

FILED DISTRICT COURT
Third Judicial District

JUN 30 2009

SALT LAKE COUNTY


Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY
STATE OF UTAH

GENA-LOUISE EDVALSON,

Plaintiff,

vs.

JANA DICKSON,

Defendant.

RULING

Case No. 090901288

Judge: L.A. DEVER

The above entitled matter is before the Court on Defendant's Motion to Dismiss Plaintiff's Complaint. Having reviewed Defendant's Motion and Plaintiff's Opposition thereto, and, having heard oral arguments on the matter on April 24, 2009, the Court makes the following Ruling.

The Defendant's Motion to Dismiss for lack of jurisdiction is denied. The argument that visitation can only be with a close relative is contrary to Utah Code Annotated 30-5a-103(2) which provides that a "person" that meets certain requirements may bring an action for custody or visitation. A clear reading of the statute establishes that this "person" may be someone other than a close relative of the child.

The second issue is the enforceability of the Co-Parenting Agreement pursuant to Utah Code Annotated Section 30-5a-103, which provides in relevant part:

(1) In accordance with Section 62A-4a-201¹, *it is the public policy of this state that parents retain the fundamental right and duty to exercise primary control over the care, supervision, upbringing, and education of their children. There is a rebuttable presumption that a parent's decisions are in the child's best interests.*

(2) A court may find the presumption in Subsection (1) rebutted and grant custodial or visitation rights to a person other than a parent who, *by clear and convincing evidence*, has established all of the following:

- (a) the person has intentionally assumed the role and obligations of a parent;
- (b) the person and the child have formed an emotional bond and created a parent-child type relationship;
- (c) the person contributed emotionally or financially to the child's well being;
- (d) assumption of the parental role is not the result of a financially compensated surrogate care arrangement;
- (e) continuation of the relationship between the person and the child would be in the child's best interests;

¹ Provides in relevant part:

(c) It is in the best interest and welfare of a child to be raised under the care and supervision of the child's natural parents. A child's need for a normal family life in a permanent home, and for positive, nurturing family relationships will usually best be met by the child's natural parents. Additionally, the integrity of the family unit, and the right of parents to conceive and raise their children have found protection in the due process clause of the Fourteenth Amendment to the United States Constitution. The right of a fit, competent parent to raise the parent's child without undue government interference is a fundamental liberty interest that has long been protected by the laws and Constitution of this state and of the United States.

(d) The state recognizes that:

- (i) a parent has the right, obligation, responsibility, and authority to raise, manage, train, educate, provide for, and reasonably discipline the parent's children; and
- (ii) the state's role is secondary and supportive to the primary role of a parent.

(e) *It is the public policy of this state that parents retain the fundamental right and duty to exercise primary control over the care, supervision, upbringing, and education of their children.*

(2008) (emphasis added).

- (f) loss or cessation of the relationship between the person and the child would be detrimental to the child; *and*
- (g) the parent:
 - (i) is absent; or
 - (ii) is found by a court to have abused or neglected the child.

(2008) (emphasis added).

The language of the statute is clear. Any action that would run afoul the public policy of parents having the "fundamental right and duty to exercise primary control over the care, supervision, upbringing, and education of their children" must be established by clear and convincing evidence of the factors identified in Subsection 30-5a-103(2). Accordingly, although Plaintiff has asserted elements (a) through (f) identified in Subsection 2, she has not asserted that Defendant is an absent parent or, that Defendant has been found to have abused or neglected the minor child, as provided for in Subsection (g). The failure to establish the applicability of all the required elements of Section 103 (2) mandates dismissal under the provisions of the cited Statute.

Finally, is the issue of the enforceability of the Co-Parenting Agreement in contravention of the aforementioned statutes. The Utah Supreme Court has held that contracts that offend public policy are void ab initio. See Ockey v. Lehmer, 2008 UT 37, ¶11, 189 P.3d 51 (citing Fletcher v. Stone, 20 Mass. (3 Pick.) 250, 252, 3 Pick. 250

(1825) ("Acts which affect injuriously the public interest are generally void; and those which affect only private rights are voidable." (citation omitted)); Black's Law Dictionary 1604 (8th ed. 2004) ("A contract is void ab initio if it seriously offends law or public policy, in contrast to a contract that is merely voidable at the election of one party to the contract.") (emphasis added).

While a contract that is voidable may be ratified at the election of the injured party, a contract that is void cannot be ratified or accepted. Id. at ¶18 (citing Mut. Benefit Life Ins. Co. v. Winne, 20 Mont. 20, 49 P. 446, 449 (Mont. 1897) ("A thing is void which is done against law at the very time of doing it, and where no person is bound by the act; but a thing is voidable which is done by a person who ought not to have done it, but who nevertheless cannot avoid it himself after it is done." (internal quotation marks omitted))) (emphasis added).

Therefore, while people are generally free to bind themselves to any contract, those contracts which are contrary to public policy are illegal and void. Id. at ¶22.

Based upon the unambiguous language of Utah Code Annotated Sections 30-5a-103(1)-(2) and 62A-4a-201(c)-(e), the Court finds that the Co-Parenting Agreement entered on March 29, 2006, between the parties is void ab initio, as it directly offends

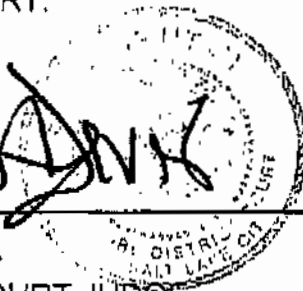
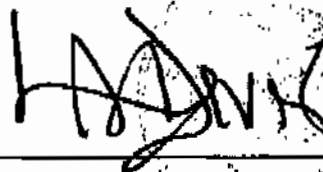
the State's public policy that parents retain the fundamental right to exercise the primary control over the care and supervision of their children.

Based on the foregoing, Defendant's Motion to Dismiss is GRANTED.

Because the Court grants Defendant's Motion, Plaintiff's Motion for a Discovery Order is MOOT.

Dated 29th day of June, 2009.

BY THE COURT:



L.A. DEVER
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing Ruling dated this 30 day of June, 2009, postage prepaid, to the following:

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CLERK OF COURT

