IN THE DISTRICT COURT OF APPEAL
IN AND FOR THE STATE OF FLORIDA
SECOND DISTRICT

2DCA CASE NO.: 2D07-4644

Theresa Marie MARTIN, Petitioner/Appellant,	)	in an appeal from summary denial of habeas corpus for child custody
v.	)	
Stephen Paul MARTIN, Respondent/Appellee,	)	Pasco County Circuit Court case: 2007-DR-4735-WS
and,	)	
In re: The welfare and interest of the parties' children, S.M.M. and J.E.M.	)	The Honorable Lynn Tepper, Sixth Judicial Circuit, Dade City

Initial Brief of Appellant

Statement of the Case and Facts

This is an appeal from summary denial of a general habeas corpus action by the alleged rightful legal and physical custodian of minor children, their Mother, Theresa M. Martin, your undersigned Appellant, a long-time resident of the State of Florida, against Stephen P. Martin, the Appellee, and the Father of the same children, who also has multiple criminal convictions against him by the State of

Michigan, including for sexual deviate conduct committed years ago upon one of Theresa's two minor children from a previous marriage [a boy]. (App. 28). The Appellee, Stephen, was duly served notice of, and had fully participated in, Theresa's original Pasco County domestic relations child custody and support case [51-2003-DR-2537WS]. (App. 10-13, 18, 22, 24). Stephen also participated in quit claiming the parties' martial home to Theresa. (App. 14). Stephen then defaulted his appearing for the final divorce hearing on permanent custody and support issues, which were awarded in favor of Theresa. (App. 13, 18, 21, 24). Stephen *then* suddenly took the minor children from Theresa's Port Richey home while she was at work, *fled* with the minor children across state lines to Michigan (App. 31), *during* pendency of an outstanding Florida arrest warrant against him for over ten thousand ($10,000) in back child support (App. 18, 21), and has *so far* evaded all subsequent efforts to return the children to their rightful Florida home with Theresa, by subsequently filing an outrageous "second divorce" action against Theresa (App. 25, 30), and incredibly obtaining a later ex parte transfer of custody in condoning his actions to take the children from Florida. (App. 33).

Theresa attempted correction of this fraud and return of the children by filing various pleadings to refute said "second divorce" action [Pasco County case #51-2004-DR-4764WS], but all law and facts were essentially and routinely ignored, ensuring that no resemblance of justice would be had in that case, ever. *See* Id.

Theresa then filed the instant habeas corpus action (App. 3-9; with Exhibits: App. 10-30), in order to challenge the very legality of the results obtained in the "second divorce" case, but that was summarily denied without hearing (App. 31-32), even though sufficient evidence was surely presented to justify an evidentiary hearing, and judgment in Theresa's favor as a matter of law. (App. 10-30). This appeal ensued. *See* Docket.

Summary of the Argument

The child custody and child support judgments of Theresa's original family court case are *res judicata* against Stephen. Had he even followed proper course of law, via petition or motion to modify that binding prior judgment, his felony child molestation convictions, and rampant "unclean hands" in the entire matter, would still have easily precluded any such modification of Theresa's child custody.

Since the entire "second divorce" action by Stephen is void and/or voidable, due largely to his various acts of fraud upon the court, the habeas court should have continued jurisdiction, held hearing, and restored custody and support to Theresa.

Your undersigned Appellant, Theresa M. Martin, alleges she is entitled to the immediate return of her minor children back to their home domicile, here in the State of Florida, i.e., Port Richey, and is also, therefore, entitled to request and have this Honorable Court's immediate assistance in either directly or indirectly achieving the same prompt results on restoring rightful child custody.

