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No. 229301

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

IN RE THE MATTER OF ANGELO FLORES-CORK

DAVID NAGEL & ANITA BANGERT
Respondents

v.

HOLLY MARIE CORK
Appellant

Respondent's Supplemental Brief

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ISSUE PRESENTED

- I. Was there substantial evidence that Holly Cork was not a suitable custodian in that placement of Angelo with Holly Cork would detrimentally affect Angelo's growth and development and result in actual detriment to him?

BASIS FOR SUPPLEMENTAL BRIEF

On July 17, 2006, the stay of these proceedings were lifted as the decision and mandate in In re the Custody of Shields, Supreme Court No. 752360 (now 157 Wn.2d 126) had been filed. In accord with the lifting of the stay, Counsel were directed to file a supplemental brief on the application of the Shields decision.

ARGUMENT

I. THERE WAS OVERWHELMING EVIDENCE THAT HOLLY CORK WAS NOT A SUITABLE CUSTODIAN FOR ANGELO CHILD, IN THAT PLACEMENT OF ANGELO WITH HOLLY CORK WOULD DETRIMENTALLY AFFECT ANGELO'S GROWTH AND DEVELOPMENT AND WOULD RESULT IN ACTUAL DETRIMENT TO HIM.

The central issue in In re Custody of Shields, as applied to the instant case, was "What showing was required of a non-parent in order to be properly award custody of a child?" In re Custody of Shields, 157 Wn. 2d 126 (2006). The determination of the Washington Supreme Court was that custody of a child may be awarded to the nonparent upon a showing that placement with the parent will result in actual detriment to the child.

The decision of the lower court in this matter was in absolute conformity both to the decision set forth in Shields but also in conformity to the cases cited with approval by the Shields court in its decision. In fact, the facts of this case are remarkably similar to those in the cited cases.

See Shields at 141 citing to the cases of In re Marriage of Allen, 28 Wn. App. 637 (1981), In re Custody of Stell, 56 Wn. App. 356 (1989), and In re Custody of R.R.B, 108 Wn. App. 602 (2001). In the Allen case, an otherwise fit father was not awarded custody because of his failure to sufficiently involve himself in his deaf child's sign language program. In the R.R.B case, the nonparent met the burden of establishing actual detriment in the case of a suicidal child suffering from bipolar stress disorder and post-traumatic stress disorder. The child required extensive therapy and stability at the level the parents could not provide. In Stell, the non-parent met the burden of establishing actual detriment in the case of a child who had been physically and sexually abused while young. This child required extensive therapy and stability at the level the parent could not provide. The summaries are located at In re Custody of Shields, 157 Wn.2d 126 at 145.

From here the application to the instant case begins. Holly Cork argues in her brief that these facts are not similar to the instant case in that

"Angelo does not have special needs; is not disabled, and was never abused." Supplemental brief of Respondent, Page 5 (last sentence). Such a claim is completely refuted by the facts and findings of this case.

To wit, on July 17, 1997, CFS Montana received a referral regarding Holly Cork, who was 14, pregnant, and shoplifting baby clothes. At that time, Holly Cork's mother was incarcerated for drug related charges and Holly Cork was living with her grandmother Mavis Thornton and aunt Sherry Williams. As a result of the CFS complaint, Holly was placed in a foster home. EX 2, page 3. Angelo Cork (hereafter Angelo) was born August 28, 1997.

Holly Cork did not remain in her foster home and instead returned to the home of Mavis Thornton. In October 1997 CFS began receiving referrals from relatives regarding educational neglect, physical neglect, and emotional abuse of Angelo by Holly Cork. EX 2, page 3-4 (emphasis added).

As a result of the concerns, CFS again placed both Holly Cork and Angelo in foster care. On July 7, 1998, Montana CFS was contacted by Shirley

Corpe, Holly Cork's aunt. Ms. Corpe resided in Kalispell, Montana and informed DFS that Holly Cork and Angelo were now residing with her. EX 2, page 4. By December 1998, this placement was breaking down. CFS again received referrals about Holly Cork's treatment of Angelo. EX 2, page 4.

On February 4, 1999, Holly Cork and Angelo were placed at the Florence Crittenton Home in Helena, Montana by CFS. EX 2, page 4. Holly Cork refused to abide by the requirements of the Home, and engaged in conduct detrimental to Angelo. RP 73 line 2; RP 258, line 3; RP 258, line 8. As a result of Holly Cork's conduct and inappropriate care of Angelo, Angelo was removed from Holly Cork and placed in foster care. RP 258, line 1.

