

Your Name: Teressa Fauver-Hernandez

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Federal Way, WA 98003

Telephone: (206) 472-9507 Message phone: Same

NOTE: If for any reason you do not wish the other party to know your physical address, you must still provide a mailing address so that the court and the other party can serve you by mail.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
AT FAIRBANKS

TERESSA FAUVER-HERNANDEZ
fka TERESSA GARDINER,

Plaintiff,

NO. 4FA-17-02257CI/3AN0311696CI

MOTION TO VACATE 7/18/17 ORDER
MODIFYING CUSTODY & STRIKE RELATED
PLEADINGS & TO RE-AFFIRM ORDER(S)
GRANTED 4/5/04, 5/6/04

JERRY GARDINER, JR.,

Defendant.

I. INTRODUCTION

COMES NOW the Plaintiff/Respondent, Teressa Fauver-Hernandez, and hereby moves this Court for an order vacating its order modifying custody dated July 18, 2017 and to strike all filed pleadings relating thereto. The July 18 order was granted by default due to lack of a responsive filing. Legal reasoning, facts and argument are detailed below in support of this motion to vacate. To date, I have not received documents relating to this claim from the defendant/petitioner, though I have specifically requested copies directly from him (Fauver-Hernandez Dec., Ex. 1, p. ____), nor was I given notice that he was submitting any filings to this Court.

II. FACTS & ANALYSIS

Due Process: Failure to Provide Notice
and/or Effect Process Service on Plaintiff Ms. Fauver

The defendant/petitioner did not make any diligent inquiry into coordinating a successful service of his motion. Though he was aware of ways in which to communicate with plaintiff/respondent Ms. Fauver, and had exercised those methods on dates close in

proximity to his modification filing, he did not contact the plaintiff with a due diligence inquiry in a good faith attempt to efficiently notify and serve her (Id.).

The defendant is aware that Ms. Fauver was not properly served due to his attempted service by mail to an unverified address. It can be reasonably assumed that he is also aware this service "attempt" went to a non-existent address when his failed mailing was returned to him (as this Court was also alerted to when its July 18 order was returned from the address provided to it by the defendant. This return appears on the docket at July 31, 2017). To date, despite my request to review July's motion for modification, the defendant has not coordinated successful delivery/service of the documents to me. In fact, it was by chance that while performing legal research on Alaska's CourtView website that she learned the 2004 divorce/custody case had been reopened, transferred to a new venue, given a new cause number, and remained open after July's order to modify was granted.

Since her discovery of the reopening, Ms. Fauver-Hernandez has submitted a request and payment for copies to this Court's records department requesting the custody modification motion and its related documents filed in July. The requested copies have not yet been received.

Section 106 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which can also be located as Alaska Statute AS 25.24.150, provides that:

A child-custody determination made by a court of this State that had jurisdiction under this [Act] binds all persons who have been served in accordance with the laws of this State or notified in accordance with Section 108...and who have been given an opportunity to be heard.

Fauver-Hernandez Dec., Ex. ___, p. __

Additionally, Section 205 of the UCCJEA provides simple language about notice required in a child-custody matter:

(a) Before a child-custody determination is made under this [Act], notice and an opportunity to be heard in accordance with the standards of Section 108 must be given to all persons entitled to notice...as in child-custody proceedings between residents of this State, any parent whose parental rights have not been previously terminated, and any person having physical custody of the child...

(b) [T]his section simply indicates that persons entitled to seek custody should receive notice...Parents whose parental rights have not been previously terminated and persons having physical custody of the child are specifically mentioned as persons who must be given notice. The

Parental Kidnapping Prevention Act (PKPA)...[at Section 1738A(e)] requires that they be given notice in order for the custody determination to be entitled to full faith and credit under the Act.

Id. at p. 34, 35.

Because Ms. Fauver-Hernandez was not given notice as stated in Section 205 of the UCCJEA or served as described in Section 106 of the same, the child-custody determination issued July 18 is **not binding** and the order should be immediately vacated, as well as the pleadings thereto stricken from the record. Additionally, full legal and sole physical custody should be restored to the child's only caretaker and provider since birth, Ms. Fauver-Hernandez. Finally, this Court should order and demand that the defendant/petitioner immediately reveal the location of the child, who he has kept intentionally and maliciously concealed from her family and restricted from any type of communication or socialization outside of his home in Fairbanks, Alaska, and therefore unable to reach out for assistance or comfort. She should be allowed immediate departure away from the defendant for her journey home without any further required interaction with defendant.

