FILED
February 25 2010
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. DA 09-0521

IN RE THE PARENTING OF, D.N.S., A MINOR, ASHLEY N. WATERS, Petitioner/Appellee, and CLAUDE DANIEL SMITH, Respondent/Appellant.	**APPELLANT'S OPENING BRIEF**

ON APPEAL FROM THE MONTANA SEVENTEENTH JUDICIAL DISTRICT COURT, PHILLIPS COUNTY, BEFORE THE HONORABLE JOHN C. MCKEON

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ISSUE PRESENTED

Did the District Court err when it refused to implement Appellant's (Mr. Smith herein) proposed parenting plan calling for equal custody of the parties' daughter?

STATEMENT OF THE CASE

The parties to this case have a child born October, 2008.

Mr. Smith lives in Charlo, Montana and Respondent (Ms. Waters) resides in Malta, Montana.

A hearing on competing final parenting plans was conducted on August 18, 2009.

On August 21, 2009, the District Court issued its decision ruling that Ms. Waters' proposed final parenting plan was in the parties' daughter's best interests.

From this final parenting plan, Mr. Smith appeals.

SUMMARY OF ARGUMENT

The District Court relegated Mr. Smith to traveling 420 miles one (1) way to see his daughter for virtually all of his visitation with his young daughter based upon unsupported findings of fact and contrary to its own guidelines for custody.

The evidence presented demonstrated that it was in the parties' daughter's best interests to be in the custody of each parent equally.

STATEMENT OF FACTS

As a result of motion practice, on January 12, 2009, the parties agreed on an interim parenting plan, pending the final parenting plan hearing on August 18, 2009. (Appendix **A**).

This parenting plan established for the months of January through April, 2009, that Mr. Smith was to have four (4) days of visitation with his daughter each month in Malta, Montana. (Appendix **A**, pgs. 2-4).

For the months of May, July, and August, Ms. Waters was to bring the parties' daughter to Charlo, so that Mr. Smith could enjoy visitation with his daughter, approximately one (1) weekend each month. (Appendix **A**, pgs. 4-5).

In June, 2009, Mr. Smith had the ability to visit with his daughter, in Malta, Montana. (Appendix **A**, pg. 6).

Mr. Smith also had the ability to travel to Malta, on other months, with the requisite notice, to visit with his daughter for additional weekends. (Appendix **A**, pg. 6).

This visitation was deemed to be in the parties' child's best interests. (Appendix **A**, pg. 8).

In spite of this agreement, Ms. Waters proposed a parenting plan, on or about August 11, 2009, which called for Mr. Smith to have weekend visitation with his daughter every sixth (6th) weekend. (Appendix **B**, pg. 2).

And Ms. Waters would meet Mr. Smith in Shelby, Montana, to exchange their daughter, every fourth (4th) scheduled weekend visit. (Appendix **B**, pg. 2). Otherwise, the visitation would occur in Malta, Montana. (Appendix **B**, pg. 2).

Ms. Waters' proposed parenting plan called for the parties to jointly make decisions concerning their daughter, including decisions on education and religion. (Appendix **B**, pgs. 5-6).

Mr. Smith proposed a parenting plan whereby the parties would have equal custody of their child. (Appendix **C**)

At the August 18, 2009, hearing, the following testimony was elicited:

1. Mr. Smith:

    a. He is the child's father (TR. pg. 8);

    b. Prior to leaving Malta, Ms. Waters was the primary care-giver to their daughter (TR. pg. 8);

    c. Ms. Waters is a good mother (TR. pg. 8);

    d. Prior to Ms. Waters moving out of the home the parties shared in Malta, the parties engaged in a hollering and screaming episode (TR. pgs. 11-12);

    e. During this episode, Mr. Smith did take Ms. Waters' cell phone so they could talk and then returned it to her (TR. pg. 12);

    f. Mr. Smith denies drinking to excess during this episode (TR. pg. 13);

