

Opinion, Case No.23783 Raymond J. Baugh v. Starr Kay Merritt

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1997 Term

No. 23783

RAYMOND J. BAUGH,
Petitioner Below, Appellee

v.

STARR KAY MERRITT,
Respondent Below, Appellant

Appeal from the Circuit Court of Lewis County

Honorable Thomas H. Keadle, Judge

Civil Action No. 95-D-133

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: January 29, 1997

Filed: July 3, 1997

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The Opinion of the Court was delivered PER CURIAM.

JUSTICE MAYNARD dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "When a natural parent transfers temporary custody of their child to a third person and thereafter seeks to regain custody of that child, the burden of proof shall be upon that parent to prove by clear and convincing evidence that he or she is fit; thereafter the burden of proof shall shift to the third party to prove by clear and convincing evidence that the child's environment should not be disturbed because to do so would constitute a significant detriment to the child notwithstanding the natural parent's assertion of a

legal right to the child. To the extent that our decision in *McCartney v. Coberly*, 250 S.E.2d 777 (W.Va. 1978) is inconsistent with this holding, it is expressly overruled." Syllabus point 2, *Overfield v. Collins*, No. 23046 (W.Va. December 6, 1996).

2. "When a natural parent transfers permanent custody of his or her child to a third person and thereafter attempts to regain custody of that child, the burden of proof shall rest exclusively upon the parent attempting to regain custody of his or her child by proving with clear and convincing evidence: (1) that he or she is fit; and (2) that a transfer of custody so as to disturb the child's existing environment would constitute a significant benefit to the child. To the extent that our decision in *State ex rel. Harmon v. Utterback*, 144 W.Va. 419, 108 S.E.2d 521 (1959) is inconsistent with this holding, it is expressly overruled." Syllabus point 3, *Overfield v. Collins*, No. 23046 (W.Va. December 6, 1996).

3. "In the unlikelihood that the scrivener of a document voluntarily transferring the custody of a child between a parent and a third person fails to express any intention as to the duration of the custodial change, it shall be presumed that the transfer is temporary, and the burden of proof shall be upon the third person to prove by clear and convincing evidence, either intrinsic or extrinsic, that it was the intention of the parent to transfer permanent custody of the child to the third person." Syllabus point 6, *Overfield v. Collins*, No. 23046 (W.Va. December 6, 1996).

Per Curiam:

This is an appeal by Starr Kay Merritt from an order of the Circuit Court of Lewis County which transferred custody of her infant child, D. M., to the appellee, Raymond J. Baugh, who is believed to be the child's uncle. On appeal, the appellant claims that the procedure used by the circuit court in transferring custody was improper and that there was no appropriate factual basis to justify the transfer. After reviewing the issues presented, this Court concludes that the circuit court did employ improper procedures in trying the case, and for that reason this Court reverses the decision of the circuit court and remands this case for further development.

The record in this case indicates that the child involved in this case was born on August 19, 1992, and that he resided with the appellant, his natural mother, until December 1994, when because of financial difficulties, she determined that it was impossible for her to care properly for him. As a consequence, in 1994, she decided to seek work and a better life in the State of Missouri. Because of the situation she also decided to leave D. M. in the temporary care and custody of his paternal uncle, Raymond J. Baugh, until such time as she found work and established herself in the State of Missouri. Raymond J. Baugh, the appellee, apparently found this arrangement satisfactory.

Before the appellant left for Missouri she delivered D. M. to Raymond J. Baugh, and she also gave Raymond J. Baugh a handwritten note dated November 22, 1994, in which she authorized him to seek medical care for her son. Apparently, both the appellant and Raymond J. Baugh believed that this would be sufficient for Raymond J. Baugh to obtain financial assistance or a "medical card" to pay for the child's medical care.

According to the appellant, the note given to Raymond J. Baugh was not adequate to cover its intended purpose, and as a consequence, she executed another document on January 25, 1995, after she arrived in Missouri. That document which was on a pre-prepared form called a "Special Power of Attorney and Voluntary Appointment of Guardian" granted Raymond J. Baugh guardianship of the infant, D. M. The document contained a preprinted clause which stated:

This Power of Attorney shall become effective when I sign and execute it below. Further, unless sooner revoked or terminated by me, this Power of Attorney shall become NULL and VOID on _____.

