2016

Kirsteen Blocker (a.k.a. Morkel), Petitioner/ Appelle, v. Michael Blocker, Respondent/ Appellant.

Utah Court of Appeals

No. 20150720

In the Utah Court of Appeals

Kirsteen Blocker (a.k.a. Morkel),
Petitioner/Appellee,

v.

Michael Blocker,
Respondent/Appellant.

On Appeal from the Fourth District Court, State of Utah
Utah County
Judge Taylor

Reply Brief for Appellant

ORAL ARGUMENT REQUESTED

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APPELLEE'S ARGUMENTS FAIL TO SHOW THAT THE DISTRICT COURT'S ORDER WAS PROPERLY BASED ON A MATERIAL CHANGE IN CIRCUMSTANCES AS REQUIRED BY UTAH LAW, NOR DO THEY SHOW THAT APPELLANT'S DUE PROCESS AND OTHER RIGHTS WERE NOT VIOLATED; THEREFORE, THIS COURT SHOULD REVERSE THE DISTRICT COURT'S RULING.

A. Morkel's argument is in error when she claims that Blocker failed to preserve the change of circumstances issue on appeal.

Morkel erroneously argues that Blocker failed to preserve the change of circumstances issue on appeal. Utah Rules of Appellate Procedure 24 requires that the appellant must provide a showing that the issue was preserved in the trial court. Three elements are required for preservation. First, the issue must be raised in a timely fashion. Second, the issue must be specifically raised, and third, the party must introduce evidence or legal authority in support of the issue. *Badger v. Brooklyn Canal Co.*, 966 P.2d 844, 847 (Utah 1998).

Blocker did properly preserve the issue below as he demonstrated in his brief.[1] First, the issue must be raised in a timely fashion. Blocker raised the issue of his objection to the petition to modify and specifically the lack of specificity in the alleged "material change in circumstances" during the June 10, 2015 hearing. (R. 6330 p. 9, lines 8-9.) Although he was cut-off by Judge Taylor before he was able to fully make the substance of his objection clear, Blocker said, "I would like to express on the record that I strenuously object with that for the following . . .." It is clear from the context of the statement that "that" in Blocker's statement referred to Judge Taylor's statement that he was going to rule that Morkel had shown a

[1] Ironically, Morkel's brief even more directly shows the preservation of the issues by directly quoting the dialogue between Blocker and Judge Taylor that preserves the issue. *See* Appellee's Brief pages 21-22.

material change in circumstances. Second, the issue must be specifically raised. Again, Blocker attempted to be specific by telling Judge Taylor that he had "reasons" that he wanted to raise. (*See* R. 6330 p. 9, line 11.) However, he was cut off by Judge Taylor who immediately overruled his attempt to speak. Again it is clear from the context that Blocker was attempting to specifically raise the issue of Taylor's conclusion that Morkel had shown a material change in circumstance. It would be putting form over substance to reject Blocker's appeal for lack of preservation at this point simply because Judge Taylor's continuous interruptions of a pro se party who felt bullied by a judge prevented Blocker from completing his sentence and thus preventing the "specificity" required by Rule 24. Finally, in compliance with the third requirement to preserve the issue for review, Blocker next attempted to state the law governing the issue: "Okay, may I state the law regarding this?" (R. 6330 p. 9, line 13.) As with his previous attempts he was cut off, being told "No, I'm familiar with the law. That's my ruling." (R. 6330 p. 9, line 14.) Blocker persisted: "Hogue v. Hogue, you're familiar with that?" (R. 6330 p. 9, line 15.) Clearly, by raising the issue in a timely matter, with specificity, and with direct citation to governing law, Blocker preserved the issue on appeal.

B. Morkel's argument that marshaling applies to this appeal is erroneous because marshaling only applies to appeals challenging findings of fact.

Morkel contends that all arguments in the Appellant's brief on the merits should be stricken for failure to marshal evidence; however, Morkel is in error because Utah's marshaling requirement only applies to appeals challenging findings of fact employing a "clear error" standard of review, and Blocker does not challenge factual findings. Nowhere in her argument has Morkel either directly or indirectly argued for such a standard of review. Blocker's appeal

challenges a conclusion of law: whether Morkel sufficiently proved and the court below was justified in concluding that she had proved a substantial change in circumstances, which is a legal conclusion, not a finding of fact. The standard of review Morkel asks this Court to adopt is unclear; in some places she seems to be asking the Court to apply an abuse of discretion standard while in others she seems to be seeking de novo review, but nowhere does she invoke a "clear error" review either directly or indirectly by asking this Court to review factual findings rather than conclusions of law.

Utah's marshaling requirement clearly applies *only* to appeals of findings of fact, subject to "clear error review," rather than conclusions of law. *Martinez v. Media-Paymaster Plus*, 2007 UT 42 ¶17, 164 P.3d 3. Appellants contesting such factual findings are required to marshal "'all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting and contradictory evidence, the findings are not supported by substantial evidence.'" *Id.* (quoting *Grace Grilling Co. v. Board of Review of Indus. Comm'm,* 776 P.2d 63, 68 (Utah Ct. App. 1989)).

