NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

RENEE K. HAYS,	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	Case No. 101,540
	)	(cons. with 101,708)
SHARON R. TAFFS,	)	
	)	
Defendant/Appellee.	)	

APPEAL FROM THE DISTRICT COURT OF
KAY COUNTY, OKLAHOMA

HONORABLE D.W. BOYD, TRIAL JUDGE

REVERSED AND REMANDED WITH DIRECTIONS

Brian T. Hermanson
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O. Ronald McGee
O. RONALD McGEE & ASSOCIATES
Ponca City, Oklahoma — For Appellee

OPINION BY JOHN F. REIF, JUDGE:

Appeal No. 101,540 and Appeal No. 101,708 arise from separate cases in the District Court of Kay County in which Renee K. Hays sought visitation with E.R.H.T., a minor child. In the case giving rise to Appeal No. 101,540, Ms. Hays sought specific performance of a written agreement with Sharon Taffs, the child's adoptive parent, that provided visitation for Ms. Hays. After the trial court granted Ms. Taffs' motion to dismiss, Ms. Hays filed Appeal No. 101,540 and brought a domestic relations case seeking visitation based on her co-parenting of the child with Ms. Taffs prior to their separation. The same trial judge was assigned the domestic relations case at the request of the parties. After the trial court granted Ms. Taffs' motion to dismiss the domestic relations case, Ms. Hays filed Appeal No. 101,708.

Each of these appeals were filed pursuant to Supreme Court Rule 1.36, 12 O.S. Revised Supp. 2005, ch. 15, app. 1. Prior to assigning these appeals to the Court of Civil Appeals, the Oklahoma Supreme Court designated these appeals to be companion cases. Following review of the record in each appeal, this Court on its own motion consolidates these appeals for disposition by a single opinion to be filed in each case. *See* Supreme Court Rules 1.27(d) and 1.36(k), 12 O.S. 2001 and Revised Supp. 2005, ch. 15, app. 1.

FACTUAL BACKGROUND

The factual basis for Ms. Hays' claim to visitation is succinctly set forth in the petition she filed in the domestic relations case. This petition states, in pertinent part:

> [The child] was born on July 10, 1999 to a friend of Renee K. Hays. The Plaintiff, Renee K. Hays, and the Defendant, Sharon R. Taffs, who had been partners for over 15 years at the time, took into their home the newborn child and raised her as their own. It was agreed that [Ms. Taffs] would adopt the child because of her better employment.
>
> [Ms. Taffs] consented to, fostered, and encouraged [Ms. Hays'] establishment of a parent-child relationship with the minor child. [Ms. Hays] assumed obligations of parenthood by taking significant responsibility for the child's care. [Ms. Hays] has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship of a parental nature. [Ms. Hays] shared in the caretaking of the minor child at least as great as [Ms. Taffs].
>
> Upon termination of [their] relationship [Ms. Hays and Ms. Taffs] entered into a Visitation and Property Settlement Agreement [delineating] the parties [*sic*] rights and responsibilities regarding visitation of [the child]. [The Agreement provided Ms. Hays] was to have visitation with the minor child and pay child support to [Ms. Taffs]. The visitation and child support pursuant to the agreement of the parties continued until the end of August, 2004, when [Ms. Taffs], without prior notice, terminated the visitation.

A copy of the visitation and support agreement was attached to the petition in the domestic relations case as well as the petition in the earlier case seeking specific performance.