Even without direct review of the defendant's modification motion, the Plaintiff is confident that the filing does not meet several basic legal requirements necessary to form a valid and actionable request. Due to the non fulfillment of these legal elements, the Plaintiff further identifies legal authorities that provide unarguable validity to her motion to and reflect the necessity of the requested reversal of the July 18, 2017 order for child-custody modification.

Residency and Jurisdiction Are Held in Home State of Washington

The minor subject to this dispute had not been present in Alaska for at least six months at the time this motion was filed. Therefore, she was not an Alaskan resident when the custody modification motion was filed nor was she when the order was granted, and in fact still is not yet a legal resident as she only became physically present in the state at the end of May 2017 with no wish to permanently stay, leaving nearly all of her belongings remain in Washington (Fauver-Hernandez Dec., Ex. ____). She has expressed the desire to continue her high school career at the arts and college preparatory high school she attended last year for her freshman year, The Center School, on the grounds of the Seattle Center and Space Needle. Prior to her arrival in Alaska, Plaintiff and child maintained residency in Washington State since summer, 2013. Both the Fairbanks and Anchorage, Alaska judicial venues lack jurisdiction due to the minor's lack of residency and of any ties to the State.

Section 202 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) provides that:

(a)...a court of this State which has made a child-custody determination...has exclusive, continuing jurisdiction over the determination until:

(1) a court of this State determines that neither the child, nor the child and one parent...have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships...

...[Comment]...This section provides the rules of continuing jurisdiction and borrows from UIFSA as well as UCCJEA case law. The continuing jurisdiction of the original decree State is exclusive. It continues until one of two events occurs:

1. If a parent...remains in the original decree State, continuing jurisdiction is lost when neither the child, [or] the child and a parent...continue to have a significant connection with the original decree State and there is no longer substantial evidence concerning the child's care, protection, training and personal relations in that State....If the relationship between the child and the person remaining in the State with exclusive, continuing jurisdiction becomes so attenuated that the court could no longer find significant connections and substantial evidence, jurisdiction would no longer exist.

Id. at p. _

Ms. Fauver-Hernandez and child have lived in Washington State for the majority of their lives and the child has clearly indicated that she would like to continue her residency in the Seattle area with her mother (Fauver-Hernandez Dec., Ex. ____). Most of her friends live in Washington state or the lower-48 and she and her mother/Plaintiff have many fond memories of their time in the area, to include exploring and socializing at various local parks, attending festivals like Folklife, participating in neighborhood and city-wide events like the Solstice Parade, Seafair, neighborhood block parties and street fairs, frequenting favorite restaurants in the various neighborhoods they've lived in, and taking part in holiday celebrations at the Seattle Center and Zoolights at the Woodland Park Zoo. The child has expressed that post-graduation, she would like to focus on obtaining a career in the music and/or entertainment industry and desires to attend a music-focused college in the lower-48.

Ms. Fauver-Hernandez and child have not lived in Alaska since the beginning half of 2012. Neither of them have significant connections to the State. They do have family in Ketchikan, Alaska, to include the defendant's sister/child's aunt and cousin, and Plaintiff's father/child's grandfather, great-aunt, and second cousins, whom are routinely in contact with

either online or on the phone. There is no substantial evidence available in Alaska relating to the child's care, protection, training, or personal relationships.

Therefore, after consideration of the facts above, this Court should recognize Washington as the child's home state and as having legal jurisdiction over this child-custody matter per UCCJEA Section 202 and the custody modification order dated July 18, 2017 should be immediately vacated, as well as the pleadings thereto stricken from the court record. Additionally, full legal and sole physical custody should be restored to the child's sole caretaker and provider since birth, the Plaintiff/respondent, Ms. Fauver-Hernandez. Finally, this Court should order and demand that the defendant/petitioner immediately reveal the location of the child, who he has kept concealed from her family and restricted from any type of communication or socialization outside of his home in Fairbanks, Alaska since approximately July 7, where she has been deprived of the freedom and ability to reach out for assistance or comfort, or openly express herself without recourse. She should be provided immediate departure from the defendant for her journey home without any further required interaction with him.