Blocker is not challenging factual findings in this case. The determination of a "material change in circumstances" for purposes of a modification of a child custody order is a conclusion of law subject to a de novo, or at best, an abuse of discretion, standard of review. Nowhere in Utah case law is "clear error" review ever applied to such determinations. Hence, Morkel's marshaling argument fails.

Even if the Court determines that marshaling does apply in this case, it should be directed by the Utah Supreme Court's recent interpretation of the marshaling requirement in *State v. Nielsen* wherein the Court held that "from here on our analysis will be focused on the

ultimate question of where the appellant has established *a basis for overcoming a healthy dose of deference owed to factual findings and jury verdicts—and not on whether there is a technical deficiency in marshaling meriting a default.*" *State v. Nielsen*, 2014 UT 10, ¶ 14, 326 P.3d 645(emphasis added).

C. Morkel's argument that Judge Taylor's temporary change from supervised to unsupervised visitation constitutes a legal "material change in circumstances" upon which the trial court can base its ruling is contrary to the requirements of Utah Code section 30-3-10.4.

In Morkel's brief she appears to argue that Judge Taylor's temporary change from supervised to unsupervised visitation constitutes a "material change in circumstances" upon which the court could later base a ruling to permanently modify the custody award. Such logic is not only facially disingenuous but completely contrary to Utah law. The standard for the "material change in circumstances" comes from Utah Code section 30-3-10.4, which states that a petition to modify must show evidence "that the circumstances of the child or one or both parents or joint legal or physical custodians have materially and substantially changed since the entry of the order to be modified." Hence, the "material change in circumstances" must *precede* the filing of the petition to modify as it is the *basis* for the petition. Without such a change in circumstances, petitioner would have no good-faith basis for the petition in the first place. Therefore, for Morkel to claim that the temporary change from supervised to unsupervised visitation that was ordered at the very same hearing where Judge Taylor converted Morkel's Order to Show Cause to a Petition to Modify constituted the "material change in circumstance" that supported her Petition to Modify is both factually and legally impossible: it could not provide the basis for a pleading that did not exist and it could not provide the required evidence to support such a pleading when it was not in place prior to the

creation of the pleading.

D. Morkel's argument that the ability to substitute unpleaded "relief" requires the court to be able to substitute an unpleaded "pleading" is unsupported by Utah law.

Blocker does not dispute Morkel's argument regarding the court's ability to substitute unpleaded *relief* when necessary as she cites in her brief; however, this is quite different from allowing the court to substitute an unpleaded *pleading*. Such is not supported by Utah law and is contrary to principles of fairness as it takes the judge out of his role as impartial arbiter and into role as adviser for a party, especially when such party is represented by counsel.

Principles of fundamental fairness would support permitting a judge either substituting or supplementing pleaded *relief* with additional relief that was not initially sought in a party's pleadings when that party is legally entitled to such relief but for whatever reason did not seek it and when without it the injured party would be left either unwhole or the other party would be left unduly benefited. This, however, is not the same as allowing the judge to interject his judgment regarding how the party should have strategically approached her case.

If a party files the wrong pleading and is denied, the party can simply file the right pleading the next time—if the party has the required evidence to support the pleading standard for that motion etc. No fundamental fairness is lost by requiring the party to do so. On the other hand, allowing a judge to step into the shoes of the attorney and essentially "re-plead" by converting one pleading into another type (especially when a substantial filing fee is waived in the process) at the very least taints the proceedings with a flavor of partiality.

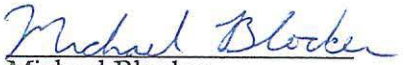
In this case nothing would have been lost if Judge Taylor had simply ruled on Morkel's

Order to Show Cause as she filed it. She later could have filed a Petition to Modify, if she chose to do so.[2] Morkel was represented by competent counsel who had filed the pleading that he and his client felt was appropriate for the matter they wanted to bring before the court. They supported her Order to Show Cause with the evidence they believed it warranted. They were not prepared for, nor did they have evidence to support, a Petition to Modify. By *sua sponte* converting Morkel's Order to Show Cause into a Petition to Modify, Judge Taylor gave her more than what she was legally entitled to; he stepped into the role of her legal counsel and stripped away the impartiality of the proceedings, and for that this Court should reverse his ruling.

Conclusion

For the foregoing reasons this Court should reverse the decision of the district court and reinstate Judge Davis's Custody Order and give direction to the district court that any modification to be made is only to substitute conditions for Morkel's unsupervised parent time that are consistent with the original order. In addition, Blocker requests that this Court award him the appropriate fees and costs associated with this appeal.

Respectfully submitted,



Michael Blocker
Pro Se, Appellant

DATE: March 24, 2016

[2] It is relevant to note that on the record in court the very day Judge Taylor converted her Order to Show cause into a Petition to Modify Morkel stated that she was *not* seeking to modify the custody order.

Word Count Certification

I, Michael Blocker, hereby certify that I prepared the foregoing brief and that the word count for this brief is 2235. I certify that I prepared this document in Word 2010, and that this is the word count Word generated for this document.

March 24, 2016

Michael Blocker

Michael Blocker, *Pro Se*

Certificate of Service

I hereby certify that on the 24th day of March 2016, I send by first-class mail two true and correct copies of the foregoing Brief of Appellant to Grant W.P. Morrison, Taylorsville, Utah.