

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Parentage of
[REDACTED] CHRISTIANSON,
d.o.b. [REDACTED],

Child,

JAMES D. CHRISTIANSON,

Petitioner,

and

[REDACTED],

Respondent.

No. 54430-6-1

COMMISSIONER'S RULING
GRANTING DISCRETIONARY
REVIEW

James Christianson seeks discretionary review of the trial court ruling that [REDACTED] the mother, established a substantial change of circumstances warranting a trial for a minor modification of the parenting plan. The trial court focused primarily upon the mother's realization that conflict had not abated and that she made a mistake when she agreed to very limited visitation two years earlier. Although the court has broad discretion, such a "change of heart" does not appear to be a substantial change of circumstances. The other changes argued by [REDACTED] do not appear to be significant. Therefore discretionary review is granted.

FACTS

█████ Christianson was born on █████. Seven months later, █████ decided to move to California where she completed a master's degree. She agreed to a parenting plan granting primary residential placement of █████ with Christianson and including very limited visitation for █████ did not exercise any visitation or initiate any other contact with █████ from October 1, 2001 until May 24, 2003.

Christianson gave notice of relocation in March 2003, when he needed to move from Kenmore to Federal Way. Wright initially objected to the relocation. In the course of the proceedings, Christianson and █████ agreed to temporary orders allowing █████ some additional visitation.

On May 24, 2003, █████ traveled from California to visit with █████. █████ did not utilize the full amount of visitation provided for in the temporary agreed orders. █████ amended her pleadings to drop her opposition to Christianson's relocation but sought a modification of the parenting plan increasing her visitation. A guardian ad litem was appointed and filed a report criticizing Christianson and recommending that increased visitation with the mother would be in the child's best interests.

A superior court commissioner determined that the mother had not established a significant change of circumstances and thus was not entitled to a modification trial. On revision, a superior court judge reviewed the pleadings in the court file and concluded that █████ established both a substantial change of circumstances and that the limited visitation was not in the child's best interest.

The court acknowledged that the substantial change of circumstances requirement presents a very close question:

The issue remains whether there is a substantial change in circumstances "of either parent or of the child." Mother's argument appears to be that she was in such conflict with the father, that she agreed to the prior plan to stop the conflict. Nevertheless the conflict has continued essentially unabated. She now realizes her mistake in agreeing to the initial plan. Her situation has changed, as she continues with her education.

It is a close question, but this court concludes upon de novo review that there is a "prima facie" case of "substantial change in circumstances" to permit a trial on the minor modification. The court notes that there has been increased visitation under various temporary orders pending trial.

(Footnote omitted.) The superior court denied reconsideration observing that:

whether there has been a substantial change in circumstances is a close factual question in this case. However, the court stand by its ruling that the mother's changed situation in California is enough to permit the minor modification on increased visitation to go forward. . . .

Christianson filed a timely notice of appeal review from the order denying reconsideration. In response to this court's motion to determine whether this matter was appealable or subject to discretionary review, Christianson filed a motion for discretionary review.¹

¹ Wright objects that motion for discretionary review is untimely. Christianson filed his motion for discretionary review in response to the court's letter directing him to appear and establish that he is entitled to review as a matter of right or to satisfy the criteria for discretionary review. Christianson was complying with this court's directive, and 's objection to the timeliness of the motion for discretionary review is denied.

CRITERIA FOR DISCRETIONARY REVIEW

Discretionary review is available only:

(1) The superior court has committed an obvious error which would render further proceedings useless;

(2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;

(3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or

(4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b).

DECISION

The superior court has discretion in deciding whether to grant a minor modification to a parenting plan, but it is an abuse of discretion to fail to base a modification ruling upon the statutory criteria. Marriage of Hoseth, 115 Wn. App. 563, 569, 63 P.3d 164, review denied, 150 Wn.2d 1011 (2003).² A minor modification of a parenting plan requires a showing of substantial change of circumstances of either parent or of the child. RCW 26.09.260(5). The change must be grounded upon facts that did not exist or were not anticipated at the

² argues that review should not be granted because Christianson only filed a notice of appeal challenging the order denying reconsideration and abuse of discretion of that ruling would be a very narrow appeal. It appears that the same abuse of discretion standard of review would apply to either order, but the parties can explore the precise standard of review in more detail in their briefing on appeal.

time the plan was approved. As recognized by the superior court in its written ruling, ordinary life events can be sufficient change of circumstances:

[there is not] a bright-line rule that ordinarily anticipated life events will always bar a finding of a substantial change of circumstances. The determinative considerations are whether the facts underlying the substantial change of circumstances existed at the time of entry of the prior or original plan or were unanticipated by the superior court at that time. RCW 26.09.260(1). If the underlying facts did not exist or the prior or original plan did not anticipate the substantial change in circumstances, the superior court may adjust the parenting plan. RCW 26.09.260(5).

Marriage of Hoseth, 115 Wn. App. at 571. But it appears that a change in circumstances is only substantial if it makes increased visitation more practical and beneficial to the child, such as a relocation that significantly decreases travel time required for overnight visitations, or it results in a more inviting environment for residential time, such as the favorable impact that a new domestic partner would have on the quality of visits. Marriage of Hoseth, 115 Wn. App. at 572-73. A decrease in conflict between the parents may be in the child's best interests, but that is a different factor than a substantial change of circumstances. In Hoseth, the trial court referred to the parents' renewed battle over the parenting plan and recognized that the existence of dispute is not healthy for a seven-year-old child, but the appellate court recognized this concern as "likely pointed at the best interests of the child," a concern separate from the required substantial change of circumstances. 115 Wn. App. at 573.

Here the trial court mentioned [redacted]'s education and noted increased visitation, but focused upon [redacted]'s realization that conflict did not abate with the agreed parenting plan and that limited visitation was not in [redacted]'s best

interests. remains in California and conflict with Christianson continues over support and visitation. It appears that the only change in 's circumstances are her completion of a master's degree program in California and her decision that she made a mistake two years earlier when she agreed to limited visitation. It is not clear how these changes potentially make increased visitation more practical and beneficial to the child.

argues numerous (25) changes in circumstances exist including the father's relocation, his employment changes, his unsuccessful attempts to modify child support, with numerous references to the guardian ad litem's report. But none of those changes were relied upon by the court. And most have little, if any, bearing on the suitability or availability of either parent or the child for increased visitation with

The superior court noted that there has been increased visitation. But the father points out that although the temporary orders included the potential for increased visitation above the level provided for in the agreed parenting plan, the mother still has not actually exercised visitation beyond the level provided for in the agreed parenting plan.

Of course, a child's best interest is always a primary concern. But the statutory scheme also requires a substantial change of circumstances to allow a minor modification. It does not appear that a parent's change of heart several years after agreeing to limited visitation is a significant change of circumstances. If a parent's realization that they made a mistake can be a substantial change under the circumstances presented in this case, then valuable guidance could be

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provided by an appellate decision addressing that point. Discretionary review is appropriate. This appeal shall be promptly perfected because it impacts the status of a young child. Christianson has already filed his designation of clerk's papers and statement of arrangements. It appears that the record on appeal should be perfected by September 20, 2004. Christianson should file his opening brief by October 20, 2004.

Now, therefore, it is hereby

ORDERED that the motion for discretionary review is granted. It is further

ORDERED that Christianson shall perfect the record on appeal by

September 20, 2004 and shall file his opening brief by October 20, 2004.

Done this 18th day of August, 2004.



Court Commissioner

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