Argument I

The child custody and child support judgments of Theresa's original family court case are *res judicata* against Stephen

Theresa has, and had, ***two (2)*** prior, binding judgments of child custody and support against Stephen, one under support not involving dissolution (App. 10-11, 24), and later again under full dissolution (App. 12-13), wherein Stephen was duly served and noticed of both such same proceedings. In fact, he did participate sporadically in the full dissolution proceedings and ancillary matters. (App. 14-20). Likewise, his work and ethics habits were also sporadic during this same time. (App. 22-23). Regardless, Stephen failed to appear for final dissolution hearing, and Theresa was again reaffirmed in primary residential custody and child support against him, for which he later earned a child support arrest warrant (App. 18-21).

Stephen never moved to alter the judgment, nor took an appeal. Accordingly, those judgments of child custody and child support against him were *res judicata*.

The Florida Supreme Court recently explained the binding nature of *res judicata* within child custody matters, in *Wade v. Hirschman*, 903 So. 2d 928 (Fla. 2005):

> A final divorce decree providing for the custody of a child can be materially modified only if (1) there are facts concerning the welfare of the child that the court did not know at the time the decree was entered, or (2) there has been a change in circumstances shown to have arisen since the decree. Belford v. Belford, 159 Fla. 547, 32 So. 2d 312, 314 (Fla. 1947). This rule promotes the finality of the judicial determination of the custody of children. After the trial court enters the original final judgment decree, it is res judicata of the facts and circumstances at the time the judgment became final. Thus, there is a

> presumption in favor of the reasonableness of the original decree. Id. This presumption may be overcome when changes in circumstances have arisen which warrant and justify modification of the original decree. See In re Gregory, 313 So. 2d 735, 738 (Fla. 1975); Frazier v. Frazier, 109 Fla. 164, 147 So. 464, 466 (Fla. 1933). To modify such judgments, the trial court must decide whether there is a "factual basis sufficient to show that conditions have become materially altered since the entry of the previous decree." Id. at 467. The degree of change in the conditions and circumstances since the date of the previous decree must be of a substantial character. Bennett v. Bennett, 73 So. 2d 274, 278 (Fla. 1954).
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> *Wade*, 903 So. 2d, at 936-937.

Florida statutory law mandates the exact same *res judicata* effect on prior child custody determinations. *See* § 61.507, Fla. Stat. (2007). *Res judicata* attached to Theresa's prior custody determination and that determination cannot be modified without satisfying the substantial change test. *See*, e.g., *Belford v. Belford*, 159 Fla. 547, 32 So. 2d 312 (Fla. 1947); *Newsom v. Newsom*, 759 So. 2d 718, 719 (Fla. 2d DCA 2000); *Zediker v. Zediker*, 444 So. 2d 1034 (Fla. 1st DCA 1984).

In a nutshell, Stephen was already estopped from ever filing a *new*, independent action against Theresa for custody of their children, before he did *exactly* that.

Accordingly, his entire action for a "second divorce" to obtain child custody and other awards is flatly null and void for lack of due process, violating law, caselaw, and at least the following Constitutional protections: Article I, §§ 9 and 13 of the Florida Constitution, the Full Faith and Credit Clauses of both the Florida and Federal Constitutions, and the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. Prompt relief should be granted on this fact alone.

Argument II

Even if Stephen had followed the proper course of law, in the first place, via petition or motion to modify that binding prior judgment, his felony child molestation convictions, and rampant "unclean hands" in the entire matter, would still have easily precluded any such modification of Theresa's child custody

Notwithstanding that Stephen's entire child custody modification attempt is and was null and void as shown estopped by **Argument I**, *supra*, his actions civilly violated several mandatory requirements of Florida family law, and criminally violated several sections of Florida's penal code. Moreover, his "unclean hands" in the matter would prevent modification of custody, he never established any change of circumstances to even warrant consideration of modification, and, again, his various felony convictions, including child molestation, would preclude the same.

By knowing of *both*, the prior temporary judgment of Theresa's child custody, and, later, the final judgment of Theresa's child custody, and also by not having the minor children very often at all, Stephen was quite aware *he did not* have custody.

