IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the De Facto Parentage of H.M.	)	NO. 66035-7-I
	)	DIVISION ONE
GEORGE MORGAN,	)	
Appellant,	)	UNPUBLISHED OPINION
and	)	
MARIE MORGAN,	)	
Respondent.	)	FILED: January 23, 2012

Leach, J. — George Morgan appeals the dismissal of his petition to establish de facto parentage of his granddaughter, H.M. Morgan and his wife previously brought and litigated a third party custody action seeking custody of H.M. Because the de facto parentage cause of action arises out of the same facts as the third party custody action and would require presentation of substantially the same evidence that was presented during the prior custody proceedings, the petition is barred by res judicata. Accordingly, we affirm.

FACTS

Marie Morgan is the mother of H.M.[1] From the time of her birth in 2000, H.M. has resided with her grandparents, George and Emma Morgan, and her

[1] H.M. has had no contact with her biological father, and he is not listed on H.M.'s birth certificate.

mother at her grandparents' home.[2] H.M.'s mother and her grandparents shared in the day-to-day care of H.M. In 2008, when H.M. was eight years old, Marie left Washington for New York, apparently intending to relocate there.[3] Marie left H.M. in her parents' care. While Marie was out of the state, George and Emma filed a third party custody action under RCW 26.10.030 in Snohomish County Superior Court.

Marie returned to Washington to contest the lawsuit. A trial took place in May 2010. By the time of trial, Marie had enlisted in the military and was stationed in Colorado. The trial court determined that George and Emma had not met their burden to establish that Marie was an unfit parent or that placing H.M. in Marie's care would result in actual detriment to H.M.'s growth and development.[4] The court awarded custody to Marie and made its custody order effective at the end of the school year in June 2010.

Shortly before the court's order took effect, George Morgan filed a petition seeking to establish his status as H.M.'s de facto father and seeking custody of H.M. on that basis. The petition alleged:

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[2] It appears that H.M. lived continuously at this home with the exception of two brief periods when Marie took H.M. to live outside her parents' household.

[3] To avoid confusion, we refer to Marie, George, and Emma Morgan by their first names in this opinion.

[4] See In re Custody of Shields, 157 Wn.2d 126, 144, 136 P.3d 117 (2006) (third party seeking custody from a parent must demonstrate that the parent is unfit or that placement of the child with the otherwise fit parent will result in actual detriment to the child's growth and development).

> The child has only known George Morgan as her father/grandpa. The child has . . . lived with her grandfather/father since birth and George Morgan has performed the role of father to the child without fail and with the blessings of the mother. George Morgan provided all the necessary fatherly duties including love and affection, physical, financial, emotional and educational support making him the only father she has ever known. The bond is such that it is not in the best interests of this child to lose the relationship.

Marie filed a motion to dismiss the petition. Following a hearing, a court commissioner granted the motion because the parties had already litigated the custody of H.M. in the third party custody action. The court further determined that the grandfather could not, as a matter of law, establish de facto parentage according to the Washington Supreme Court's decision in In re Parentage of M.F., in which the court declined to extend the common law doctrine of de facto parentage to a stepparent.[5]

George filed a motion for revision. Following a hearing, the trial court concluded that George's petition was barred by res judicata:

> While the "de facto parent" theory is somewhat different from "third party custody", they are very similar in practical terms here. And this "de facto parent" theory could conceivably have been raised as an alternate ground at the previous trial, but was not.

Accordingly, the court denied the motion because res judicata principles precluded a second attempt to litigate the custody of H.M.

ANALYSIS

[5] 168 Wn.2d 528, 532, 228 P.3d 1270 (2010)

"'Filing two separate lawsuits based on the same event—claim splitting—is precluded in Washington.'"[6] Under the doctrine of res judicata, a plaintiff is barred from litigating claims that either were, or should have been, litigated in a former action.[7] The principles of res judicata ensure the finality of court decisions.[8]

Application of the doctrine of res judicata requires identity of (1) persons and parties, (2) causes of actions, (3) subject matter, and (4) the quality of persons for or against whom the claim is made in the prior judgment and subsequent action.[9] "The party asserting the defense of res judicata bears the burden of proof."[10] Whether res judicata bars an action is a question of law we review de novo.[11]

George maintains that the two actions do not assert identical causes of action. In order to determine whether causes of action are identical, we may consider

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[6] Ensley v. Pitcher, 152 Wn. App. 891, 898–99, 222 P.3d 99 (2009) (quoting Landry v. Luscher, 95 Wn. App. 779, 780, 976 P.2d 1274 (1999)), review denied, 168 Wn.2d 1028, 230 P.3d 1060 (2010).

[7] Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995).

[8] Pederson v. Potter, 103 Wn. App. 62, 67, 11 P.3d 833 (2000).

[9] Loveridge, 125 Wn.2d at 763.

[10] Ensley, 152 Wn. App. at 902 (citing Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 865, 93 P.3d 108 (2004)).

[11] Lynn v. Dep't of Labor & Indus., 130 Wn. App. 829, 837, 125 P.3d 202 (2005).

> (1) whether the rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the suits involved infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.[12]

These four factors are analytical tools; it is not necessary that all four factors be present to bar the claim.[13]

George points out that his current petition seeks to establish permanent parental rights, while his prior lawsuit sought to establish only custody. He further contends that the two actions would require presentation of different evidence. But George's petition to establish de facto parentage and his prior third party custody claim both arise from the same nucleus of facts: the history of H.M., her relationships with her grandparents and her mother, and the respective historical roles of the parties in the caretaking of the child. And while it is true that the evidence supporting the grandparents' allegations of parental unfitness in the custody action would not be necessary to support the claim of de facto parentage, since the grandparents sought custody of H.M. in the previous action, substantially the same evidence regarding the nature of the relationship between George and H.M. would be essential to both claims. Because the

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[12] Pederson, 103 Wn. App. at 72.

[13] Kuhlman v. Thomas, 78 Wn. App. 115, 122, 897 P.2d 365 (1995) ("there is no specific test for determining identity of causes of action"); Philip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington, 60 Wash. L. Rev. 805, 816 (1985).

claims arise from the same facts and would require presentation of the same evidence, the causes of action have a concurrence of identity.

The elements of res judicata are met in this case.[14] The factual basis for George's de facto parentage claim existed at the time the custody action was filed. George had the opportunity to litigate this claim in his initial action. Applying res judicata, we conclude George is now barred from litigating de facto parentage in a separate action.

We also reject George's procedural argument that Marie's motion to dismiss was improperly granted because he was not provided with 28 days' notice prior to the hearing on the motion. It is clear from the record that the motion was brought and granted under CR 12(b). The notice provisions of CR 56(c) he relies on did not apply. And even if CR 56(c) was applicable, deviation from the timing requirements for summary judgment motions is permissible, and a party challenging such a deviation must demonstrate actual prejudice.[15]

CONCLUSION

We affirm.

[14] George focuses on the identity of causes of action. He also argues in passing that the parties are not identical. But George does not dispute that he and Marie are parties to both actions. It is immaterial that Emma Morgan is not a named party in the second action.

[15] See State ex rel. Citizens Against Tolls (CAT) v. Murphy, 151 Wn.2d 226, 236, 88 P.3d 375 (2004).

WE CONCUR: