

No. 33954-4-II

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

IN RE CUSTODY OF ZACHARY MORGAN

DAVID B. RADFORD & SHEILA RADFORD

Appellants

v.

MARYJANE AGNESS VANNING

JEFFREY C. MORGAN

Respondents.

BRIEF OF RESPONDENT

JEFFREY C. MORGAN

Jeffrey C. Morgan

Respondent, Pro Se

376 Douglas Street
Longview, WA 98632
(360) 578-0272

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Statement of the Case

During Mary's pregnancy, Jeff was living with his wife and son in Oklahoma (RP 8/25/05, p. 14, l. 21-p. 16, l. 20; p. 17, l. 1-22; p. 76, l. 20-p. 77, l. 7).

Jeff also had a nine-year-old son in Oklahoma (RP8/25/05, p. 19, l. 18-p. 20, l. 4). Jeff was found to be a fit parent in that divorce (RP 8/24/05, p. 60, l. 15-p. 61, l. 4) and was awarded joint legal custody (RP 8/24/05, p. 62, l. 6-14).

Zach was born May 28, 2003 (RP 8/24/05, p. 34, l. 16; p. 82, l. 15-19).

Jeff filed his Petition for Establishment of Parentage on September 2, 2003 (RP 8/24/05, p. 82, l. 20; p. 83, l. 3-4). That was about as quick as he could do it, considering the lack of information from MaryJane and

the fact that he was living with his wife and son in Oklahoma at the time (RP 8/25/05, p. 14, l. 21-p. 16, l. 20; p. 17, l. 1-22; p. 76, l. 20-p. 77, l. 7).

On January 11, 2004, Jeff was injured at work in Oklahoma (RP 8/24/05, p. 7, l. 9-p. 8, l. 13).

On August 13, 2004, David Radford filed his Motion to Intervene, To Consolidate, and to Change Venue (CP 41-67).

On August 25, 2004, Jeff's Order on Motion For Temporary Orders was entered (EX 15; RP 8/24/05, p. 69, l. 24-p. 71, l. 6) acknowledging that Jeff would be established as Zachary's legal father and that Mary would turn Zach over to Jeff on September 1, 2004, subject to orders of the Pierce County Superior Court.

On August 25, 2004, the Final Parenting Plan was

entered giving Jeff custody of Zach (EX 13).

On August 25, 2004, the Oder of Child Support was entered. Jeff did not ask for any child support.

On August 25, 2004, the Judgment and Order Determining Parentage and Granting Additional Relief was entered designating Jeff as Zach's father (EX 14).

On October 6, 2004, an Amended Judgment and Order Determining Parentage and Granting Additional Relief was entered giving Zach Jeff's last name (EX 4).

Argument

The premise of Jeff's argument is, if a guy kidnaps a child and is able to get away with it for five years, should the kidnapper be awarded custody of the child because the kidnapper is the only parent the child

knows?

A Judgment and Order Determining Parentage was entered in Lewis County on August 25, 2004 (EX 14). The Final Parenting Plan was entered on August 25, 2004 requiring Zach to be turned over to Jeff immediately (EX 13, RP 8/24/05, p. 68, l. 2-18).

An Order on Motion for Temporary Orders was entered in Lewis County on August 25, 2004 (RP 8/24/05, p. 70, l. 2-13; p. 71, l. 6; CP 41-67).

On September 30, 2004, MaryJane filed her Petition for a Protection Order in Lewis County (EX 8) to keep Jeff from taking custody of Zach. MaryJane was granted a Temporary Order for Protection (EX 6), which was dismissed on October 5, 2004 (EX 5) (RP 8/24/05, p. 63, l. 14-p. 66, l. 18).

This Court must keep in mind that Zach was with Dave from the time he was born because MaryJane has a diminished mentality (RP 8/24/05, p. 23, l. 3-22).

Jeff's Visitations

Jeff did get some visitations with Zach (RP 8/24/05, p. 19, l. 12-p. 21, l. 14; p. 77, l. 11-p. 79, l. 23).

There was an issue about Jeff's efforts to get visitation between the time he filed his papers in September 2003 and August 2004 (RP 8/24/05, p. 82, l. 17-p. 87, l. 17) . Jeff's memory was a little fuzzy there. Actually, he made six attempts to get visitation in Lewis County – September 2, 2003; October 7, 2003; December 5, 2003; December 19, 2003; April 19, 2004, and July 15, 2004. These documents are available at the Lewis County Superior Court if necessary.