Because of Angelo's traumatic life experiences, which centered around the substantial abuse by Ms. Cork, during the re-integratin process Ms. Cork was repeatedly advised that Angelo was in need of counseling. Despite Holly Cork's attempt in her current supplemental memorandum to defer blame for Angelo's substantial and severe behavioral issues to David Nagel and Anita

Bangert's (blaming their later re-involvement with Angelo), the evidence in this case indicates that Angelo's need for counseling was a known reality long before this re-involvement ever took place.

In fact, even prior to Ms. Cork's return to Washington, she was advised by Angelo's Montana therapist Cheryl Ronish that she needed to get Angelo involved in counseling. RP 282, line 1, RP 291, line 1. Holly Cork promised to do so. RP 291, lines 9-12. Ms. Cork never did. RP 282, lines 18-24, RP 291, line 21. This continued counseling for Angelo was an expected component of the dismissal of the TIA. RP 513 line 14 through RP 514, line 3.

Holly Cork was also involved with psychologist Dr. Robert Page during the TIA process. Dr. Page performed a psychological evaluation of Ms. Cork. RP 710, line 1. Ms. Cork was also advised by Dr. Page that she would need both personal individual counseling as well as parental support and group involvement following her return to Spokane. RP 724, line 22 through 725, line 8.

After returning to Washington, Holly Cork was

again advised by a Washington CPS worker of the need to get Angelo in counseling (RP 283, line 9) and that problems would occur if she did not do so. RP 294, line 15. Ms. Cork never sought counseling after being so advised. RP 283, line 19. She made promises to do so, but never did. RP 296, line 8.

Ms. Cork was also referred to counseling by Angelo's school psychologist. RP 283, line 15; RP 177, line 4. In fact, Ms. Cork never sought counseling for Angelo until required by court order in this matter. RP 77, line 10. CP 51-53.

These facts could not be more on point with those in R.B.B. and Stell. This was a child that was in extreme need of counseling. Despite the recommendations of multiple service providers, Ms. Cork refused to involve Angelo in the needed counseling. It was not until the Respondent's forced counseling through court order that Angelo received the help that he so desperately needed. In fact, Court Commissioner Pro Tem Michael P. Price ordered Ms. Cork to comply with the counseling and indicated that if she did not do so, it would serve as a basis to transfer placement of

the child to the Nagels. CP 51-53, page 2. Ms. Cork was not initially compliant in working with Carol Thomas despite the counseling order. RP 116, line 8.

These factors alone would serve as a sufficient basis for the trial court's finding that placement of Angelo with Ms. Cork would result in actual detriment to him. However, the facts of this case go far beyond Ms. Cork's failure to get Angelo the counseling that he needed.

In the instant case, the trial court specifically considered the requirements of the Shields Court of Appeals case. CP 459-467, Finding of Fact 2.5(3). While the Court of Appeals decision was reversed, the trial court in this case specifically focused on the showing of actual detriment/the mother was not a suitable custodian that was approved in the Supreme Court's ruling in that "its very clear that continued placement with the mother would detrimentally affect Angelo's growth and development." CP 459-467, Finding 2.5(57); In re Custody of Shields, 157 Wn. 2d 126, 144-145 (2006). The trial court, as required by

Shields, specifically disavowed the best interests of the child standard. CP 459-467, Finding 2.5(1).

~~As required by Shields the trial court~~ properly recognized the heightened protections afforded to a parent as opposed to a non-parent. CP 459-467, Finding 2.5(2). Holly Cork's efforts in her brief to declare that the burden of proof was placed on her, is accordingly utterly without merit.

The inquiry thus turns to whether these findings of a "detrimental affect on Angelo's growth and development" are supported by substantial evidence. The trial court set forth extensive findings at section 2.5(17) through section 2.5(59) which documented the complete lack of bond with Holly Cork, the "hatred, anger and rejection" of his mother by Angelo, and the severe detrimental effect of Ms. Cork's parenting on Angelo. RP 459-467. The degree of Angelo's suffering while in Ms. Cork's care goes well beyond the detrimental effect on the child in the Shields case.

Each of the Court's findings are fully

supported in the record. As also set forth in Respondent Nagel's original brief, Angelo's counselor Carol Thomas discussed the serious detriment to Angelo of living with Holly Cork at length in her testimony. Her testimony, as to her observations of Angelo, begin at RP 383.