Accordingly, to *even begin* to consider relocating the minor children out of the State of Florida away from Theresa and the court, Stephen would *first* have to:

a) File an appropriate pleading in the **same** Pasco County family court case [51-2003-DR-2537WS] where final judgment of custody had been awarded to Theresa already, asking to modify that final judgment, which he did not do;

b) File and serve Notice of his intent to relocate the children more than 50 miles away, as per § 61.13001(3)(a), Fla. Stat. (2007), which he did not do;

c) Wait at least for the allowed thirty (30) days with which the other parent, in this case, Theresa, could have responded to his any such failed Notice, as per § 61.13001(3)(a)(7), Fla. Stat. (2007), which he did not do; and,

d) Appear and prevail at the hearing regarding such proposed relocation, required under § 61.13001(10), Fla. Stat. (2007), after such Notice and Response would have been *first* done by law, which he also did not do.

Furthermore, Stephen's actions in unilaterally removing the children from the State of Florida to deprive Theresa of her custody violated several **civil** provisions of Florida **family** law, including § 61.45, Fla. Stat. (2007) [bond for risk of flight with minor children out of state in violation of custody], the Relocation Notice requirements discussed above, § 61.515, Fla. Stat. (2007) [court of initial custody determination has continuing, exclusive jurisdiction], and etc., as well as **criminal** provisions of the Florida **penal** code, including § 787.03(1), Fla. Stat. (2007) [interference with custody], § 787.04(2)&(4), Fla. Stat. (2007) [removing minors from state or concealing minors contrary to court order], § 837.06, Fla. Stat. (2007) [false official statements], § 843.0855(3), Fla. Stat. (2007) [criminal actions under color of law or through use of simulated legal process], various other statutes against fraud, obstruction of justice, possibly confinement/kidnapping, and etc.

Indeed, by the time he had already returned to Michigan, and then briefly came back to Florida to abscond with the children to Michigan, he had also removed residency of both himself and the children in question by those acts, prior to trying to file a new action in the Florida courts. He arguably *deprived himself* of standing with which to even lawfully file any new court case in the Florida court system.

Moreover, even with any proper custody modification pleading filed, Stephen's prior convictions for child molestation already precluded having any wide open and unrestricted visitation ("parenting time"), and any notion of having primary custody of minor children, by operation of applicable Florida law. *See*, e.g.; § 39.0139(3)&(4)&(5), Fla. Stat. (2007); § 61.13(2)(b), Fla. Stat. (2007); and, etc.

Furthermore, Stephen's only "change of circumstances" was no change at all, but only his fraudulently alleged count of child abuse upon Theresa, which caused her to be arrested, and falsely provided an impetus for Stephen to abscond with the children "in the name of their safety" – the allegation was obviously *so wildly* false, that the court granted defense's motion for a directed verdict of acquittal.

Even if attempting modification, Stephen totally failed the substantial change of circumstances test, which is required and applies, unless the judgment, itself, otherwise provides for the standard that should be applied when one party seeks a modification. *See*, e.g.; *Mooney v. Mooney*, 729 So. 2d 1015, 1016 (Fla. 1st DCA 1999) [parents agreed that beginning of school would constitute a change in

circumstances which would require custody to be readdressed]; *Greene v. Suhor*, 783 So. 2d 290, 290-91 (Fla. 5th DCA 2001) [custody order provided that either parent could seek reconsideration of the custody issue when the child started school without showing a change in circumstances]. The trial court was required to use the substantial change test in *Cooper v. Gress*, 854 So. 2d 262 (Fla. 1st DCA 2003), in proceedings seeking modification of custody. *Wade*, 903 So. 2d, at 944.

