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Court of Appeals No. 35015-7-II

IN RE: B.R.S.H. and M.R.E.

BRENDA KAY HIGGINS and DANNIE EDWARD HIGGINS

Appellants

v.

JASON EVANS, father, and BIANCA MAYA CROCKETT, mother,

Respondents

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
HONORABLE BRIAN TOLLEFSON

BRIEF OF RESPONDENT JASON EVANS

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ORIGINAL

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I. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

The issue in this case is whether the trial court erred in finding and concluding that MRE, a minor, should be placed in the custody of her father, respondent Jason Evans, and out of the custody of her grandparents, appellants Mr. and Mrs. Higgins, because Mr. Evans is a fit parent and it would not be detrimental to MRE to place her in Mr. Evans' custody.

II. STATEMENT OF THE CASE

The facts of this case are not in significant dispute. On March 16, 1999, Mr. Higgins' step-daughter and Mrs. Higgins' daughter, Bianca Maya Crockett gave birth to MRE. While Ms. Crockett is a named party, her interests are not material to this appeal. The father of MRE is Mr. Evans.

On August 1, 2000, Mr. and Mrs. Higgins filed a Nonparental Custody Petition, alleging that MRE and another child of Ms. Crockett (unrelated to Mr. Evans and therefore not material to this appeal), were living in the Higgins' home and that neither parent was a suitable custodian. CP 5. On May 8, 2001, Terri S. Farmer, a Guardian ad Litem appointed by the court, filed her Report of Parenting Investigator. Ms. Farmer found that Mr. Evans was not at that time a fit parent. CP 35. On

September 10, 2001, at an uncontested resolution hearing, the court granted custody of MRE to Mr. and Mrs. Higgins. CP 41. The Court's Decree permitted Mr. Evans to visit with MRE four (4) hours every other week with certain conditions imposed. CP 45. If Mr. Evans failed to comply with these conditions, Mr. and Mrs. Higgins were within their rights to deny Mr. Evans visitation. CP 45. Mr. Evans complied with the court imposed conditions and regularly visited with MRE for his permitted four (4) hours.

On June 23, 2005, Mr. and Mrs. Higgins filed a Notice of Intended Relocation of Children. CP 59. Mr. Evans filed an Objection to Relocation/Petition for Modification of Custody Decree/Parenting Plan/Residential Schedule. CP 58-62. In that petition, Mr. Evans sought to obtain custody of MRE. On March 8, 2006, William Abbott, a Guardian ad Litem appointed by the court, filed his report. CP 74. In that report, Mr. Abbott found that Mr. Evans is fit parent and that it would not be detrimental to place MRE in Mr. Evans' custody. CP74-80.

On April 17, 2006, this case was called before the Honorable Judge Brian Tollefson. At that time Mr. and Mrs. Higgins requested that their Petition to Relocate be dismissed, and the court granted their request. RP 2

at 8-11. The court ruled that a trial on the merits of Mr. Evans' Petition for Modification would commence the following morning. RP 3 at 3-4; RP 15 at 20-22. No record was created of any objection by Mr. and Mrs. Higgins to this ruling.

Trial was conducted, and both sides provided evidence in support of their respective positions. On May 4, 2006, the court rendered its oral decision, and on June 9, 2006, the court ruled that beginning July 28, 2006, MRE shall be placed in the custody of her father, Mr. Evans, and Mr. and Mrs. Higgins shall not have any court ordered visitation with MRE. CP 201. This appeal followed.

III. ARGUMENT

A trial court's ruling dealing with the placement of children is reviewed for abuse of discretion. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable ground. *Id.* A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. *Id.* It is based on untenable grounds if the factual findings are unsupported by the record. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 132 (1997).

A. Findings of Fact 2.13(10), 2.13(11) and 2.13(12) Are Supported By Substantial Evidence.

Findings of fact supported by substantial evidence will not be disturbed on appeal. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Substantial evidence is present if the record contains evidence sufficient to persuade a fair minded, rational person of the truth of the finding. *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

Finding of Fact 2.13(10) reads as follows:

The Petitioners have not shown that the Respondent is unfit as a parent.

Finding of Fact 2.13(11) reads as follows:

The Petitioners have not provided a psychological evaluation of the child to show that there would be psychological detriment to the child if MRE were placed with Jason Evans.

Finding of Fact 2.13(12) reads as follows:

Guardian ad Litem, William Abbott identified what can happen to a child who suffers from significant lack of contact with one parent the negative impact on a child deprived of contact with one parent.

