Swistak v. Stelmokas

Appeals Court of Massachusetts

February 5, 2013, Entered

12-P-628

Reporter
2013 Mass. App. Unpub. LEXIS 145 *; 83 Mass. App. Ct. 1111

MARY ANN Z. SWISTAK[1] vs. WILLIAM STELMOKAS.

Judges: [*1] Kantrowitz, Katzmann & Hanlon, JJ.

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff appeals from an order of the Probate and Family Court dismissing her complaint for modification of a 2008 judgment ordering grandparent visitation, and then sua sponte dismissing the earlier complaint for visitation. She argues that the judge misread G. L. c. 119, § 39D, when he declared that she lacked standing to seek visitation rights. We agree and vacate the judgment and the postjudgment orders.

The plaintiff is the grandmother of a minor child born to her daughter in 2004 during the daughter's marriage to the defendant, who is the child's father. The

[1] Michael J. Swistak, the plaintiff's husband, was also a plaintiff in this action. We were informed at oral argument that he since has died.

daughter died in an accident in 2005. In 2007, the plaintiff and her husband (grandparents) filed with the Probate and Family Court a complaint for grandparent visitation. On April 10, 2008, the parties entered into a judgment by stipulation whereby the grandparents were granted regular, weekly visitation with the child, including one full week during each summer. Over time, according to the plaintiff, the agreed visitation time expanded.

On June 29, 2009, the grandparents filed a complaint for modification to formalize the expanded visitation [*2] schedule; they also attached a document making negative allegations about the father's parenting. While that matter was pending, the father, on the advice of the child's therapist, filed a motion for further temporary orders seeking to terminate the visits temporarily or for the judge to order that they be supervised. On May 19, 2010, the judge allowed the father's motion to terminate visitation temporarily.

On October 18, 2011, the grandparents filed a motion for further temporary orders seeking to reinstate the weekly visitation schedule. The parties appeared before the court on the following day. At the hearing, the judge informed the grandparents that the child had been adopted by the father's new wife and that the plaintiff was "not the grandmother anymore, legally" because "as soon as a child's adopted by another parent, that cuts off the entire other family." The judge opined that, after review of the petition for adoption (notably, adjudicated by the same judge approximately three and one-half weeks earlier on September 22, 2011), the grandparents no longer had standing under G. L. c. 119, § 39D,[2] "as an adoption ha[d] taken place" which "terminates all prior Orders." Without [*3] hearing further from the grandparents' counsel, the judge then denied their motion for further temporary orders and, also, sua sponte, dismissed both the complaint for grandparent visitation and the grandparents' complaint for modification.

The grandparents filed two postjudgment motions, seeking to draw the judge's attention to the wording of the statute, which specifically excepted stepparent adoptions. Both were denied with the endorsement that the "former grandmother has no standing as child was adopted." The judge issued findings and rulings on March 19, 2012, describing the contentious history between the parties and

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[2] General Laws c. 119, § 39D, as appearing in St. 1991, c. 292, provides for visitation rights to certain grandparents of unmarried minor children. It states that "[n]o such visitation rights shall be granted if said minor child has been adopted by a person other than a stepparent of such child and any visitation rights granted . . . prior to such adoption of the said minor child shall be terminated upon such adoption without any further action of the court" (emphasis supplied).

concluding, "The maternal Grandmother is attempting alienation of affection of the child [*4] towards her Father."[3] The plaintiff timely appealed.

Discussion. The plaintiff argues that the judge erred as a matter of law when the judge found that, because the minor child had been adopted by her stepmother, the plaintiff no longer had standing to seek visitation under G. L. c. 119, § 39D. She also maintains that he erred when he dismissed, sua sponte, the complaint for visitation, which had resulted in a judgment encompassing the parties' stipulation. Finally, she claims that she was deprived of due process, specifically, notice and an opportunity to be heard, at the time of the hearing in October, 2011.