In a nutshell, Stephen *falsely* alleged Theresa with child abuse, so he could take the children out of the State of Florida during the week of her arrest, right after she had returned to work. This is classic "unclean hands" enrichment. His removal of the children to Michigan violated numerous laws, both civil and criminal. Even if he had followed the proper course of law in attempting modification, he could not have *ever* been successful in changing custody away from Theresa, as *several* matters of Florida law operate in finality, or in preclusion, or both, against him.

Again, Stephen's removal of the children from Florida, and his entire action for a "second divorce" to obtain child custody, and other awards, is flatly null and void for lack of due process, violating law, caselaw, and at least the following Constitutional protections: Article I, §§ 2, 9, 12 and 21 of the Florida Constitution, the Full Faith and Credit Clauses of both the Florida and Federal Constitutions, and at least the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. Theresa was, and is *still*, fully entitled to immediate habeas relief.

Argument III

Since the entire "second divorce" action by Stephen is void and/or voidable, due largely to his various acts of fraud upon the court, the habeas court should have continued jurisdiction, held hearing, and restored custody and support to Theresa

The very idea of trying to divorce a person a *second* time – and starting *only weeks* after final judgment was already had in the valid, original case – is nothing but sheer, unmitigated fraud that the law simply cannot tolerate. Indeed, Stephen's unlawful actions include multiple forms of fraud, both extrinsic and intrinsic.

Extrinsic fraud is considered "fraud on the court." *DeClaire v. Yohanan*, 453 So. 2d 375, 377 (Fla. 1984). The rules do not limit the power of a Florida court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding, or to set aside a judgment or decree, for fraud upon the court. See *DeClaire*, 453 So. 2d at 378. See Black's Law Dictionary 595 (rev. 5th ed. 1979).

Intrinsic fraud, on the other hand, applies to fraudulent conduct that arises within a proceeding and pertains to the issues in the case that have been tried or could have been tried. The Florida Supreme Court has expressly held that false testimony given in a proceeding is intrinsic fraud. See *DeClaire*, 453 So. 2d at 377.

Because Stephen's various unlawful and unethical conduct involves *both* basic forms of fraud, i.e., extrinsic and intrinsic, and more importantly, because his new "second divorce" was extrinsic fraud, itself, upon the original case and judgment,

Theresa was certainly entitled, by well established law grounded deeply in historic doctrines, to collaterally attack Stephen's second, fraudulent case by way of any valid independent action in equity to correct the matter. And, because the primary issue involves correcting unlawfully obtained custody and control of one or more bodies (minor children), an action filed under habeas corpus is, and was, the most on-point and correct option of the available equitable remedies at law.

Indeed, *at least* as far back as 1878, the United States Supreme Court explained:

> There is no question of the general doctrine that fraud vitiates the most solemn contracts, documents, and even judgments. . . . Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practised on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side, -- these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. See Wells, Res Adjudicata, sect. 499; Pearce v. Olney, 20 Conn. 544; Wierich v. De Zoya, 7 Ill. 385; Kent v. Ricards, 3 Md. Ch. 392; Smith v. Lowry, 1 Johns. (N.Y.) Ch. 320; De Louis et al. v. Meek et al., 2 Iowa, 55.
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> United States v. Throckmorton, 98 U.S. 61, 68-72, 25 L.Ed. 93 (1878).

In fact, the ***very point*** of a habeas court is to directly inquire into the legality of the results of the proceedings held in ***another*** court. There was no reasonable basis, whatsoever, for the instant habeas court to refer to Theresa's action as an effort in "judge shopping", as the focal point in habeas is to examine another court's results.

In a nutshell, Theresa was entitled to have an equity court look into the alleged fraud, res judicata, and other issues complained of, and she was entitled to have those issues corrected by the independent equity court – herein, the habeas court.

Again, Stephen's removal of the children from Florida, his entire fraudulent action as a "second divorce" to obtain child custody and other awards, and the recent habeas court's declination to entertain the evidence already submitted, hold a prompt hearing, and then also grant the required relief, are all flatly null and void for lack of due process, violating law, caselaw, and at least the following Constitutional protections: Article I, §§ 2, 9, 12 and 21 of the Florida Constitution, the Full Faith and Credit Clauses of both the Florida and Federal Constitutions, and at least the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. Theresa was, and is *still*, fully entitled to immediate habeas relief.