The Higgins' assigned error to Findings of Fact 2.13(10), 2.13(11) and 2.13(12). Page 1 of Opening Brief of Appellant. However, their brief

fails to develop any argument or to put forth any legal citation to support these assignments of error. Without argument or authority to support it, an appellant waives an assignment of error. *Bercier v. Kiga*, 127 Wn. App. 809, 824, 103 P.3d 232 (2004). Regardless, all three of these findings of fact are supported by substantial evidence.

1) Finding of Fact 2.13(10)

Mr. Abbott was appointed by the court as a Guardian ad Litem/Parenting Investigator. In preparation for his report, Mr. Abbott interviewed Mr. and Mrs. Higgins, Mr. Evans, and Mr. Evans' fiancée Latia Harris. He also held telephone interviews with Respondent Ms. Crockett, Debbie Martinez (Mrs. Higgins' sister), Marsha Evans (Mr. Evans' mother), and Dee Dee Simmons (Mr. Evans' sister). Mr. Abbott found that Mr. Evans "has been steadily employed as a data technician for at least the past five years, and is working toward promotions to improve his earning capacity. He has been in a steady relationship for two years with TIA HARRIS, who is pregnant. I think they plan to marry. He is a fit father." CP 76-77.

The trial court found Mr. Abbott's GAL report to be persuasive. Under RCW 26.09.220, the court is authorized to utilize a Guardian ad

Litem report. *In re Custody of S.H.B.*, 118 Wn. App. 71, 84, 74 P.3d 674 (2003). The testimony of Mr. Evans, Ms. Harris, Maurice Scott, and Ryan Dardis support the Guardian ad Litem report.

Mr. Evans testified that he has been employed steadily for six years and there has been an increase in both responsibility and income. RP 112 at 9-12; RP 115 at 9-12. Mr. Evans testified that he has met the four requirements for visitation: drug/alcohol free, stable employment, safe and stable housing, and certificate of parenting class. RP 191 at 2-8. Since September 2001, Mr. Evans testified that he has probably taken ten or eleven drug tests. RP 238-39 at 25-2. Furthermore, Mr. Evans stated that he has not used marijuana since December 2000. RP 320 at 16-17.

Ms. Harris testified that she is currently pregnant and she thinks that Mr. Evans will be a great dad to her daughter as well as to MRE. RP 73 at 6-13. Ms. Harris later described Mr. Evans as a great person, who is going to be a good father and who will be responsible. RP 75 at 15-25.

Ryan Dardis testified that Mr. Evans works for Sequoyah and that Mr. Dardis supervises him on a daily basis. RP 30-31 at 24-6. Mr. Dardis has known Mr. Evans since 2001. RP 31 at 16-17. Mr. Dardis described Mr. Evans as "Reliable, honest, trustworthy, integrity." RP 33 at 23-24.

Mr. Dardis testified that Sequoyah has random drug testing. RP 34 at 12-14. Mr. Dardis testified that there was nothing to cause him to think that Mr. Evans should not have custody of his daughter and take care of her on a daily basis. RP 38 at 1-6.

Maurice Scott testified that he has become a close friend of Mr. Evans after working with him over the past nine (9) years with three (3) different telecommunications companies. RP 154 at 18-22. Mr. Scott testified that Mr. Evans is up for being a dad on a full-time basis. RP 169 at 2-15. Mr. Scott believes that Mr. Evans is more than qualified and entitled to have custody of his daughter. RP 182 at 9-10.

The Guardian ad Litem report and the testimony provide substantial evidence to support finding of fact 2.13(10).

2) Finding of Fact 2.13(11)

No evidence in the record suggests that Mr. and Mrs. Higgins have actually provided a psychological evaluation to the trial court to show that there would be psychological or other detriment to the child if MRE were placed with Mr. Evans. The lack of any evidence to the contrary is substantial evidence to support the trial court's findings of fact 2.13(11).

3) Finding of Fact 2.13(12)

On page 5 of the Guardian ad Litem Report, Mr. Abbott states, Deprivation of significant contact with one parent can cause children to suffer feelings of abandonment, rejection, and/or betrayal. Mr. Abbott's report did in fact identify the potential harm to a child that lack of contact with one parent can inflict. This is substantial evidence to support the court's findings of fact 2.13(12).

B. The Trial Court Acted Within Its Discretion In Finding Adequate Cause To Consider Modification of the 2001 Visitation and Decree and Custody Arrangements.

Finding of Fact 2.8 reads as follows:

Adequate cause for this proceeding has been found.