Inconvenient Forum

Section 207 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) provides the following regarding the determination of a potential jurisdictionally inconvenient forum and the factors which the Court may consider when deciding the appropriate venue:

(a) A court of this State which has jurisdiction under this [Act] to make a child-custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another State is a more appropriate forum...

(b) Before determining whether it is an inconvenient forum, a court of this State shall consider whether it is appropriate for a court of another State to exercise jurisdiction. For this purpose, the court shall...consider all relevant factors, including:

(1) whether domestic violence has occurred...and which State could best protect the parties and the child;

(2) the length of time the child has resided outside this State;...

(7) [and] the ability of the court of each State to decide the issue expeditiously and the procedures necessary to present the evidence...

Subparagraph (1) is concerned specifically with domestic violence and other matters affecting the health and safety of the parties. For this purpose, the court should determine whether the parties are located in different States because one party is a victim of domestic violence or child abuse. If domestic violence or child abuse has occurred, this factor authorizes the court to consider which State can best protect the victim from further violence or abuse...

The court is also authorized to impose any other conditions it considers appropriate. This might include the issuance of the designated State, dismissing the case if the custody proceeding is not commenced in the other State or resuming jurisdiction if a court of the other State refuses to take the case.

Fauver-Hernandez Dec., Ex. ____

A Washington State court is the most appropriate forum in this matter because the subject child has been a Washington resident for the majority of her life. She has participated in the public education system in the City of Seattle for all but two of her ten years (she is now a sophomore and should be enrolled for 10th grade, which defendant has not done). School started September 6. The venue in Fairbanks, Alaska is an inconvenient forum for the minor and her mother/plaintiff Ms. Fauver-Hernandez, and their lives in Seattle, Washington.

Domestic violence has been a very serious and judicially-recognized issue for the Plaintiff and child and their relationship with the defendant. The child-custody orders provided allow only a minimum of supervised visitation privileges to the defendant and command his completion of a 28-week domestic violence intervention program and of three separate parenting classes (Declaration of Fauver-Hernandez, Ex. ____). The defendant has not provided evidence of completion of either of these court-ordered education programs that were made as requirements of the defendant for the safety of the child. Washington state is the most convenient forum for the Plaintiff, Ms. Fauver, and child, when the defendant's admittedly violent history and lack of accountability are taken into Consideration. Alaska is an inconvenient forum for the family due to the defendant's criminal and violent history.

In consideration of the facts outlined above, and Section 207 of the UCCJEA, the custody modification order dated July 18, 2017 should immediately be vacated and the pleadings thereto stricken, and any motion the defendant/petitioner brings should be presented in King County, Washington.

Additionally, full legal and sole physical custody should be restored to the child's sole provider and caretaker since birth, Ms. Fauver-Hernandez. Finally, this Court should order and demand that the defendant/petitioner immediately reveal the location of the child, who he

has kept concealed from her family and restricted from any type of communication or socialization outside of his home in Fairbanks, Alaska, and therefore unable to reach out for assistance or comfort. She should be allowed immediate departure away from the defendant for her journey home without any further required interaction with defendant.

Defendant's Failure to Adhere to Prior Custody Order

The original custody order in this matter was not granted until pleadings and discovery had been exchanged between the parties and a trial was held, which included live witness testimony. After considering all the evidence presented at trial, Honorable John Reese, presiding out of Anchorage, ruled that the mother (Ms. Fauver-Hernandez) would receive 100% physical and legal custody. Professionally supervised supervision was allotted once a week for a maximum duration of two hours, to be paid for by the defendant (Mr. Gardiner) at a location most convenient for Ms. Fauver-Hernandez and child (Id. at p. ____).

A court restricts visitation when a party presents reason for serious safety concerns. The defendant in this matter was given a severely restricted visitation schedule due to the extremely disturbing and violent facts he admitted to without argument in trial, including severe violence toward the plaintiff pre- and post-partum and of recklessly endangering the life of their child.