Although Dave knew there was a paternity action in Lewis County and attended almost every one of those hearings (RP 8/24/04, p. 38, l. 5-10; p. 71, l. 7-25), he waited until August 13, 2004 to file his Motion to Intervene, To Consolidate, and to Change Venue in Lewis County (CP 41-67).

Dave admitted that he has planned to adopt Zach from the day he was born (RP 8/24/05, p. 37, l. 15-20).

Dave began his crusade to stop Jeff's lawful right to custody of Zach in Pierce County by filing his Nonparental Custody Petition (CP 5-10) on August 12, 2004, followed by his restraining order filed on August 23, 2004 (CP 20-22).

Dave filed a second Motion and Declaration for Ex Parte Restraining Order on August 26, 2004 (CP 32-35). An Ex Parte Restraining Order and Order to Show

Cause was entered on August 27, 2004 (CP 37-39).

The Court can clearly see that it was not Jeff who was causing the delay of his lawful custody of Zach.

Jeff filed his Response to Nonparental Custody Petition (CP 68-70) on September 3, 2004. Jeff pointed out that Zach's last name is Morgan pursuant to the Amended Judgment entered in Lewis County on August 25, 2004 (EX 4; RP 8/24/05, p. 62, l. 19-p. 63, l. 7). Jeff pointed out that Dave had no standing in Pierce County pursuant to Custody of Nunn, 103 Wn.App. 871, 14 P.3rd 175 (2000). Jeff pointed out that there was no finding in Lewis County that he would be an unfit parent. Jeff requested that Dave's Nonparental Custody Petition be dismissed.

Jeff filed his Declaration in Response to Motion for Ex Parte Restraining Order on September 3, 2004 (CP 71-

78).

Jeff denied that he had a history of methamphetamine use and included a report from Quest Diagnostics to prove it. He pointed out that Dave's own attorney acknowledged that the main reason for the delay in Lewis County was because of MaryJane's misrepresentations. He pointed out that he had joint custody of his son in Oklahoma. Once again, Jeff pointed out that Dave had no standing pursuant to Nunn. Jeff also filed a declaration from his ex-wife, Kristi, who supported his efforts to gain custody of Zach (CP 79-80).

Along with his Response, Jeff also submitted his Declaration in Support of Proposed Temporary Parenting Plan from Lewis County (CP 41-67).

On September 8, 2004, the Order re Show Cause was

entered (CP 84) providing for a parenting investigation pursuant to the Nunn standards and granting Jeff eight hours of supervised visitation over the following two days.

The Order Allowing Appointment of Guardian ad Litem specifically required an investigation pursuant to Nunn (CP 83).

Jeff moved right away for his Motion for Expanded Visitation (CP 92-95) on September 22, 2004. Jeff pointed out that Dave drug out the eight hours of visitation over several days. Jeff requested that he have visitation every day from 9 a.m. to 5 p.m.

On September 27, 2004, a Temporary Parenting Plan was entered (CP 105) giving Jeff minimal unsupervised visitations.

Jody Long, Guardian ad Litem

First, it is important to point out Ms. Long's lack of qualifications to determine any harm to Zach by turning him over to Jeff.

Ms. Long claimed that Zach could not be turned over to Jeff without an extensive integration plan because he had been psychologically bonded to the Radfords. However, on cross-examination by Jeff's attorney, Mr. Webley, Ms. Long admitted that she was not a doctor and that she took only a psychology class in college in 1978 (RP p 48, l. 1-23).

Ms. Long admitted that she talked to Dave a few days before the trial but had not talked to Jeff for months (RP 8/24/05 p. 46, l. 8-25).

Ms. Long failed to mention the delay in Lewis County

was caused primarily by Ms. Vanning (RP 8/24/05, p. 52, l. 18-p. 54, l. 13).

Ms. Long never contacted any of Jeff's references (RP 8/24/05, p.79, l. 24-p. 80, l. 6).

Ms. Long was dismissed from this case on September 16, 2005 (CP 168).

After failing twice to get his stay from the Court of Appeals, Dave was able to coax Ms. Long into writing her declaration in support of his emergency stay on October 26, 2005. Notice that she refers to Zach as Z.R. although she, more than anyone else, knew that Zach's last name had been changed to Morgan in Lewis County.