Angelo expressed anxiety in his interaction with his mother as manifested through the distancing and the lack of social interaction. RP 391, line 6. Angelo did not feel free or safe to express his emotions with his mother. RP 393, line 3. Angelo stated that he was angry with his mother and disclosed that his mother yelled at him and spanked him. Angelo described feelings of being unloved and unwanted by Ms. Cork. Angelo disclosed his feeling of loneliness and sadness, He described fighting between his mother and Josh Rich and talked about emotionally being frightened by this and very scared. RP 405, lines 10-25. These facts are eerily (and sadly) reminiscent of the same charges made against Holly Cork when Angelo was initially placed into foster care in Montana.

Ms. Thomas found that one of the themes of

Angelo in expressing fear is that Holly Cork was consistently yelling at him. RP 407, line 9. Ms. Thomas found Angelo's reports to be credible. RP 407, line 14. Contrast these findings with Ms. Cork's consistent denial of such conduct. RP 408, line 2-9. Of course, this is entirely consistent with Ms. Cork's claims in her current supplemental brief that she was witnessing no problems with Angelo that would have required counseling.

The Shields court found that a non-parent will meet the actual detriment test only in "extraordinary circumstances". In re Custody of Shields, 157 Wn.2d 126, 145 (2006). Such extraordinary circumstances are overwhelmingly present here. Ms. Thomas found that Angelo consistently expressed hatred, anger and rejection towards Ms. Cork. RP 408, lines 10-16. Angelo disclosed that Ms. Cork "just does bad, bad, bad stuff to me." "My mom says don't tell anybody or talk about it or they will tell the Judge." RP 409 line 9 through 410, line 19.

Angelo also disclosed that the mother's live-in boyfriend Josh Rich spanked him hard and yelled

at him. Ms. Thomas testified that Angelo's relationship with Mr. Rich did not appear healthy and that Angelo was fearful of Mr. Rich's anger. RP 411, lines 6-25.

Ms. Thomas testified that Angelo stated that "It's like being killed living with my real mom", and that this statement was his way of expressing that it was very distressful, that he was in despair living with them, very little hope. RP 413, lines 1-5. See also CP 459-467, Finding of Fact 2.5(30). Ms. Thomas testified that Ms. Cork did not have a healthy relationship with Angelo. RP 413, line 23.

Ms. Thomas found it very disturbing that Angelo had such a negative sense of self while in Ms. Cork's care and that it manifested through his anger and his aggression. Angelo described himself in counseling as a bad kid. RP 414, lines 10-22.

Ms. Thomas concluded that Angelo's relationship with Holly Cork was basically characterized by lack of emotional connection and minimal social interaction. She found that Angelo was very distant and detached from her and found no

evidence of a parent/child bond. Angelo did not use his mother as a source of care, comfort, security, nurturing, or emotional support. He felt unloved by his mother and expressed extreme hatred for his mother. Angelo was unable to tell Ms. Thomas anything positive about his mother or any positive experiences that he had with his mother. RP 415, line 10 through RP 416, line 15. See also CP 459-467, Finding of Fact 2.5 (27), (28), (29), (30), (32), (35).

Angelo further expressed to Ms. Thomas extreme hatred, anger, and rejection towards his mother as a result of the distressful experiences he described while in her care, including her anger, yelling and spanking. He expressed fear and anger toward the boyfriend Josh Rich and identified the stressful experiences with him to include Mr. Rich's anger, his yelling, and his spanking. Ms. Thomas testified that Angelo expressed emotional distress regarding living with his mother and Josh Rich. RP 416, line 17 through 417, line 4. See also CP 459-467, Finding of Fact 2.5 (30). All of these extreme emotional responses to Holly Cork and

her boyfriend by Angelo constitute extraordinary circumstances and actual detriment.

The Shields requirement for actual detriment was further addressed in Ms. Thomas' testimony. She testified that if Angelo were not returned to the Nagels, she would be very worried about increasing depression in Angelo, very concerned about his detachment and withdrawal, concerned about his rebellion and his possibility of self-destructive behaviors and continued violence towards others. RP 419, lines 8-13.

Ms Thomas defined her concern over self-destructive behaviors to arise from Angelo's negative sense of self and anger. RP 419, lines 16-18. She testified that these self-destructive behaviors could include drugs and alcohol, running away behaviors, putting themselves in risky situations where they could be physically harmed. As kids get older, risks could include carving on themselves, cut their bodies up, and eating disorders. RP 419, lines 16-25.