Because statutory interpretation is a pure question of law, we review the judgment de novo. Rosnov v. Molloy, 460 Mass. 474, 476, 952 N.E.2d 901 (2011). Although substantial deference is given to a reasonable interpretation of a statute, an "incorrect interpretation of a statute . . . is not entitled to deference." Commerce Ins. Co. v. Commissioner of Ins., 447 Mass. 478, 481, 852 N.E.2d 1061 (2006), [*5] quoting from Kszepka's Case, 408 Mass. 843, 847, 563 N.E.2d 1357 (1990). In this case, § 39D provides that any grandparent visitation rights ordered by a court in circumstances such as these shall be terminated "if said minor child has been adopted by a person other than a stepparent"[4] (emphasis supplied). G. L. c. 119, § 39D, as appearing in St. 1991, c. 292. Here, the minor child was adopted by the father's new wife, the child's stepmother, leaving the plaintiff's right to visitation with her granddaughter unaffected, at least by that statute. It was error for the judge to dismiss the modification complaint on that ground.[5]

The plaintiff also argues that her due process rights were denied when "ninety seconds" after she learned the child had been adopted by the stepmother, the judge determined that the plaintiff no longer had standing and sua sponte dismissed the visitation complaint as well as the pending modification complaint. We agree. "The fundamental requirement of due process is notice and the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"

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[3] In support of that conclusion, the judge noted that the plaintiff had filed with the Department of Children and Families (DCF) repeated allegations of abuse and neglect against the father. DCF did not support any of the charges.

[4] The father's contention that the judge was "clearly contemplating the adoption statute [G. L. c. 210, § 6] when he determined that the plaintiff no longer had standing" is misguided. While that statute states that an adoption decree shall terminate "such rights, duties and legal consequences . . . between the child so adopted and his natural parents and kindred," that language is directed to an adoption that does not involve a natural parent. To the extent that it appears to conflict with G. L. c. 119, § 39D, the more specific statute controls, i.e., § 39D, which discusses grandparent [*6] visitation in these circumstances. "[W]hen the provisions of two statutes are in conflict, 'the more specific provision, . . . applies over the general rule.'" Commonwealth v. Harris, 443 Mass. 714, 738, 825 N.E.2d 58 (2005), quoting from Doe v. Attorney Gen. (No. 1), 425 Mass. 210, 215, 680 N.E.2d 92 (1997). See 2B Singer & Singer, Sutherland Statutory Construction § 51.2 (6th ed. 2012) ("If an irreconcilable conflict does exist between two statutes, the more specific statute controls over the more general one").

[5] In fact, at the time of the hearing, the plaintiff's visitation rights had been suspended for more than one year.

Gillespie v. Northampton, 460 Mass. 148, 156, 950 N.E.2d 377 (2011) (citations omitted). Due process, in this context, requires that the plaintiff be given [*7] an adequate opportunity to meet her burden of proving a "significant preexisting relationship" with the child and that failing to grant "visitation would cause the child significant harm by adversely affecting [the child's] health, safety, or welfare." Sher v. Desmond, 70 Mass. App. Ct. 270, 275, 280, 874 N.E.2d 408 (2007) (citations omitted). See Blixt v. Blixt, 437 Mass. 649, 658-659, 774 N.E.2d 1052 (2002). Here, the plaintiff clearly was deprived of these due process rights when the judge spontaneously truncated the motion hearing and erroneously denied her the required opportunity to address the newly advanced issue of standing.

Accordingly, we vacate (1) the portion of the judgment purporting to dismiss the plaintiff's complaint for visitation; (2) the portion of the judgment dismissing the plaintiff's complaint for modification; and (3) the orders denying the plaintiff's postjudgment motions to alter and amend and for reconsideration. In light of the history of this case, we think it best that the issues be given a fresh look, and remand for proceedings before a different judge. Pending further proceedings, visitation is to remain terminated, pursuant to the May 19, 2010, order. The plaintiff has requested that [*8] we order the defendant to pay her appellate costs; in all of the circumstances, we decline to do so.

So ordered.

By the Court (Kantrowitz, Katzmann & Hanlon, JJ.),

Entered: February 5, 2013.