g. His home in Charlo, Montana, is approximately 420 miles from Malta, Montana (TR. pg. 14);

h. When he arrived in Charlo, he obtained a job paying $7.50 per hour (TR. pg. 14);

i. He was laid off in June, 2009, and earns $1,400.00 in unemployment insurance proceeds (TR. pg. 15);

j. He didn't care for his daughter very much when he and Ms. Waters were together because she didn't want his help (TR. pg. 18);

k. Mr. Smith admitted to making a hole in a wall while arguing with Ms. Waters on another occasion, while the parties were living in Bozeman, prior to the birth of their daughter (TR. pgs. 21-22);

l. He believes an equal parenting plan is in his daughter's best interests, so that she can know and be around both parents and their respective families as much as possible (TR. pgs. 26-27);

m. He has family members who can provide day care for his daughter when he is working (TR. pg. 27);

n. He has a good support system for himself and the parties' child in Charlo (TR. pg. 200);

o. He witnessed Ms. Waters drink while she was pregnant on two (2) occasions (TR. pg. 202);

p. He believed the interim parenting plan the

parties worked out was in his daughter's best interests because she was being breast fed (TR. pg. 204);

q. He does not believe Ms. Waters' proposed final parenting plan is his daughter's best interests because it is in her best interests that she see both parents equally (TR. pg. 204);

r. His proposed parenting plan of monthly alternating custody would save money and reduce the amount of time his daughter would need to travel (TR. pg. 207);

s. When he moved back to Charlo, he took First Aid and CPR for infants (TR. pg. 207);

t. He would not stand in the way of his daughter going to church (TR. pgs. 208-209);

u. He wants his daughter to get a proper education and reach her potential (TR. pg. 209);

v. Although he and Ms. Waters had a very turbulent relationship, he does not believe he has an anger problem (TR. pg. 210);

w. He believes his daughter needs to be disciplined when she is old enough to understand what is going on (TR. pg. 211);

x. His only DUI conviction was when he was eighteen (18) or nineteen (19) years of age (TR. pg. 211);

y. Ms. Waters never made Mr. Smith aware of any constipation issues the parties' child

allegedly had after returning from his care (TR. pg. 213);

z. Ms. Waters has never complained about any of Mr. Smith's care when the parties' child has returned to her (TR. pg. 213);

aa. He believes it is important for his child to have equal contact with him because she needs to know her father (TR. pgs. 213-214).

2. Barb Waters:

a. She is Ms. Waters' mother (TR. pg. 31);

b. She didn't see Mr. Smith helping parent very frequently (TR. pg. 33);

c. She witnessed, Mr. Smith drinking alcohol on several occasions (TR. pg. 33);

d. Her daughter is a good mom who will bring up the parties' daughter with a proper education, religion, and in a very loving home (TR. pgs. 36-37);

e. Her ability to observe Mr. Smith parent was probably limited because she was at their home on a limited basis (TR. pg. 38-39);

f. She and her husband also drink - she on occasion and her husband daily (TR. pgs. 39-40);

g. Although she has seen Mr. Smith drink, she hasn't seen him put his daughter in danger (TR. pgs. 39-40);

h. She doesn't know if her daughter drank while she was pregnant, but she may have when she

was nursing (TR. pg. 41);

i. It's probably not appropriate to drink while nursing (TR. pg. 41);

j. Ms. Waters moved from the Bozeman/Belgrade area to Malta on September 12, 2008 (TR. pg. 43);

k. Ms. Waters moved into her parents' home, then moved into a home in Malta with Mr. Smith, then moved out of that home in the middle of December, 2008, and back into her parents' home (TR. pg. 43);

l. Ms. Waters moved out of her parents' home for the last time in May or June, 2009 (TR. pg. 44);

m. In Bozeman her daughter was not a regular church goer. In Malta she goes once or twice a month (TR. pgs. 45-46);

n. Other than alleged wheezing when she returned from custody with Mr. Smith, the parties' daughter did not have any difficulties when returning from Mr. Smith's custody (TR. pgs. 46-47);

3. Wesley Pankratz:

a. He is Ms. Waters' fiancé (TR. pg. 50);

b. He is a laborer who has known Ms. Waters' for seven (7) or eight (8) years (TR. pg. 50);

c. He and Ms. Waters have been living together for approximately a month and a half and intend to get married "maybe next summer." (TR. pg. 51);

d. He considers the parties' child as his own and has a good relationship with her (TR. pg. 52);

e. He began dating Ms. Waters approximately five (5) months ago (TR. pg. 54);

4. Ann Sowder:

a. She is friends with Ms. Waters (TR. pg. 55);

b. Ms. Waters is a very good mother (TR. pg. 56);

5. Ashley Waters:

a. She is the child's mother (TR. pg. 59);

b. She graduated from Malta High School in 2005 (TR. pg. 59);

c. Thereafter, she left for school in Bozeman to obtain a degree in pre-nursing, and switched majors to aviation (TR. pg. 59);

d. Prior to moving back to Malta, she lived with Mr. Smith in Belgrade and Bozeman, Montana (TR. pg. 60;

e. The parties had disputes their entire relationship and she decided to leave because she didn't think it was safe for their daughter to be raised in that environment (TR. pg. 61);

f. Mr. Smith drank and was allegedly verbally and mentally abusive to her (TR. pgs. 61-62);

g. Mr. Smith didn't hit her, but allegedly prevented her from leaving by force (TR. pg. 62);

h. Alcohol precipitated these incidents (TR.

pg. 63);

i. Even though he was allegedly violent, requiring her to move out, she allowed Mr. Smith to move in with her in Malta, because she felt guilty (TR. pg. 66);

j. Ten percent (10%) of Mr. Smith's activities involved their daughter when the parties lived together in Malta (TR. pg. 68);

k. Mr. Smith would not help watch their child or do things around the house (TR. pg. 69);

l. During an incident on December 14, 2008, Mr. Smith allegedly threatened to slap Ms. Waters (Tr. pgs. 70-72);

m. During the interim parenting plan, it took eight (8) to nine (9) hours to transport the child to Charlo for visitation (TR. pg. 81);

n. She believes that Mr. Smith smokes around his daughter because her clothes smell like it (TR. pg. 87);

o. She believes Mr. Smith should see his daughter in brief periods because of his "behavioral patterns and drinking patterns." (TR. pg. 91);

p. She believes the long trip to Charlo and back is bad for the child because "she gets sick, she gets constipated and she's fussy the whole way." (TR. pgs. 91-92);

q. She did drink while nursing, but pumped

breast milk afterwards and had stored frozen breast milk (TR. pg. 92);

r. She doesn't know how Mr. Smith parents their daughter since they split up (TR. pg. 96);

s. She admitted to drinking alcohol on one (1) occasion when she was pregnant (TR. pgs. 96-97);

t. She admitted this was a mistake (TR. pg. 97);

u. Although she didn't want her daughter in the turbulent environment which allegedly existed while she was with Mr. Smith, she didn't leave until December 14, 2008. She never called the police and never got a restraining order (TR. pgs. 101-102);

v. During these alleged episodes, their daughter was never placed in danger (TR. pgs. 102-103);

w. Mr. Smith did allegedly try to stop her from leaving by pushing against her when she was pregnant (TR. pgs. 102-103);

x. Mr. Smith was present at the hospital when their daughter was born and stayed at the hospital until they checked out two (2) days later (TR. pgs. 105-106);

y. Ms. Waters does not believe it is important for her daughter to have a good relationship with Mr. Smith because he would neglect her - even though she has no evidence that he has neglected

her since the parties began living separate and apart (TR. pgs. 107-108);

z. Their daughter is properly fed and dressed when she is returned from time with her father (TR. pgs. 108-109);

aa. She claims on one occasion their daughter was not wiped well when she came back from Mr. Smith's (TR. pg. 109);

bb. Mr. Smith would be confronted with the same difficulties of traveling to see his daughter in Malta, when he obtains a job (TR. pg. 115);

cc. There was no requirement the parties notify the other of a change in address during the interim parenting plan between January and August, 2009 (TR. pg. 132-133);