In her supplemental brief, Ms. Cork claims that these concerns raised by Ms. Thomas are only

speculative and that there is no showing of current actual detriment to Angelo. Ms. Cork's mis-reads the language of Shields. See the following summary: "Supreme Court: Holding that the stepparent has standing to have the petition considered by the court, and that custody of the child may be awarded to the stepparent upon a showing that placement with his mother will result in actual detriment to the child..." In re Custody of Shields, 157 Wn.2d 126, 127 (2006). The context of "will result in actual detriment to the child" considers not only the current detriment being suffered by the child, but also considers the future detriment the child would suffer if left in the parent's care. To read this language in any other way would result in an absurd result.

However, even if we were to look only at current actual detriment on an *arguendo* basis, this standard has been more than met. Ms. Thomas noted that Angelo was already showing some behaviors where he was already assaulting children, but testified that if he had not been returned to the Nagels, there would be a great increase in those

behaviors. RP 420, lines 1-8. (Angelo was placed with the Nagels by temporary order on August 29, 2003, about 5 ½ months before trial. CP 138-142.)

See also CP 459-467, Finding of Fact 2.5(37) which provides "Ms. Thomas indicated that these behaviors were already occurring as was also indicated by the evidence in this case. Angelo made a comment to Ms. Thomas that he was going to slice and kill people, including cops." There could not be a clearer showing of current actual detriment to Angelo.

Ms. Thomas testified that if the trial court were to return Angelo to Holly Cork, she would have concerns of increased depression, excessive rebellion, detachment, self-destructive behaviors, and aggressive violent behaviors toward others. RP 424, lines 14-17. She testified that Angelo would be at risk for totally detaching from everybody and everything and not willing to be in social and emotional connections with relationships with anyone. CP 424, lines 17-25. With regard to Ms. Thomas' testimony, see CP 459-467, Findings of Fact, section 2.5 (30), (31), (32), (33), (34),

(35), (36), (37), (38).

Ms. Thomas found that Angelo was very happy after placement with the Nagels under the temporary orders and that there were many positive changes. RP 420, line 12 through 424, line 20. These findings were further supported by Angelo's Montana teacher who testified that his school performance and behavior rapidly improved and he became "right up there on top of his class" and was one of the teacher's better performers. RP 309, line 14; RP 310, lines 9-13; RP 315, line 17. The child's Montana counselor Rob Dickey noted similar progress in Angelo's behavior. RP 330 line 19 through RP 331, line 15.

While Respondent Holly Cork has chosen to ignore these findings of Carol Thomas in claiming that there was no current or future actual detriment to Angelo, Respondent Nagel's case did not rest on Ms. Thomas' findings alone. Substantial evidence, even apart from the guardian ad litem and Carol Thomas' testimony exists to support the findings and conclusions of the trial court.

It was obvious, or should have been obvious to Holly Cork, that Angelo's behavior began seriously deteriorating, and he was labeled as a child in crisis by his teacher and school counselor. RP 176, line 23; RP 176, line 12; RP 166 line 14; RP 170, line 12; RP 187, line 19; RP 195, line 1; RP 195, line 8; RP 196, line 12; RP 197, line 15; RP 198, line 3. See generally RP 60-207. See also Findings of Fact section 2.5 (18), (19), (20), (21), (22), (23), (24). The trial courts findings are exceptionally well supported. All of these observations of the teacher and school counselor speak to the issue of actual detriment. It is remarkable that the mother did not seek counseling given the serious emotional issues that Angelo was facing.

Importantly, the trial court observed "The court listened to the testimony and watched Ms. Cork. It appeared that, from the testimony anyway, that Ms. Cork's general attitude toward the situation with regard to Angelo is, at best, casual." Findings of Fact section 2.5 (45). Such observations are within the discretion of the trial

court and should be afforded great weight on appellate review. Such observations are also highly supported Ms. Cork's almost complete lack of effort to even contact Angelo after he was placed with the Nagels under temporary orders.

As noted in the statement of facts, after Angelo was placed with the Nagels in August 2003, Holly Cork made almost no efforts to see or even talk to her son. From August 2003 through February 2004, she called Angelo once. RP 370, line 22. In fact, she intentionally threw Angelo's phone number away. RP 371, line 4. She didn't call Angelo's school or try and talk with his counselor. Her lack of effort to contact her child continued up until trial. See RP 370-378. Again, this provides ample evidence that an actual detriment to Angelo existed. It also ties in with Ms. Thomas' observations of the complete lack of parent-child attachment between Angelo and Holly Cork. This is actual detriment.