The words "unknown at present time" were handwritten in the preprinted blank.

According to the appellant she was later informed that even this document was not sufficient to enable Raymond J. Baugh to obtain a "medical card" for D.M., and as a consequence she executed a form which she believed would qualify her son for a "medical card."

In May 1995, the appellant returned to Lewis County, West Virginia, and picked up her son and returned to Missouri. Shortly thereafter Raymond J. Baugh traveled to Missouri, according to the appellant, and threatened her with kidnaping and demanded her son. At this point the appellant returned her son to Raymond J. Baugh, and the child was returned to West Virginia. Thereafter, in September 1995, the appellant notified Raymond J. Baugh that she was returning to West Virginia to regain custody of her son and to terminate the temporary guardianship arrangement.

After receiving this notification Raymond J. Baugh instituted the present action in the Circuit Court of Lewis County. In instituting the action he sought to obtain the permanent custody and control of D. M. In his petition Raymond J. Baugh alleged that in December 1994, the appellant had turned custody of D. M. over to him and that from December 1994, she had neglected him. The petition also contained an allegation that

she had abused him.

A hearing was conducted on November 3, 1995, and although according to the appellant the court did not have adequate time to hear all witnesses, she did introduce evidence relating to her finances and the living arrangements which she had established for herself and her son in Missouri.

At a later hearing Raymond J. Baugh introduced evidence suggesting that the appellant had neglected her son prior to moving to Missouri.

The circuit court, after hearing the evidence, concluded that the appellant had intended to transfer permanent custody of Dustin Merritt to Raymond J. Baugh and that prior to living with Mr. Baugh the child was not well taken care of, was in dire need, and that his physical, mental and psychological well-being were not attended to. The court also found that the child had been abused and neglected, and that Raymond J. Baugh had become the psychological father of the child. The court concluded that the appellant had abandoned the child to Mr. Baugh and done nothing to support him or to assist in his support even though she had been employed since 1994.

In the present proceeding the appellant claims that the trial court followed improper procedures in adjudicating this case. Among other things she claims that petition contained no allegation of abandonment. She further claims that there was no clear, cogent, and convincing evidence that she permanently transferred custody of D. M. to Raymond J. Baugh or that she had relinquished her parental rights to him. She also argues that there was no clear, cogent, and convincing evidence, that she had abused and neglected the child. Relating to this, she points out that she had not had actual physical custody of the child for approximately a year before the proceeding and that there could thus be absolutely no basis for the trial court to conclude that she was presently abusing or neglecting the child in such a way as to serve as a basis for terminating her custody under the abuse and neglect statute.

After the filing of the appeal in the present case, this Court on December 6, 1996, rendered an opinion in the case of *Shirley V. Overfield v. Tammy Lynn Collins*, No. 23046 (W.Va. December 6, 1996). The *Overfield* case is closely analogous to the one presently under consideration, and in *Overfield* the Court detailed the procedures to be followed by a circuit court in adjudicating custody questions where a natural parent has relinquished custody to an individual other than a parent, and where there is some claim that the child's permanent custody should be transferred to the non-parent custodian. Several holdings in *Overfield* have bearing on the present case. First, in *Overfield* the Court stated that a document transferring custody of a child from a natural parent to a third-party, non-parent custodian should expressly provide whether the intention of the natural parent is to transfer the custody permanently or should indicate whether the

intention is to transfer custody only temporarily. In syllabus point 6 of the *Overfield* case the Court stated:

In the unlikelihood that the scrivener of a document voluntarily transferring the custody of a child between a parent and a third person fails to express any intention as to the duration of the custodial change, it shall be presumed that the transfer is temporary, and the burden of proof shall be upon the third person to prove by clear and convincing evidence, either intrinsic or extrinsic, that it was the intention of the parent to transfer permanent custody of the child to the third person.