4. Cindy Smith:

a. She is Mr. Smith's mother and lives in Charlo, Montana (TR. pg. 137);

b. There are approximately sixty-three (63) members of the tight-knit Smith family in the Lake County area (TR. pg. 138);

c. Since Mr. Smith moved back to Charlo, she hasn't seen him drink to excess (TR. pg. 142);

d. The contacts the parties had during the interim parenting plan were cordial (TR. pg. 143);

e. During both visitation in Malta and Charlo, she witnessed Mr. Smith provided all of the care for his daughter (TR. pg. 143-144);

f. She did not observe anything that caused her concern with Mr. Smith's care of his daughter (TR. pg. 145);

g. She believes Mr. Smith is a fit parent (TR. pg. 145);

h. She has seen Mr. Smith drink around his daughter on one (1) occasion over a 4th of July weekend, having one (1) beer (TR. pg. 145);

i. She witnessed Ms. Waters drink once while she was pregnant (TR. pg. 146);

j. She witnessed Ms. Waters drink three (3) times while nursing (TR. pg. 147);

k. She did not see Ms. Waters give the parties' child a bottle (TR. pg. 149);

l. She thinks in spite of this that Ms. Waters is a great mom (TR. pg. 150);

m. Neither Mr. Smith, nor anyone else smokes around the parties' child (TR. pg. 151);

n. She had concerns about the parties' child wheezing when Mr. Smith would have visitation with his daughter (TR. pg. 151-153);

o. It would cost between $500.00 and $600.00 for each three (3) to four (4) day period Mr. Smith would travel to Malta for visitation (TR. pg. 153);

p. She has no concerns for Mr. Smith parenting his daughter (TR. pg. 155);

q. She does not believe Mr. Smith has an

alcohol or psychological problem (TR. pg. 155);

r. She has seen Mr. Smith when he is angry, but not physical (TR. pgs. 164-165);

5. Steven Smith:

a. He is Mr. Smith's cousin and has witnessed Mr. Smith parenting his daughter appropriately (TR. pg. 167);

b. Mr. Smith is good with children (TR. pg. 167);

c. Mr. Smith does not have an anger or drinking problem (TR. pg. 167);

d. Mr. Smith does not smoke around his daughter (TR. pgs. 167-168);

6. Claude Smith:

a. He is Mr. Smith's father (TR. pg. 169);

b. He has never seen the construction field doing so poorly in the Lake County area (TR. pgs. 169-170);

c. He hasn't seen Mr. Smith or anyone smoke around the parties' child while in Mr. Smith's custody (TR. pgs. 170-171);

d. He has watched Mr. Smith care for the parties' child and has seen nothing that causes him concern (TR. pg. 171);

e. He hasn't seen Mr. Smith drink alcohol to excess (TR. pgs. 171-172);

f. The parties' child does not seem any worse for the wear when she has arrived for visitation in

Charlo after traveling from Malta (TR. pg. 172);

7. Jeanne Bocksnick:

a. She lives in Charlo and is engaged to Mr. Smith's brother (TR. pg. 176);

b. She has observed Mr. Smith parent his daughter and has no concerns about his parenting ability (TR. pg. 177);

c. She trusts Mr. Smith with her own young child (TR. pgs. 178-179);

d. She hasn't seen Mr. Smith drink to excess since he moved back to Charlo (TR. pg. 178);

e. She witnessed Ms. Waters drink alcohol twice while she was pregnant (TR. pg. 178);

f. On one occasion, Ms. Waters drank a couple of glasses of champagne and on the other, Ms. Waters and Ms. Bocksnick drank an entire bottle of wine (TR. pgs 178-179);

g. She witnessed Ms. Waters drink twice since she gave birth to the parties' child (TR. pg. 179);

h. She had a good relationship with Ms. Waters before the parties broke up (TR. pg. 181);