This was Ms. Long's chance to submit her opinion of how Judge McCarthy should have ruled on August 24,

2005.

On page 3, Ms. Long argues that Jeff made a decision to forego his relationship with Zach and should not be “rewarded” with custody of Zach after making only “a half attempt to establish a bond of love with the child.”

As Judge McCarthy was well aware, Jeff had joint custody of his son in Oklahoma. Jeff had medical appointments to attend to in Oklahoma due to his neck injury. Dave is the one who is responsible for dragging this case out.

Then Ms. Long went on to give her unqualified psychological evaluation of this case.

Ms. Long cited In re Hall, 99 Wn.2d 842, 664 P.2d 1245 (1983), which brings up an interesting question. What about adopting children who had been in foster

care for two+ years?

But there is no way Hall is analogous to this case. Hall was a dependency case. In Hall, there was a question of how long it would take Mr. Hall to bring his parenting skills up to par. Nobody has questioned Jeff's ability to parent Zach. The only issue is how long Dave can drag this case out.

On December 14, 2004, the Guardian ad Litem's report was entered (CP 108-121). However, that report did not comply with the ruling in Nunn. It did not specifically address whether Jeff, the biological father, was an unfit parent.

On April 11, 2005, Ms. Long submitted her second Guardian ad Litem Report (CP 125-127) attempting to address Nunn.

Ms. Long pointed out that in addition to the unfitness standard in Nunn, In re the Custody of Shields, 120 Wn.App. 108, 108 P.3d 905 (2004), added a detriment to the child standard pursuant to In re Marriage of Allen, 28 Wn.App. 637, 626 P.2d 16 (1981).

Shields was reviewed by the Washington State Supreme Court at In re Custody of Shields, 157 Wash.2d 126, 136 P.3d 117 (2006).

In the first place, the Shields Court found that when determining custody between a parent and a non-parent, the best interests of the child standard is inappropriate. The best interests of the child standard was unconstitutional in a custody proceeding between a parent and a non-parent because that standard does not give the required deference to parental rights. At 128.

That Court kept the unfitness standard and the

detriment to the child standard, but the Court found that the burden of proof is on the non-parent to demonstrate that placement of the child with the fit parent will result in actual detriment to the child's growth and development. The Court stated that when this heightened standard is properly applied, the requisite showing required by the non-parent is "substantial" and a non-parent will generally be able to meet this test in only "extraordinary circumstances." Shields at 144-145.

The Court stated that the evidentiary burden should not be placed upon the fit parent. The heightened burden of proof is upon the non-parent. It is not the burden of the fit parent to provide evidence of "compelling reasons" to gain custody of his son.

Psychological Parent

The Shields Court had concerns about the terms psychological parent, in loco parentis, and de facto parent. Shields at 145. The court affirmed its decision in In re Parentage of L.B., 155 Wn.2d 679, 122 P.3d 161 (2005), where it held that in order for a court to give legal effect to a de facto parent, the court must find that the natural or legal parent consented to and fostered the parent-like relationship.

Obviously, Jeff has never consented to allowing Dave to have custody of Zach in any manner. Consequently, Dave cannot use the status of psychological parents to interfere with Jeff's constitutionally protected rights.

Contrary to the suggestion in Allen, the Shields Court did not recognize "de facto family" as a legal status.

The Shields Court found that siblings could be separated if it was in "the best interests" of the children

(at 148), citing In re Marriage of Little, 26 Wn. App. 814, 614 P.2d 240 (1980), rev'd 96 Wn.2d 183, 634 P.2d 498 (1981), and Smith v. Frates, 107 Wash. 13, 180 P. 880 (1919), later modified by Frates v. Frates, 135 Wash. 567, 238 P. 573 (1925).

The Guardian ad Litem Report Re: Integration was submitted on September 6, 2005 (CP 150-152). Ms. Long argued that integration should be gradual.

Ms. Long submitted some hearsay statements from David Hall and Emma Jones.

Thanks to Dave, this case has been dragging on for a long time. Judge McCarthy ordered an integration schedule on August 24, 2005 (RP 8/24/05, p. 137, l. - 22), but Dave made every effort to sabotage it, even to the extent that Jeff had to get a Writ of Habeas Corpus against him on October 21, 2005, five days before Dave

was granted his stay in the Court of Appeals on October 26, 2005 (RP 9/16/05, p. 4, l. 9-19).