The foregoing facts were not only admitted by Ms. Taffs for purposes of her motion to dismiss, but were confirmed in substance by her attorney during argument on the motion to dismiss:

> In this situation, we have two adults that lived together for a long period of time, never entered into a marriage relationship in the State of Oklahoma and, in fact, were not legally capable of doing so. However, my client, Sharon Taffs, did adopt the minor child . . . .
>
> . . . .
>
> The issue of visitation on behalf of Ms. Hays has to do with the fact that – that while the parties lived together, Ms. Hays did assume a parent role with regard to this child, did undertake and – and enjoy a parent/child relationship with this child even though she was not legally a parent of the child. And this was a relationship which was permitted and allowed by Defendant, Sharon Taffs. However, the parties separated, broke up, whatever you want to attach to it, and subsequently entered into the written agreement which is attached as an exhibit to Plaintiff's motion for visitation. The written agreement between the parties certainly did address visitation and recognized the agreement between the parties with regard to Ms. Hays being a potential parent in a parent/child relationship with this child.

> The situation, according to the Defendant, escalated to a point where the Defendant felt like acts – action on behalf of the Plaintiff constituted a situation which – which became harmful to the child, no longer – and that visitation was no longer viable, and so she terminated the visitation. Essentially, that is what brings us to the Court today is an attempt by the Plaintiff to enforce the agreement between the parties and seek the visitation.

Clearly, Ms. Taffs does not deny Ms. Hays has a close parental-figure relationship with the child.

TRIAL COURT RULINGS

In ruling on the motion to dismiss in the first case, the trial court similarly recognized that there was no dispute about the relationship that existed between Ms. Hays and the child, and its importance to the child. The court observed:

> There's no question that the plaintiff in this case lived with this little girl for five years, the first five years of her life, and there's no question that a bond was created there, and there is no question that preventing that continued contact will have a detrimental effect on that child.
>
> . . . .
>
> I'm absolutely certain that it's in the best interest of this child that there be further contact with the plaintiff, [but] I have no authority [to order further contact], other than to ask that the feelings and emotions of that child be considered.

While these statements do not constitute findings of fact, they do underscore the absence of a controversy over the relationship between Ms. Hays and the child.

As the foregoing comments reveal, the trial judge recognized that Ms. Hays had played an important nurturing role in the first five years of the child's life. However, the trial judge likened her role and relationship to that of a step-parent or people who were not married but living together for a lengthy period of time. The trial judge observed that the step-parent or non-parent in such cases may have been "significant forces" in parenting during the formative years of young children, and even formed a "significant bond" but are "left absolutely defenseless, without remedy" upon the termination of the adult relationship.

In sustaining the motion to dismiss Ms. Hays' petition seeking specific performance of the visitation agreement (the first case), the trial court said, "I do not believe this is an area that should be controlled by contract law. Not in this case, not in the case of a step-parent, not in any case." The trial judge explained that "[a]pplying contract principles to these relationships would be extraordinarily difficult." The trial court ultimately determined that "the contract is unenforceable as against public policy."

In sustaining the motion to dismiss Ms. Hays' domestic relations petition seeking visitation (the second case), the trial court found that 43 O.S. Revised

Supp. 2005 § 112.3(A)(3) does not lend support for her contention that the visitation agreement was valid and enforceable. This statutory provision, governing relocation of a child, applies in the case of a non-parent when he or she is a "person so entitled by virtue of a court order or by an express agreement that is subject to court enforcement." The trial court found that this statute does not constitute general legislative recognition that visitation rights could be conferred by contract on a non-parent who is not also a relative of the child. The trial court observed that "if the Legislature intended to create an expansion of the rights of nonparents it would do so in a more direct manner." The trial judge also stated that he was persuaded by the case of *Steinberg v. Frentz,* 2002 OK CIV APP 94, 57 P.3d 877, which the trial judge read as holding non-parents do not have the right to seek visitation in the State of Oklahoma through court mandate.

APPLICABLE LAW AND ANALYSIS

The *Steinberg* case, relied upon by the trial court below, involved a request by a step-parent for visitation with the child of his ex-wife. The trial court in *Steinberg* granted ex-wife's motion to dismiss on the ground that the step-parent lacked standing to enforce visitation. Division I of the Court of Civil Appeals affirmed the dismissal because "under current Oklahoma law the trial court could not have granted visitation to Steinberg." *Id.* at ¶ 1, 57 P.3d at 878.