I. Mr. Smith is very respectful to people (TR. pg. 182);

j. She has not seen Mr. Smith have any rage or anger (TR. pg. 182);

k. Although Mr. Smith would drink to excess on occasion before moving back to Charlo, he has

stopped doing so because he wants his daughter (TR. pg. 185);

ARGUMENT

The District Erred When it Refused to Adopt Mr. Smith's Proposed Final Parenting Plan

The issue is whether the District Court was justified in refusing to adopt Mr. Smith's Proposed Final Parenting Plan?

The Supreme Court reviews the District Court's findings related to custody modifications to determine whether the findings are clearly erroneous. *In re Marriage of Olson* (Mont., 2005), 111 P.3d 686, 688.

Findings are clearly erroneous if they are not supported by substantial evidence, if the District Court misapprehended the effect of the evidence, or if the Supreme Court's review of the record indicates that a mistake has been made. *Id.*, at 688.

Mr. Smith asserts that the District Court's ruling is clearly erroneous as it is not supported by substantial evidence, the District Court misapprehended the effect of the evidence, and the District Court is clearly mistaken.

Upon review of the District Court's findings, it appears the District Court made its ruling primarily upon the following factors:

1. Mr. Smith was allegedly violent and abusive towards Ms. Waters; and

2. The parties' child would be fearful of extended absences from Ms. Waters.

As it relates to the alleged violence and abuse, it appears that the District Court selected which facts it wished to utilize in awarding the majority of the custody with Ms. Waters.

There is no doubt that Mr. Smith engaged in some violence as he admitted to punching a hole in a wall during an argument with Ms. Waters. However, this was before the parties' child was born.

Moreover, in none of these episodes of violence or alleged violence were police called or a restraining order obtained.

In none of these episodes was the parties' child placed in jeopardy.

Further, arguably, by remaining in this supposedly violent situation, Ms. Waters put the parties' daughter in danger also.

Unfortunately, the District Court ignored these facts.

There was credible evidence by a number of witnesses who testified that Ms. Waters was drinking alcohol while pregnant and while nursing.

In point of fact, Ms. Waters even admitted to drinking while pregnant on one (1) occasion.

Clearly, if accepted as true, this would have run contrary to the parties' child's best interests, and served to justify Ms. Waters obtaining a chemical

dependency evaluation and treatment too.

Again, unfortunately, the District Court ignored the facts set forth by these witnesses - three (3) of whom witnessed Ms. Waters' improper drinking.

Without providing any explanation as to why it found so, the District Court stated that the witnesses who testified on the issues of Ms. Waters' drinking were not credible.

Second, although the District Court stated stability and continuity of care, as well as getting to know and interact with both parents is essential, it ordered a parenting plan which makes that virtually impossible.

In addition to the sheer expense of requiring Mr. Smith to travel 420 miles one (1) way to see his daughter seventy-five percent (75%) of the time, the District Court restricted this time to one (1) time a month.

In so doing, the District Court provided the following as the basis:

> . . . until 36 months of age, the child can reasonably be expected to be fearful of extended absences from the primary caretaker.
>
> (Appendix **D**, pg. 6).

There was absolutely no testimony whatsoever to support the finding that the parties' child would be fearful of being away from her mother.

The District Court apparently presumed primary

custody should remain with the primary care giver.

What the District Court did has been expressly prohibited by this Court; to wit: no presumption that custody should be granted to the parent who provided most of the primary care during the child's life exists. *In re Marriage of Robison* (Mont., 2002), 53 P.3d 1279.

Even assuming *arguendo*, the District Court did not engage in such a presumption. It certainly abused its discretion by making this finding, as there was no evidence to support this finding and the District Court did not set forth what it based this finding on.