Argument IV

Theresa is now entitled to the immediate return of her minor children back to their home domicile in the State of Florida

Indeed, because of Stephen's child molestation convictions, and the rebuttable presumption of detriment to a child created thereby, all Florida courts are ***required*** to specifically **supervise** his parenting time. *See* § 39.0139(4)(d), Fla. Stat. (2007), and also ¶¶ (5) and (6) thereunder. This alone precludes Stephen having custody.

Additionally, § 61.13001(3)(f), Fla. Stat. (2007) **requires** returning the children.

Moreover, and independently, § 61.11(1), Fla. Stat. (2007), provides any Florida court, including this Honorable Court, with the express authority to issue any writs necessary to effect the purposes of various relief sought after in this matter, which, at a bare minimum, would obviously include returning the children to Florida, but also could be utilized to bring Stephen himself back to Florida to face judgment for his various aforementioned criminal actions, and for the thousands in back support.

Art. I, § 13, Fla. Const., expressly provides the right for Theresa to seek habeas corpus relief of her minor children's custody. The habeas court erred in failing to examine the evidence, hold a hearing, and grant the relief that is absolutely required as a matter of law in several aspects. She is now entitled to have her relief.

Conclusion

Stephen was already a four-time convicted child molester, even against one of Theresa's own previous minor children, and has absolutely no lawful basis at all, in *any* American jurisdiction, in which to seek an award of child custody.

Stephen was fully and duly aware of, and even sporadically participating in, Theresa's original cause of action for child custody and child support, he did also knowingly fail to appear and default in that case, and he also failed to appeal it.

The custody and support judgments in favor of Theresa entered in that original family court case are all *res judicata*, and could only be possibly modified by a properly filed motion to modify in that same case, with proper notice, and etc.

Even if – if – Stephen Martin could overcome his child molester convictions as very serious deterrents to *any* award of child custody, he would *still* have to utilize attempts at modification of the prior judgment (having higher burdens), using the proper channels, procedure and law, instead of literally kidnapping the children out of Florida, without any notice, under false pretenses, during the dark of night, and while an arrest warrant was active against him for over $10,000 in child support.

The "second divorce" proceedings used to condone transfer and control of the two minor children from Theresa to Stephen are an utter sham in direct violation of numerous Florida statutes, rules of court, and other authorities. They are voidable.

The original final judgment, having been participated in by Stephen, and never having been moved to be altered, nor ever having been appealed, should now be reinstated as the only possible lawful judgment still enduring between the parties.

Theresa Martin is now entitled to have the remaining child who is still a minor, J.E.M., promptly and safely returned to her rightful custody and control, and does now so request this Court's assistance in effecting the same immediate results.

Furthermore, Theresa alleges Stephen's irresponsible character is the cause for S.M.M.'s new legal troubles, and would request this Court also take it upon itself to consider ordering the transfer of S.M.M. and her remaining Michigan probation time, returning to and under Florida's local authorities for and at her ready and much more stable home environment, with Theresa, in Port Richey, Pasco County.

WHEREFORE, your undersigned hopeful Appellant, Theresa M. Martin, prays and moves this Honorable Court to find that the Appellee, Stephen P. Martin, had no lawful basis or authority with which to remove any of the minor children from the State of Florida as he did, find that your undersigned Appellant should still have full legal custody and control of the remaining minor child, J.E.M., find that the instant habeas action should have been granted a hearing, and at such hearing, upon the evidence shown also herein, that the same relief promptly in favor of the Appellant should have been ordered, and accordingly now cause the same relief to actually occur, either by mandate or instruction, and moves for all other just relief.

Respectfully submitted,

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