The defendant failed to fulfill his obligations as described in the April and May 2004 custody orders granted in Anchorage, Alaska, which set forth the following:

"...defendant shall enroll in and complete the following programs:

- a. A state certified domestic violence intervention program that is at least twenty-eight (28) weeks in length; and
- b. Three (3) different parenting classes or programs that address the needs of children that are Krystin's age...

Defendant shall provide proof of the above to plaintiff's counsel as soon as defendant enrolls in the above programs and defendant shall also execute appropriate releases upon enrollment in the above programs so that plaintiff can verify that defendant is compliant with the above conditions.

Fauver-Hernandez Dec., Ex. ____, p. ____

****Look up DV statutes relating to custody grantings******

The professionally supervised visitation for only two hours a week and the 28+ week course on _____ were requirements put in place by the Anchorage Superior Court to ensure the offending parent addressed any concerning behavioral habits and/or issues before being allowed access to the child.

The Court should have been aware of the history in this matter and should not have awarded custody to the defendant. He has not fulfilled his obligations to the issuing Court's requirements for visitation and has had approximately 13 years to fulfill these obligations. With a history of emotional instability and other personal issues that the issuing Court initially recognized and demanded be addressed prior to the defendant spending any time alone with the minor, **these obligations should not have been overlooked** by the Court. Doing so has endangered the child and the defendant has shamelessly abused any rights he may have had or obtained as the child's legal guardian, in his decision to keep her concealed for over two months.

The child has not been enrolled in a public high school for her sophomore year. She has not had an internet presence for over two months. She has been kept from any communication with *anyone* outside of her undisclosed location, believed to be in Fairbanks, for the same amount of time. The legal parental rights of Ms. Fauver-Hernandez have been outrageously and unconscionably interfered with to the extreme by the defendant and to the child's unimaginable and absolutely unnecessary detriment. The defendant has consistently refused and denied any demand or request made by Ms. Fauver-Hernandez to communicate with her only child for over two months, despite daily demands/requests sent to the defendant asserting her legal right to do so (Dec. of Fauver, Ex. ____). The defendant has also denied visits and/or conversations between the child and her grandmother, great uncle and cousin. The child's location should be revealed immediately and 100% custody returned to the Plaintiff, Ms. Fauver-Hernandez, who has been the child's sole caretaker and provider since her birth.

III. CONCLUSION

I swear or affirm that the above facts and statements are true to the best of my knowledge.

Your Signature (In blue ink if possible)

Subscribed and sworn to or affirmed before me at _____,
Name of City, Town or Village

Alaska on _____.
Date

Notary Public or other person authorized to administer oaths.

My commission expires on_____.

Certificate of Service (to be filled out by person filing the motion)

I certify that on _____ a copy of this *Motion & Affidavit to Appear & Testify by Telephone* and proposed Order was ☐ mailed ☐ hand delivered to:

☐ Opposing Party _____ ☐ Opposing Lawyer _____
☐ AG _____ ☐ CI _____ ☐ Other _____

Your signature: _____

ORDER ON MOTION TO VACATE & STRIKE RELATED PLEADINGS

Having considered the *Motion & Declaration* and any *Opposition* filed, and finding good cause and no substantial prejudice to the opposing party, the Court ORDERS:

The ☐ Plaintiff's ☐ Defendant's request to appear by telephone for ☐ all hearings / trial
☐ the hearing / trial on ____ at ____ is:
(date of hearing / trial) (time of hearing / trial)

☐ **Granted.**

☐ The court will call you at the telephone number provided in your motion. Wait by the telephone for up to 2 hours after the hearing/trial start-time for the call because your case may be delayed by prior cases.

☐ You need to call the court at the following number: _____

☐ Other: _____

☐ **Denied.** To testify, you must appear in court at the above date and time.

Date

Superior Court Judge

Certificate of Distribution (to be filled out by court staff)

I certify that on _ a copy of the above was mailed to each of the following at their addresses of record: ☐ Plaintiff

☐ Defendant _____ ☐ AG ☐ CI

☐ Other _____

Deputy Clerk / Judicial Assistant