

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 31933-4-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

In re the custody of CHRISTOPHER R. DEBURRA II

CHRISTOPHER R. DEBURRA I
APPELLANT

vs.

ARTHUR LERITZ AND DESIREE MILLER
RESPONDENTS

BRIEF OF APPELLANT CHRISTOPHER R. DEBURRA

Christopher R. DeBurra
Appellant
3803 E. 18th Ave.
Spokane, WA 99223
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I. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in entering the order granting non parental custody to the maternal aunt and uncle.
2. The trial court erred in not granting a continuance to the biological father.
3. The GUARDIAN AD LITEM failed to properly execute her duties as outlined in the GALR Superior Court Rules.

Issues Pertaining to Assignments of Error

1. Did Mr. Leritz and Ms. Miller make an actual showing of unfitness of the biological father.
2. Did the trial court fail to grant the biological father a continuance in accordance with Due Process of Law
3. Did the GAL fail to properly execute her duties and if not are her report and testimony valid in accordance to the law.

II. STATEMENT OF THE CASE

This is a non parental custody case filed by the petitioners Desiree Miller, hereafter referred to as Mrs. Miller, the maternal aunt of the child and her husband Arthur Leritz, hereafter referred to as Mr. Leritz, hereafter jointly referred to as Petitioners, against the biological parents, Christopher DeBurra, hereafter referred to as Mr. DeBurra and Antoinette Shaffer, hereafter referred to as Mrs. Shaffer. Mrs. Shaffer is not a party to the appeal.

Mr. Leritz and Mrs. Miller filed a non parental custody petition with the Spokane County Superior court on April 24th, 2012 and were granted custody of the child by the trial court.

The appellant will show why this case should have been dismissed based on the assignment of errors.

III. ARGUMENT

1. *The trial court erred in entering the order granting non parental custody to the maternal aunt and uncle.*

Mr. DeBurra respectfully challenges the trial courts order granting non parental custody to the maternal aunt and uncle.

On April 24th, 2012 Mr. Leritz and Mrs. Miller filed a Non Parental custody action with the Spokane County Superior Court. Mr. DeBurra and Mrs. Shaffer, the biological parents were named as the respondents.

If the child is in the custody of a parent, to gain custody a nonparent must establish that the parent is unfit, or that continuing to reside with the parent would detrimentally affect the child's growth and development. *In. re Custody of S.H.B.* (2003) 118 Wn. App. 71, 74 P.3d 674. At question is whether or not the petitioners showed that Mr. DeBurra is unfit. Mrs. Shaffer testified that Christopher had been in her custody from Aug of 2004 until he placed in the temporary care of the

petitioners. RP v1 pg22 ln 20-25. The petitioners made multiple claims that Christopher was having problems in school during this time. RP v1 pg24 ln9-25, pg25 ln 11-25. As Christopher was in the custody of Mrs. Shaffer at this time, this can not reflect negatively on Mr. DeBurra. The Residential Schedule only had Christopher spending one night a week during the school year with Mr. DeBurra. A parent can not be held accountable when a child is not in that parent's custody and care but in the instead is in the custody and care of the other parent.

The petitioners entered the declaration of Karen Winston CP 5. In this Declaration Karen Winston stated "Christopher stated that he was afraid of his father and did not want to live with him because he had been hit while there." Mrs. Winston entered an amended declaration on May 4th, 2012. In this amended declaration she stated that "Christopher did not say that his father Chris had hit him during the interview itself and on tape, but did tell me that following the interview while in the waiting room" CP 18. Mrs. Winston at no time disclosed this information to the Police Detective or CPS case worker but rather joined the detective and CPS worker in informing Mrs. Shaffer that Christopher did disclose that she herself was abusing him. This draws into question the validity of this evidence and it should not be considered. What was the situation that prompted him to suddenly disclose this? Why did he not disclose it during

the interview? What was Mrs. Winston's professionalism if any when he disclosed this in the waiting room?

The petitioners presented a Psychological Evaluation Best Program as evidence P4. In this report Christopher stated that he worried a lot about "not being able to live with my dad full time", in terms of his current living situation "I don't like living there; my mom doesn't really tell me when something is true and it breaks my heart sometimes", specific worries he had "Mostly not doing good at things or not being able to be with my dad" P4 pg5.

