contact with the non-residential parent, and a trial court may not restrict parenting time unless the court adequately finds that it would endanger the child's physical health or significantly impair the child's emotional development, which constitutes the "compelling state interest" element of the Strict Scrutiny Doctrine. C.R.S. § 14-10-129(1); *In re Marriage of Finer*, 920 P.2d 325, 328 (Colo.App. 1996); *In re Marriage of Martin*, 42 P.3d 75, 78 (Colo.App. 2002). Here, the trial court's conclusion that the child was in any danger is not supported by competent evidence. The law in Colorado requires at least as much and nothing less.

Mother cited C.R.S. § 14-10-124 and *In Re Marriage of McGee* to assert that, "The best interests of a child must predominate in any hearing." 613 P.2d 348 (Colo.App. 1980). However, in *People ex rel. E.L.M.C.*, 100 P.3d 546 (Colo.App. 2004), the Court opined that, "[U]se of the best interests test to discern a compelling state interest could be problematic." (citing *Rideout v. Riendeau*, 2000 ME 198, 761 A.2d 291 (Me. 2000) (the best interests standard "delegates to judges authority to apply their own personal and essentially unreviewable lifestyle preferences to resolving each dispute"))).

In *E.L.M.C.*, the court embraced the Strict Scrutiny Doctrine, finding that, "due process requirements [are] met under statute that requires presumption that fit parent acts in best interest

of child and places burden to show otherwise on petitioner." (citing *State v. Paillet*, 270 Kan. 646, 16 P.3d 962 (2001)) and established a requirement for "proof that a fit parent's exercise of parental responsibilities poses actual or threatened emotional harm to the child establish[ing] a compelling state interest sufficient to permit state interference with parental rights . . . consistent with existing federal limitations on a parent's fundamental right to direct the upbringing of the child."

Despite *E.L.M.C.*, mother cited *People ex rel. A. R. D.*, 43 P.2d 632 (Colo.App.2001.) (actually reported in the Pacific 3rd) to slip by her preferred viewpoint that, "A heightened standard is not necessary to protect a parent's fundamental constitutional right to maintain a relationship with his child." Answer at pp. 10 – 11. However, the *A.R.D.* court made no such holding and mother's assertion is misleading and in bad faith. The *A.R.D.* court's conclusion that the burden of proof [that parenting time with the non-custodial parent was in the best interests of the child] belonged to the non-custodial parent was based specifically and solely on the fact that he had been, "convicted of incest with a daughter from a prior marriage," which is one of the crimes enumerated under section 14-10-129(3)(b)(VIII) (C.R.S. 2000).² *Id.* at *6. In the case at bar, father had been convicted of no crime under § 14-10-129(3)(b)(VIII).

Though the mother had been convicted of child abuse, the trial court refused to give any consideration, as required under C.R.S. § 14-10-124(1.5), to whether one of the parties had been a perpetrator of child abuse or neglect (Vol 7, p. 32, lines 21 – 25). This oversight is an error of

² Under § 14-10-129(3)(a), the person granted custody of or parental responsibility for the child may object to parenting time by a parent who has been convicted of any of the crimes listed in the statute. The offending parent shall have the burden at the hearing to prove that parenting time by such parent is in the best interests of the child.

law, subject to *de novo* review. A trial court's ruling not adequately supported by findings of fact or conclusions of law must be vacated. *Marriage of Goodbinder*, 2005 Colo.App. LEXIS 1010. The trial court's restriction on father's parenting time and arbitrary, capricious elimination of telephone contact was an abuse of discretion. A trial court abuses its discretion when it acts in a manifestly arbitrary, unfair, or unreasonable manner. *In re Marriage of Page*, 70 P.3d 579, 581 (Colo.App. 2003); and see *Guevara v. Foxhoven*, 928 P.2d 793 (Colo.App. 1996), establishing a standard for determining when a trial court has abused its discretion.

CONCLUSION

The trial court's ruling, findings and orders, including the suspended sentence of imprisonment, the award of attorneys' fees and the revocation of parental contact arising from the September 22nd 2004 contempt proceedings should be reversed and the case remanded with instructions for the immediate reestablishment of the parental relationship.

Respectfully submitted this 1st day of August 2005.

Gordon Stadnyck

CERTIFICATE OF MAILING

I hereby certify that on this 1st day of August 2005 a true and correct copy of the above and foregoing **REPLY BRIEF** was placed in the U.S. Mail, first-class postage prepaid, addressed to:

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