To support its conclusion, the Court of Civil Appeals cited Oklahoma Supreme Court precedent that held: "*The right of visitation in the absence of a statute derives from the right to custody* [and one] who has no right to the custody of the child is not entitled to an award of visitation rights." *Id.* at ¶ 4, 57 P.3d at 878 (quoting *Leake v. Grissom,* 1980 OK 114, ¶ 8, 614 P.2d 1107, 1110). The Court of Civil Appeals believed the Supreme Court precedent reflected "a commitment . . . to leaving to the Legislature decisions concerning what persons should have the ability [standing] to judicially enforce the right to a relationship with a child over the objections of parents." *Id.* at ¶ 7, 57 P.3d at 879.

Steinberg is helpful to deciding whether Ms. Hays has stated a claim for enforceable visitation, because in both *Steinberg* and the case at hand, the party seeking visitation had a long-term relationship with the legal parent of the child, but no legal relationship to the child. We do not find *Steinberg* dispositive, however, because it only addresses one aspect of third-party visitation over a parent's objection – the absence of legislative recognition of standing on the part of the third party to seek visitation. The other consideration that we view as more important is the question of when a court or the legislature may interfere with the parental decision regarding who may see a child.

A parent's right to rear children without state interference is largely a "liberty interest" but is also a right that derives from "privacy rights inherent in the constitution." *In re Herbst,* 1998 OK 100, ¶ 12, 971 P.2d 395, 398 (citations omitted). "Intrusion upon the privacy and sanctity of the [parent-child] bond can be justified only upon demonstration of a *compelling state concern*." *Id.* at ¶ 10, 971 P.2d at 397 (quoting *Davis v. Davis,* 1985 OK 85, ¶ 17, 708 P.2d 1102, 1109).

"The state's interest in a child is 'implicated upon a finding of harm to the child . . . or of the custodial parent's unfitness.'" *Id.* at ¶ 13, 971 P.2d at 398 (quoting *Davis,* 1985 OK 85, ¶ 13, 708 P.2d at 1108). "Without the requisite harm or unfitness, the state's interest does not rise to a level so compelling as to warrant intrusion upon the fundamental rights of parents." *Id.* (citation omitted).

"With respect to [the] constitutional evaluation, whether a court ordered [third-party] relationship might be thought of as better or more desirable for a child is not relevant." *Id.* at ¶ 16, 971 P.2d at 399 (citation omitted). "If operating over the objection of fit parents, [third-party] visitation may be imposed only upon a showing that the child would suffer harm without it." *Id.*

The foregoing analysis also applies where the third party relies upon "an equitable interest in . . . visitation, apart from the authority granted by statute." *Id.* at ¶ 20, 971 P.2d at 399-400 (citation omitted). The Oklahoma Supreme Court

said, "[E]quity is subject to the United States and Oklahoma constitutions and may not exceed the protections and privacy therein assured to families [and parental decisions about third-party visitation]." *Id.* at ¶ 20, 971 P.2d at 400.

Finally, the fact that Ms. Taffs is the adoptive parent of the child does not affect her right to make decisions concerning whether Ms. Hays will have visitation following the end of their relationship. "[A]doptive parents are entitled to exercise all the rights of natural parents [and] whether [a third party] can continue visitation with the [child] is within the discretion of the . . . adoptive parents." *Id.* at ¶ 10, 971 P.2d at 398 (quoting *In the Matter of Fox,* 1977 OK 126, ¶ 7, 567 P.2d 985, 986). Again, "[a]bsent a showing of harm, (or threat thereof) it is not for the state [or its courts] to choose which associations a family must maintain and which the family is permitted to abandon." *Id.* at ¶ 18, 971 P.2d at 399.