The issue of reintegration should be addressed in the trial court if this Court decides that Jeff should be the custodial parent.

The Nonparental Custody Decree (CP 175-179) and Findings of Fact (CP 169-174) giving Jeff custody of Zach were entered on September 16, 2005. Visitation did not apply.

An Order allowing Jeff to take Zach back to Oklahoma was entered on September 16, 2005 (CP 168; RP 9/16/05, p. 15, l. 22).

As this court is well aware, Dave did not think those orders giving Jeff custody of Zach and permission to take him back to Oklahoma applied to Dave. Jeff was

forced to apply for a Writ of Habeas Corpus on October 21, 2005.

Constitutional Right

According to In re Parentage of L.B., 155 Wn. 2d 679, 709, 122 P.3rd 161 (2005):

It is well recognized that “[t]he liberty interest ... of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme] Court.” Troxel, 530 U.S. at 65, 120 S.Ct. 2054 (plurality opinion) (citing Prince, 321 U.S. at 166, 64 S.Ct. 438; Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534-35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042

(1923)); accord In re Welfare of Sumey, 94 Wash.2d at 762, 621 P.2d 108. Additionally, in In re Custody of Smith, this court applied a strict scrutiny analysis in discerning whether a grandparent's invocation of the visitation statute infringed on the biological parent's "fundamental 'liberty' interest." 137 Wash.2d at 15, 969 P.2d 21. In doing so, this court stated that "state interference is justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved." *Id.*; see also In re Parentage of C.A.M.A., 154 Wash.2d 52, 57-58, 109 P.3d 405 (2005) (reaffirming Smith's strict scrutiny analysis).

C.A.M.A. reaffirmed Smith's holding establishing strict scrutiny analysis as the appropriate analytic framework in reviewing the State's infringement

on a parent's fundamental liberty interest.

Dave's Brief

There are three recurring themes throughout Dave's brief.

First, he claims that Jeff abandoned Zach. But as this Court can clearly see, Jeff did everything he could reasonably do to assert his parental rights.

Second, Dave complains that Jeff never supported Zach. No court has ever required Jeff to support Zach. It is obvious that Jeff was doing everything he could possibly do to gain custody of Zach so Dave would not have to support him. Jeff should have taken custody of Zach on August 25, 2004 when he was granted custody in Lewis County.

Jeff never asked for child support from MaryJane.

Third, Dave complains that Jeff never sent Zach any cards or gifts. The first Temporary Parenting Plan entered Pierce County was on September 27, 2004. Zach was only 16 months old then. He did not know who Jeff was without Jeff actually being there, and considering Dave's efforts to thwart any relationship between Jeff and Zach, there was no assurance that Dave would give him any of Jeff's cards or gifts.

Conclusion

Dave's attorney concluded that leaving a child with a kidnapper would be very damaging to the child. He stated that anyone who actively interferes with a parent-child relationship is a bad parent (RP 8/24/05, p 92, l. 1-p. 93, l. 14).

There was no evidence that Jeff could not properly parent his child.

Jeff adopts the closing argument by his attorney, Gregory S. Webley, from the trial held on August 24, 2005 (RP 8/24/05, p. 108, l. 6 through p. 118, l. 3) and the oral decision of Judge John A. McCarthy (RP 8/24/05, p. 122, l. 23 through p. 137).

Respectfully submitted this 4 day of April, 2007.



Jeff Morgan

Respondent, Pro Se

COURT OF APPEALS
DIVISION II

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In re the Custody)
of ZACHARY MORGAN)
Child)
)
DAVID B. RADFORD &)
SHEILA RADFORD)
Appellants)
and)
MARYJANE AGNESS)
VANNING and JEFFREY)
C. MORGAN)
Respondents.)
_____)

CERTIFICATE OF SERVICE

Jeffrey Morgan, Respondent, Pro Se, declares as follows:

I served Ross E. Taylor, attorney for Appellants, a Brief of Respondent by depositing a true and correct copy thereof in a receptacle of the United States Postal Service to the address of:

Ross E. Taylor
4217 Juniper Drive W

University Place, WA 98466

I certify under penalty of perjury under the laws of the state of Washington that the foregoing statements are true and correct.

Respectfully submitted this 4 day of April, 2007.



Jeffrey Morgan

Respondent, Pro Se

376 Douglas Street

Longview, WA 98632

(360) 578-0272