The guardian ad litem testified to Ms. Cork's multiple moves in Washington while caring for Angelo, the police activity at one of her homes,

that she resided with an individual on home monitoring following a conviction for felony drug distribution (cocaine) and third degree assault, and that she began living with her boyfriend Josh Rich after his release from prison on a burglary conviction. RP 78, line 8 through RP 80, line 13; RP 84, line 9; RP 86, line 21 through 87 line 21; RP 93, line 16.

There was evidence of Washington CPS involvement with Ms. Cork while caring for Angelo. RP 283, line 9; RP 734. There was evidence of Mr. Rich's (Holly Cork's live-in boyfriend) use of marijuana and Angelo's exposure to it. RP 173, line 15; RP 186, line 1. The court was justified in its findings of home instability. CP 459-467, Findings of Fact section 2.5 (55). These show actual detriment.

An appellate court reviews a trial court's findings of fact to determine whether they are supported by substantial evidence. In re Marriage of McDole, 122 Wn.2d 604, 610 (1993). A trial court's custody disposition will not be disturbed on appeal absent a manifest abuse of discretion.

Schuster v. Schuster, 90 Wn.2d 626, 632 (1978). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. In re Marriage of Kovacs, 121 Wn.2d 795, 801 (1993). It is clear that in this case, the trial court applied the proper standard (rejecting best interests), required a heightened showing of detriment by the Nagels, and based its decision on the substantial evidence of actual detriment that was before the court.

CONCLUSION ON APPLICATION OF SHIELDS

The standard to be applied by the trial court in third party custody cases was first articulated in In re Marriage of Allen, 28 Wn. App. 637 (1981). The Allen court concluded that courts determining custody between a parent and nonparent must apply a more stringent balancing test to protect both the parents' constitutional rights to privacy and the family entity. Id. at 645-46. Allen held that the state may interfere with the parent's constitutional rights only if 1) the parent was

unfit, or 2) the child's growth and development would be detrimentally affected by placement with an otherwise fit parent. Id. at 647. The Allen court proposed the detriment to the child standard as a middle ground requiring more than the best interests, but less than parental unfitness. Id. at 649. The Allen court concluded that a finding of parental unfitness was not required in a nonparent custody proceeding. Id.

The court in In re Custody of Stell, 56 Wn. App. 356, 365, (1989) held that the legislature, in adopting chapter 26.10 RCW, intended to incorporate Allen's judicial interpretation of the earlier statute. Like Allen, Stell determined that in a custody proceeding between a parent and a nonparent, the nonparent must show that the parents are unfit or that placement with an otherwise fit parent would detrimentally affect the child's growth and development. Stell, 56 Wn. App. at 365.

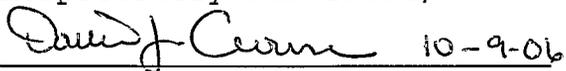
In another nonparent custody case, In re Custody of R.R.B., 108 Wn. App. 602 (2001), Division Two considered the constitutionality of the best interests standard set forth in RCW

26.10.100. In R.R.B., the trial court granted a nonparent custody concluding that while the parents were fit, placing R.R.B. in their custody would detrimentally affect her growth and development. Id. at 606.

As noted in the brief above, these rationales were explicitly approved in In re Custody of Shields, 157 Wn.2d 126 (2006). The court concluded that while the detriment standard does not require a showing of parental unfitness, it does require a showing of actual detriment to the child's growth and development. Id. at 127.

The trial court made the explicit finding that placement of Angelo with Holly Cork would detrimentally affect his growth and development. The court, even without the benefit of the Supreme Court's Shields decision employed the standard enunciated in Allen, R.R.B., and Stell, which has now been detremined to be the accepted standard. The decision of the trial court should be affirmed.

Respectfully submitted,


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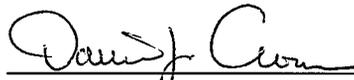
CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion to be competent to serve papers.

That on the 9th day of October, 2006, he served, via Spokane Messenger Service, a copy of the Respondent's supplemental brief to the persons hereinafter named at the places of address stated below which is the last known address.

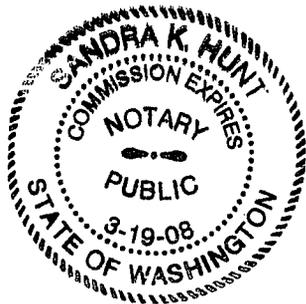
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DAVID J. CROUSE

SUBSCRIBED AND SWORN to before me this 9th day
of October, 2006.





NOTARY PUBLIC in and for the
State of Washington, residing
in Spokane.
My Commission Expires: 3-19-08