In *Herbst*, the Oklahoma Supreme Court affirmed the trial court's dismissal of a grandparent's application for visitation, because the facts of the case involved no harm or threat of harm to the child and no unfitness on the part of the parents who refused the grandparental visitation. *Id.* at ¶ 17, 971 P.2d at 399. The Court ruled there was "no interest so compelling which could give the State of Oklahoma license to interfere with the decision of these parents whose care for their child has

never been questioned or suspect." *Id.* The Court held that "[m]andating . . . visitation in this case, whether by statute or equity, would violate the federal and state constitutions." *Id.* at ¶ 20, 971 P.2d at 400.

In view of the foregoing principles, the trial court's reluctance to interfere with Ms. Taffs' decision to disallow visitation between Ms. Hays and the child is both understandable and a commendable exercise of restraint. Like the trial court, this court finds no legal or equitable basis to extend visitation to Ms. Hays based upon her past co-parenting relationship with the child.

Ms. Hays insists, however, that she is not relying solely on her past relationship with the child in seeking visitation. She also contends she is not seeking State-sanctioned intrusion into Ms. Taffs' parental right to make decisions concerning the child's welfare. Ms. Hays basically propounds that the visitation and support agreement between the parties actually involves Ms. Taffs' unrestrained exercise of her parental decision-making right to provide for the child's welfare and that the benefits of that contract independently inure to the child.

Ms. Hays stresses the parties were represented by counsel in making the agreement. She also asserts that the agreement not only manifests Ms. Taffs' parental choice, but her acknowledgment that the visitation and support

arrangement are in the best interests of the child. Finally, Ms. Hays notes that the parties undertook performance of the agreement and both Ms. Taffs and the child have received the benefits of the agreement.

In response, Ms. Taffs has noted that the agreement reflects that one of its premises was a conflict between Ms. Hays and Ms. Taffs over the adoption of a second child. Ms. Taffs' counsel argued that Ms. Taffs' consent to the agreement was as much influenced by her desire to complete the adoption of the second child without problems as it was to provide for the welfare of the child. Ms. Taffs also contended that the agreement was contrary to public policy.

We might be inclined to agree with Ms. Taffs if the agreement addressed only visitation and the only consideration for Ms. Taffs' agreement to visitation was Ms. Hays' dismissal of her competing petition to adopt the second child. That is not the case, however. The agreement did two things that even a court could not do upon the dissolution of the parties' co-parenting arrangement for the care and maintenance of the child. First, the agreement created an obligation for Ms. Hays to support the child. Second, the agreement created an obligation for Ms. Taffs to permit visitation. The fact that these mutual obligations did not exist apart from the parties' agreement provides sufficient and valid consideration to support the agreement. More importantly, they do not violate any public policy known to this

court. To the extent that the agreement can be said to limit or condition Ms. Taffs' fundamental constitutional right to raise the child, we know of no reason why this constitutionally protected right cannot be voluntarily waived or curbed, like any other constitutional right, or be made subject of a contractual arrangement.

In reaching this conclusion, we are cognizant that "[c]hildren are not legally subject to barter or sale or gift in this state," *Taylor v. Taylor,* 1938 OK 77, ¶ 2, 75 P.2d 1132, 1133, *Olinghouse v. Olinghouse,* 1995 OK CIV APP 104, ¶ 12, 908 P.2d 280, 285, and that the legislature has provided "[n]o person may surrender, assign, permanently relinquish, or otherwise transfer to another the person's rights and duties with respect to the permanent care and custody of a child [except as provided by law]." 10 O.S.2001 § 21.4(A). However, there is nothing in Oklahoma law to prevent the making of a contract for the benefit of the child, and we believe the agreement in question, whereby Ms. Hays assumed responsibility to support the child and was allowed visitation, is a contract that benefits the child.