Appellant's Assignment of Error #2 and the first issue on page 10 of Opening Brief of Appellant is based on the trial court's alleged error in finding adequate cause to consider a petition for modification. This argument is without merit for two reasons.

First, the Higgins' failed to raise this objection in a timely manner. RAP 2.5(a) states, "The appellate court may refuse to review any claim of error which was not raised in the trial court." The trial court was not given sufficient opportunity to consider and rule on this issue. It was only after trial

when the court made its final ruling against them that the Higgins' attempted to introduce this error on appeal.

Second, the case law put forth by the Higgins' for their argument that the trial court lacks any discretion on whether to hold an adequate cause hearing when a relocation action is no longer pending is not persuasive. The pertinent facts of *In re Marriage of Grisby*, 112 Wn. App. 1, 57 P.3d 1166 (2002) were that the court denied a relocation action and then subsequently modified the parenting plan. *Id.* at 15. In the case at hand, the trial court did not rule on the relocation petition, rather the Higgins' dismissed their relocation action voluntarily on the eve of trial. These situations are distinguishable.

Furthermore, the *Grisby* court conceded that "We do not reach the question of whether a trial court would have the authority to modify a parenting plan when the withdrawal of the request to relocate is disingenuous or made in bad faith because these facts are not before us in this case." *Id.* at 17. *Grisby* does not stand for the absolute requirement of an adequate cause hearing when a relocation action is no longer pending.

This case was originally brought as a relocation action and did not require adequate cause. In addition to Mr. Evans' objection to the

Relocation, Mr. Evans also filed a Petition for Modification of Parenting Plan, in which he sought a finding of separate cause. Thereafter Mr. Evans conducted a trial on the merits and expended his own, as well as the court's, resources in good faith. This was an error of the Higgins' own making, and they should not be rewarded with an opportunity to re-litigate settled issues.

C. The Trial Court Acted Within Its Discretion In Granting the Custody Modification.

1) Error is Assigned to Findings of Fact 2.7, 2.13(13), 2.2 & 2.5.

Finding of Fact 2.7 reads as follows:

MRE should be placed place in the custody of her father, as her father is a fit parent and it would not be detrimental (and it could be beneficial) to place MRE in the custody of her father.

Finding of Fact 2.13(13) reads as follows:

The Court must look at the constitutional framework the protected liberty interest of a parent to parent a child that the Court should not interfere unless unfitness or detriment to the child is found.

Findings of Fact 2.2 reads as follows:

The custody decree/parenting plan/residential schedule should be modified because a substantial change of circumstances has occurred.

This finding is based on the factors below:

The court finds that the father of MRE is a fit parent and it would not be detrimental to MRE to transfer custody to the father.

The following facts, supporting the requested modification, have arisen since the decree or plan/schedule or were unknown to the court at the time of the decree or plan/schedule:

The court finds no evidence of drug or alcohol use/abuse by the father of MRE.

The court finds that the father of MRE has maintained stable employment (being steadily employed as a valued and sought-after employee in the telecommunications industry) for a period of over five (5) years.

The court finds that the father of MRE has safe and stable housing for MRE and/or that he can otherwise provide adequate care for her.

The court finds that the father of MRE has completed a certificated parenting class and provided proof to the Petitioners and the Court.

Finding of Fact 2.5 reads as follows:

The following substantial change has occurred in the circumstances of either party on the children:

The Court finds that the father of MRE is a fit parent and it would not be detrimental to MRE to transfer custody to the father.

2) Support for Custody Modification

All four of these findings of fact relate to Mr. Evans' current status and relevant statutes in light of Mr. Evans' constitutional rights. The court's findings and conclusions are supported by applicable case law.

The outcome of this case does not depend upon how good a job

Mr. and Mrs. Higgins have done in raising MRE. The determinative fact in this case is that the rights of a parent and grandparents are severely unequal. Mr. Evans has a fundamental liberty interest in raising MRE that the Higgins do not possess.

In *In re Custody of Smith*, 137 Wn.2d 1, 969 P.2d 21 (1998), the Washington State Supreme Court held that a parent has a “constitutionally protected right to rear his or her children without state interference.” *Id.* at 15. This right “has been recognized as a fundamental ‘liberty’ interest protected by the Fourteen Amendment and also as a fundamental right derived from privacy rights inherent in the constitution.” *Id.* at 15. Since a fundamental right is concerned, “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.* at 15.