The Petitioners entered a report from Dr. Barry Nyman dated July 9th, 2012. In this report Dr. Nyman stated "Christopher's aunt reported today that he had "quit lying" and was responding to them quite realistically now" P8. This is from approximately 4 months after Christopher went to be with the petitioners. In Dr. Nymans testimony he stated that Christopher's reports were "unreliable" RP v1 pg114 ln 18 and "The original reason for saying that was because the reports from a previous guardian as litem and from a BEST program in Spokane had been presented to me, which contradicted what Christopher was telling me at the time". P8 pg 114 ln 24-25 pg 115 ln 1-2. This report, nor testimony should not be considered clear and convincing evidence. It raises the

question of why Christopher changed his story. What took place during the 4 months between going to live with the petitioners and the report and over 1 year to the testimony of Dr. Nyman? The change of story could be contributed to numerous variable including but not limited to bribery and Stockholm syndrome. In Mrs. Millers testimony she describes how they took him on trips to California and Hawaii and bought him Lego's, iPod and anything he needed RP v2 pg6 ln15-25, pg7 ln1-25, pg8 ln 1-25, pg9 ln 1-18.

2. The trial court erred in not granting a continuance to the biological father.

The trial court was aware that Mr. DeBurra had severed ties with his attorney and was unaware that the trial was approaching. *“Mr. DeBurra, I believe we had a hearing, was it two weeks ago; Mr. Stenzel had moved to withdraw?”* RP pg 4 ln 24-25 Mr. DeBurra was unable to make a motion for continuance as the court was unavailable *“You had set a status conference, follow-up status conference, because Mr. Stenzel and I had signed an order setting I believe the trial date of June 8—in June—then that didn't happen. Mr. Stenzel sought a withdrawal. To get it back on, we had a status conference. During that colloque there was a discussion with Mr. Stenzel by you for him to advise Mr. DeBurra that if*

he was going to get new counsel and/or file a continuance request, he needed to do so by a date certain because you were then gone for the last two weeks leading up to today's date. All right. So no one committed that to writing. I hadn't pulled the transcript. So thanks for the update." RP pg5 ln 3-13. As Mr. DeBurra was not notified of any of this he was unaware. Mr. Stenzel notified Mr. DeBurra of the trial date and that was his last contact with Mr. Stenzel. Since the court was not available to make a motion for continuance Mr. DeBurra had no choice but to wait until the morning of the trial when the court returned from its 2 week vacation.

The Due Process Clause of the Fourteenth Amendment requires that severance in the parent-child relationship caused by the state occur only with rigorous protections for individual liberty interests at stake. The parent-child relationship is a liberty interest protected by the Due Process Clause of the 14th Amendment. 746 f 2d 1205, 1242-45; US Ct. App 7th Cir WI (1985). By not granting the continuance, Mr. DeBurra was not able to present the evidence that makes clear that he is in fact a FIT parent. To not have all the evidence available to the court, specifically the Police and CPS reports does not meet rigorous protections of Due Process. The trial courts failure to grant Mr. DeBurra a continuance knowing the time frame was short and notification had not been giving, compounded

by the courts lack of availability prior to the trial for Mr. DeBurra to make said motion for continuance, also does not constitute “rigorous protections”.

3. *The GUARDIAN AD LITEM failed to properly execute her duties as outlined in the GALR Superior Court Rules.*

On February 6th, 2013 the GAL filed a motion and affidavit to discharge and make her records and notes unavailable. Under the Washington State Superior Court Rules a GAL must:

Maintain independence. A guardian ad litem shall maintain independence, objectivity and the appearance of fairness in dealings with parties and professionals, both in and out of the courtroom. GALR 2 (b)

Avoid conflicts of interests. A guardian ad litem shall avoid any actual or apparent conflict of interest or impropriety in the performance of guardian ad litem responsibilities. A guardian ad litem shall avoid self-dealing or association from which a guardian ad litem might directly or indirectly benefit, other than for compensation as guardian ad litem. A guardian ad litem shall take action immediately to resolve any potential

conflict or impropriety. A guardian ad litem shall advise the court and the parties of action taken, resign from the matter, or seek court direction as may be necessary to resolve the conflict or impropriety. A guardian ad litem shall not accept or maintain appointment if the performance of the duties of guardian ad litem may be materially limited by the guardian ad litem's responsibilities to another client or a third person, or by the guardian ad litem's own interests. GALR 2 (e) The GAL cited a conflict of interest in her declaration to discharge CP 55