The parenting plan the District Court instituted ran contrary to its own Child Visitation Guidelines.

For children the parties' child's age, these guidelines state:

> Until the child begins the first grade, the residential custody of the child shall be divided between the parents as equally as possible. If the parents are unable to agree to an equal division of residential care than each parent shall have three months beginning with the date of the child turning six months. At that point the father will have custody for three consecutive months and the mother and father shall alternate three consecutive month periods thereafter. The nonresidential parent shall have a visitation alternating weekends beginning Friday afternoon through Sunday evening . . .
>
> (Appendix **E**, pg. 7).

While this serves solely as a guide, certainly the guideline's recognition that each parent should have

equal time with a child of a young age suggests, contrary to the District Court's unsupported finding, residing with Mr. Smith would not cause the parties' child to be fearful.

There was also no evidence presented which would justify a parenting plan which provided less time for Mr. Smith to have custody with his daughter than the interim parenting plan agreed upon by the parties as being in the parties' child's best interests.

Equally concerning was the District Court's restriction that visitation (other than holiday visitation) occur in Malta. (Appendix D, pgs 7-8).

Again, there was absolutely no evidence to support or otherwise justify this limitation.

In fact, given the size and limitations of Malta in terms of services, as well as the fact that Mr. Smith has no family in the area, such a limitation serves as another hindrance to meaningful visitation as Mr. Smith, at least in the winter months, is confined to visitation with his daughter in a hotel room.

Finally, the District Court erred when it determined that Ms. Waters should be allowed to make all decisions relating to education and religion for the parties' child.

First, in her own proposed parenting plan, Ms. Waters provided:

> Major decisions regarding the child's religious, educational, and non-emergency health care decisions shall be decided

jointly.

(Appendix **B**, pgs. 5-6).

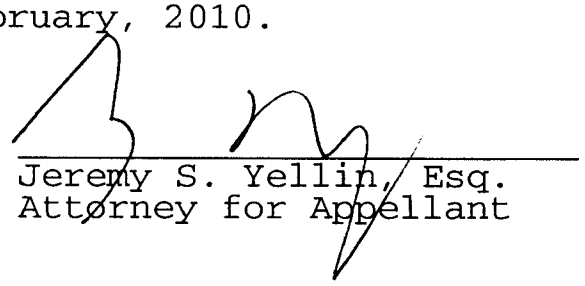
Second, there were no facts which supported a finding that the parties could not and/or should not make these decisions together.

CONCLUSION

In conclusion, there was no justification in law or fact for the District Court's refusal to implement Mr. Smith's proposed parenting plan.

Consequently, Mr. Smith respectfully asserts the Court must reverse the District Court, and order implementation of Mr. Smith's proposed parenting plan.

DATED this 25th day of February, 2010.



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Certificate of Service

I hereby certify that on the 25th day of February, 2010, I;

[_X_] Mailed

[____] Hand-delivered

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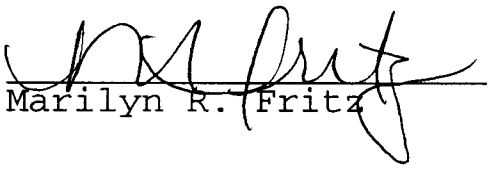
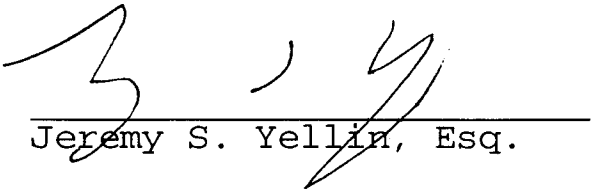


Marilyn R. Fritz

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with Courier monospaced typeface having 12 characters per inch; is double spaced except for footnotes and for quoted indented material, does not exceed 40 pages, excluding table of contents, table of citations, certificate of service and appendix.



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