Smith recognized two exceptions to a parent’s constitutional right to be free of state interference in parental decisions: the police power and *parens patriae* power. The police power enabled the state to intrude on the part of “the interests of society as a whole where the [parental] decision directly and severely imperiled the child” (e.g. vaccinations). *Id.* at 16. The other exception in which the state may act is “where a child has been harmed

or where there is a threat of harm to a child.” *Id.* at 16. Both exceptions contemplate harm to the child. *Id.* at 16.

In light of these two limited exceptions to Mr. Evans’ constitutional right to raise MRE without government interference, the trial court was correct to determine that this case was governed by *Custody of Shields*, 157 Wn.2d 126, 136 P.3d 117 (2006) and *In re Marriage of Allen*, 28 Wn. App. 637, 626 P.2d 16 (1981). CP 169. Between a parent and a nonparent, a more stringent balancing test than best interests of the child is required to justify awarding custody to the nonparent. *Allen* at 645-46. Parental rights may be outweighed if a parent is unfit or the child would be detrimentally affected by placement with an otherwise fit parent. *Id.* at 646-47.

This case is different in that both of those cases involved an initial determination of custody rather than a custody modification. However, the reasoning that a fundamental liberty interest will not be invaded absent a compelling state interest is common to both situations. No present compelling state interest exists, and the distinction between Mr. Evans’ situation and those in *Shields* and *Allen* is immaterial.

When the court determined that Mr. Evans is a fit parent and that

restoring Mr. Evans' parental decision-making ability would not be detrimental to MRE, the state no longer had a proper basis for its interference. This is a substantial change that permits modification, although not stated in RCW 26.09.260. The trial court properly interpreted the effect of this finding vis a vis RCW 26.09.260. The conclusion to be drawn is that Mr. Evans' fundamental liberty right must trump that statute.

The legal authority provided by Mr. and Mrs. Higgins that RCW 26.09.260 should be rigidly enforced is unpersuasive. Both *In re Marriage of Mangiola*, 46 Wn. App. 574, 732 P.2d 163 (1987) and *Schuster v. Schuster*, 90 Wn.2d 626, 585 P.2d 130 (1978) involved parties with equal constitutional rights (i.e. two opposing parents). This case is fundamentally different, because on one side is a parent and on the other is a non-parent. As such, constitutional issues, which in *Mangiola* and *Schuster* were not applicable, are absolutely involved. The court was correct in deciding that since Mr. Evans is now a fit parent and it would not be a detriment to place MRE in his care, he has the right to raise MRE.

D. The Higgins Are Not De Facto Parents.

Finding of Fact 2.13(8) reads as follows:

That factor one and four as above mentioned are missing in this case. Jason Evans did not consent to the placement of MRE, but did not appear at trial and therefore documents were entered by default against

him. While MRE has had a bonded, dependent relationship with the Petitioner, that relationship is not parental in nature.

The Higgins attempt to insert themselves into the narrowly circumscribed exception in *In re Parentage of L.B.*, 155 Wn.2d 679, 122 P.3d 161 (2005) is without merit. *L.B.* involved extraordinary facts that are not present in the case at hand.

In Re Parentage of L.B. involved a committed same-sex relationship that spanned twelve (12) years. *Id.* at 683. During the course of this relationship, both parties mutually agreed to conceive and raise a child. *Id.* at 683. A male friend agreed to provide the necessary genetic material, which one woman used to personally inseminate the other. *Id.* at 683. During the course of the pregnancy, both women attended all prenatal appointments as well as participated in prenatal birthing classes together. *Id.* at 683-84. The child was given both parties' family names and for the first six (6) years of his life, all three lived together and held themselves out to the public as a family. *Id.* at 684. During this time, both parties actively shared parenting responsibilities. *Id.* at 684.

The Higgins *can not* meet the requirements of the multi-part test set forth in *L.B.* for establishing themselves as *de facto* or psychological parents. In *L.B.*, the Washington State Supreme Court stated, "1) the natural or legal

parent consented to and fostered the parent-like relationship, 2) the petitioner and the child lived together in the same household, 3) the petitioner assumed obligations of parenthood without expectations of financial compensation, and 4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature. In addition, recognition of a *de facto* parent is limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life." *Id.* at 708.

The record before the trial court demonstrates that substantial evidence supports the trial court's conclusion that the Higgins have failed to establish parts one and four of the test set forth in *L.B.* When compared to the actions of the birth mother in *L.B.*, Mr. Evans did not foster or actively participate in the creation of expectations that the Higgins were MRE's parents or should occupy a parent-like role to MRE.