Become informed about case. A guardian ad litem shall make reasonable efforts to become informed about the facts of the case and to contact all parties. A guardian ad litem shall examine material information and sources of information, taking into account the positions of the parties. GALR 2 (g). The GAL was unable to reference what the CPS report said. *In regards to the sexual assault, what was the CPS finding? I don't recall. I think it was unfounded. Okay. Did CPS have me sign a safety plan because they wanted me to have the custody? I don't recall that specifically.* RP v1 pg58 ln 21-25, pg 59 ln 1. *What did Sacred Heart say in regards to that? I don't recall.* RP v1 pg 64 ln 22-23

Timely inform the court of relevant information. A guardian ad litem shall file a written report with the court and the parties as required by law or court order or in any event not later than 10 days prior to a hearing for which a report is required. The report shall be accompanied by a written list of documents considered or called to the attention of the guardian ad litem and persons interviewed during the course of the investigation. GALR 2 (i) The GAL report did not contain a list of documents other than a vague reference to *various documents provided by the father.* P10

The GAL failed to be informed about the facts of the case, did not provide a proper list of documents and stated that she had a conflict of interest.

IV. CONCLUSION

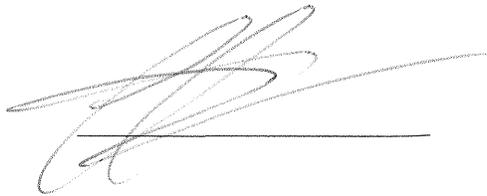
The petitioners made no clear and convincing showing that Mr. DeBurra was unfit to parent his son. They concentrated the argument that they would be better parents and were in the best interest of the child. *Award of child custody to paternal aunt and uncle, rather than to otherwise fit mother, was abuse of discretion, despite finding that aunt and*

uncle offered child superior environment; finding that aunt and uncle would be better parents than mother could not, without more, justify state interference with parent/child relationship. In re Custody of Anderson (1995) 77 Wash. App 261, 890 P.2d 525 The issue that the child has had and sided by the petitioners have all been in the custody of the mother, Antoinette Shaffer and not the father, Christopher DeBurra. It is undisputed that Mr. DeBurra does not get along with Mrs. Shaffer or her family. That fact does not make him unfit. *Can an otherwise fit parent be found unfit because she chooses to fight a non parental custody petition, because she openly expresses her dislike of the side of the family that brought the custody petition, because she avoids old family friends who are supporting the other side in the custody litigation, because she doesn't trust the custody evaluators who have been brought into the litigation, and because she doesn't foster a good relationship between her child and all of those people? The answer is no.* In re Custody of Nunn 103 Wa. App. 871, 14 P.3d 175

Since the petitioners did not make a clear and convincing case of unfitness of Mr. DeBurra, the trial court erred in granting non parental custody to them. The Appellant, Mr. DeBurra respectfully request this Court reverse the order of the Spokane County Superior Court awarding

non parental custody and that this Court award Mr. DeBurra his costs and attorney fees pursuant to RAP 18.1

RESPECTFULLY SUBMITTED this 8 day of March, 2014

A handwritten signature in black ink, appearing to read 'C. DeBurra', with a long horizontal line extending to the right.

Christopher DeBurra

Appellant

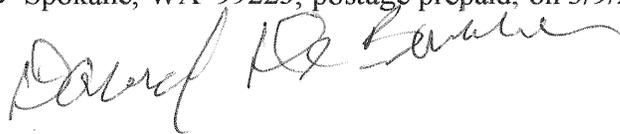
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CERTIFICATE OF MAILING

I certify that I mailed a copy of the Appellants Brief to the office of Matthew Dudley attorney for the respondents Arthur Leritz and Desiree Miller, at 2824 E. 29th Ave. Suite 1B Spokane, WA 99223, postage prepaid, on 3/9/2014.



David DeBurra