In *Plunkett v. Atkins,* 1962 OK 87, ¶¶ 25, 26, 371 P.2d 727, 731, the court found the child was a third-party beneficiary of a contract for its support entered into by its mother with a man who was the putative father; interestingly, under the contract the putative father "voluntarily [assumed] a greater responsibility than that provided by statute." In *Looper v. McManus,* 1978 OK CIV APP 26, ¶ 3, 581 P.2d

487, 488, the court recognized that "[v]isitation is not solely for the benefit of the adult visitor but is aimed at fulfilling what many conceive to be a vital, or at least a wholesome contribution to the child's emotional well-being by permitting partial continuation of an earlier established close relationship." Additionally, as concerns visitation, the legislature has defined "[p]erson entitled to custody of or visitation with a child" (as used in the statute governing relocation of a child) to mean "a person so entitled by virtue of a court order or by an express agreement that is subject to court enforcement." 43 O.S. Revised Supp. 2005 § 112.3(A)(3) (emphasis added).

It is apparent from the record that difficulty has arisen in the performance and enforcement of this agreement, and that customary remedies to secure compliance with similar provisions in a divorce decree are not available to the court. However, these circumstances do not make the agreement contrary to public policy.

"A contract violates public policy only if it clearly tends to injure public health, morals or confidence in administration of law or it undermines the security of individual rights with respect to either personal liabilities or private property." *MIF Realty L.P. v. Duncan Development Co.,* 1995 OK CIV APP 25, ¶ 7, 892 P.2d 664, 667 (quoting *Shepherd v. Farmers Ins. Co.,* 1983 OK 103, ¶ 3, 678 P.2d 250,

251). "Detriment to the public interest is not to be presumed, but must be clearly apparent before a court is justified in declaring a contract unenforceable on public policy grounds." *Id.* (citations omitted). Furthermore, "[t]he power of courts to nullify contracts as being in contravention of public policy is a very delicate power, to be exercised only rarely, with caution and restraint, and only in cases that are free from doubt." *Id.*

"Whether a contract is against public policy is a question of law for the court to determine from all the circumstances of the case." *Id.* "Issues of law are to be reviewed *de novo* and an appellate court claims for itself plenary, independent and non-deferential authority to reexamine a trial court's legal rulings." *Mangrum v. Fensco, Inc.*, 1999 OK 78, ¶ 4, 989 P.2d 461, 462 (citations omitted). Upon *de novo* independent review, we conclude the trial court erred in ruling the agreement was unenforceable as against public policy.

DISPOSITION ON APPEAL

In the first case which is the subject of Appeal No. 101,540, the trial court erred in granting the motion to dismiss on the ground that the visitation and support agreement was unenforceable as against public policy; however, the court was correct that contract law did not furnish the appropriate remedy. In the second case which is the subject of Appeal No. 101,708, the trial court properly concluded

that Ms. Hays' co-parenting of the child did not itself create an enforceable right to visitation with the child, but erred in dismissing the case without considering the child's interests as a third-party beneficiary of the visitation and support agreement and whether enforcement of the agreement would be in the child's best interests. In reversing the judgment of dismissal in each case and remanding to the trial court, we direct that these cases remain consolidated to avoid further confusion over whether the case is a "contract case" or a "domestic relations case." The resolution of this controversy on remand does not depend upon the form of action, but on inquiry into the best interests of the child.

Also, as a beneficiary of the agreement for visitation and support, the child has an interest in the agreement's performance, enforcement, modification or termination. As a beneficiary, she should have independent representation to protect her interests in further proceedings on remand. Accordingly, the trial court is directed on remand to appoint a guardian ad litem and to order Ms. Hays and Ms. Taffs to pay the expense of the guardian ad litem in such proportion as the court may deem just and equitable. 12 O.S.2001 § 2017(C).

Each judgment of dismissal under review in Appeal No. 101,540 and Appeal No. 101,708 is reversed. On remand, the cases underlying Appeal No. 101,540

and Appeal No. 101,708 are to be consolidated for further proceedings consistent with the views expressed in this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

RAPP, V.C.J., and GABBARD, P.J., concur.

March 28, 2006