On page 21 of the Opening Brief of Appellant, the Higgins make the strained argument that because Mr. Evans has abided by the terms of the visitation decree, he has fostered the Higgins *de facto* parent status. If this line of reasoning had any merit, it would put Mr. Evans in the unenviable position of deciding between either violating the visitation decree and thus

providing the Higgins with a basis for denying Mr. Evans any visitation or in the alternative abiding by the visitation decree and being deemed to have fostered a *de facto* parent relationship against his wishes. This is a classic example of a Catch-22. A court should be leery of creating incentives for violating a valid court order.

The Higgins' argument that because MRE lived with them for five and one-half years they have attained the status of *de facto* parents is similarly without merit. The facts of *In re Custody of S.H.B.*, 118 Wn. App. 71, 74 P.3d 674 (2003) are comparable. In *S.H.B.*, a grandchild lived with her paternal grandmother, Gail Luby, for six (6) years. *Id.* at 74. Presumably, both the Higgins and Ms. Luby had unfettered control over the upbringing of a grandchild in their respective care. Nothing indicates that Ms. Luby had any less of a bonded relationship with her grandchild than the Higgins have had with MRE. However, absent legislative action, those persons acting in an *in loco parentis* capacity do not have the same constitutional rights of a parent. *Id.* at 80.

The record shows that MRE did not consider Mr. and Mrs. Higgins to be her parents. Mr. Evans testified that MRE calls him dad and refers to the Higgins as grandparents. RP 91-2 at 25-11; RP 102 at 2-4. Ms. Harris

testified that MRE identified Mr. Evans as father and identified the Higgins as grandparents. RP 72 at 8-17. Mr. Higgins testified on cross examination that MRE calls the Higgins “grandpa or grandma, or granddad.” RP 446 at 3-4. The trial court had ample evidence to conclude that MRE does not consider Mr. and Mrs. Higgins to be her parents, and their role to her is not parental.

The Higgins are unable to “fully and completely” undertake a parental role due to the cogent fact that those parental roles are already occupied by MRE’s natural parents. Unlike the child in *L.B.*, MRE knew exactly who her parents were, because she visited with both Mr. Evans and Ms. Crockett on a regular basis. Whatever role the Higgins do play, it is less than what is required for a *de facto* parent.

E. The Trial Court Found That It Would Not Be Detrimental To MRE To Transfer Custody To Father.

The trial court found in Finding of Fact 2.7 that it would not be detrimental to transfer MRE into the custody of Mr. Evans, and substantial evidence supports this finding. The Guardian ad Litem reported that it would not be detrimental to MRE to live with her father. CP 79. Mr. Abbott further reported that MRE would forgo living with a half-sibling if she were placed with her father, but would also gain one. CP 77. Mr.

Abbott also found that MRE would have an elementary school down the street to attend and constant contact with one parent and probably more contact with her mother. CP 78.

Ms. Harris testified that MRE would have access to her extended family. RP 77 at 3-6. She also testified that Mr. Evans and her currently live in Tukwila near an elementary school that MRE would attend. RP 69 at 18-25. Mr. Evans stated under oath that he has never physically abused MRE. RP 199 at 18-19. Mr. Evans is able to provide both a financially and an emotionally stable environment for MRE. Substantial evidence supports the court's finding of fact 2.7 that MRE's placement with Mr. Evans would not be detrimental to her.

Mr. and Mrs. Higgins' argument on page 25 of Opening Brief of Appellant that "the court should remand for a determination of whether the change of custody to Mr. Evans will cause 'actual detriment' to MRE's growth and development is nonsensical, because the court already found that such a transfer would not cause detriment. This finding is supported by substantial evidence.

V. CONCLUSION

For the reasons hereinabove set forth, Respondent father Jason Evans submits that the trial courts rulings should be affirmed in their entirety.

Respectfully submitted this 5th day of April 2007.

BOTTIMORE & ASSOCIATES, P.L.L.C.



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CERTIFICATE OF SERVICE

I, JESS McKAY BUCKLEY, a person over 18 years of age, certify that on the 5th day of April, 2007, I caused a true and correct copy of this Motion for Extension of Time to File Respondent Jason Evans' Opening Brief to be served on the following in the manner indicated below:

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Brenda Higgins

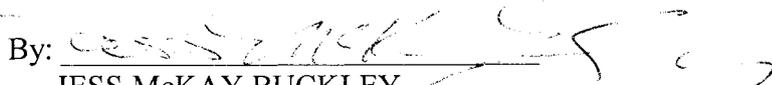
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