In examining the documents in the present case, this Court cannot say that they expressly provide whether the transfer of custody of D. M. from the appellant to Raymond J. Baugh was intended to be a permanent or a temporary transfer of custody. Although the fact that the "Special Power of Attorney and Voluntary Appointment of Guardian" contained a clause indicating that it would become "NULL and VOID" would suggest that there was some intention to impose some limit upon the transfer of custody, that fact is not absolutely clear from the document.

In any event, given the nature of the documents involved, and given the holding in syllabus point 6 of the *Overfield* case, this Court believes that it was incumbent on Raymond J. Baugh to prove by clear and convincing evidence, either intrinsic or extrinsic, that the appellant intended to transfer from the custody of D. M. to him. Further, it does not appear that Raymond J. Baugh met that burden of proof, although, in fairness to the circuit court, this Court must say at the time of hearing in the case, it had not clearly indicated that such burden was on a non-natural custodian in cases such as this one.

In syllabus point 2 of the *Overfield* case the Court further stated:

When a natural parent transfers temporary custody of their child to a third person and thereafter seeks to regain custody of that child, the burden of proof shall be upon that parent to prove by clear and convincing evidence that he or she is fit; thereafter the burden of proof shall shift to the third party to prove by clear and convincing evidence that the child's environment should not be disturbed because to do so would constitute a significant detriment to the child notwithstanding the natural parent's assertion of a legal right to the child. To the extent that our decision in *McCartney v. Coberly*, 250 S.E.2d 777 (W.Va. 1978) is inconsistent with this holding, it is expressly overruled.

The Court also stated in syllabus point 3 of the *Overfield* case:

When a natural parent transfers permanent custody of his or her child to a third person and thereafter attempts to regain custody of that child, the burden of proof shall rest exclusively upon the parent attempting to regain custody of his or her child by proving

with clear and convincing evidence: (1) that he or she is fit; and (2) that a transfer of custody so as to disturb the child's existing environment would constitute a significant benefit to the child. To the extent that our decision in *State ex rel. Harmon v. Utterback*, 144 W.Va. 419, 108 S.E.2d 521 (1959) is inconsistent with this holding, it is expressly overruled.

In reviewing the present case it is apparent to this Court that the trial court did not follow the procedures and analysis outlined in the *Overfield* case in reaching the decision to transfer custody of D. M. to Raymond J. Baugh, although as noted above the *Overfield* decision had not been released at the time of the trial court's action. For that reason this Court believes that the judgment of the circuit court should be reversed, and this case should be remanded for treatment and consideration consistent with the standards set forth in the *Overfield* case.

In the present case the Court believes that given the fact that the custody documents do not expressly state whether the custody transfer was to be temporary or permanent, the trial court should presume that the transfer was temporary, and only if Raymond J. Baugh shows by clear and convincing evidence that the appellant's intention was to make a permanent transfer of custody should the documents be deemed to have transferred permanent custody. After determining whether the documents did transfer temporary or permanent custody, the Court should then proceed with a determination of the case consistent with the principles of the *Overfield* case and our other law relating to child custody.

The Court notes that in *Overfield* the Court did not depart from the principle set forth in *Lemley v. Barr*, 176 W.Va. 378, 343 S.E.2d 101 (1986), that the best interest of the child has always been regarded as superior to the right of parental custody and that where a child has been with someone other than a natural parent for an appreciable period of time, a potential material benefit to the child must be shown before a transfer of custody should be ordered.

Also, as previously indicated in *In the Matter of Lindsey C.*, 196 W.Va. 395, 473 S.E.2d 110 (1995), and *Overfield* in a case such as the present one the trial court should appoint a guardian *ad litem* to represent the interests of the infant child and should fashion a plan of visitation to afford the non-custodial parent with an opportunity to visit with the child pending the ultimate resolution of the case. The Court also believes, given the facts of this case, the trial court should consider whether, after the ultimate resolution of this case, the non-prevailing party should have the right of continued association with the child so as not to interrupt the continuity in bonding that may have

been developed between the child and that party.

The judgment of the Circuit Court of Lewis County is, for the reasons stated, reversed, and this case is remanded for further development consistent with the principles

set forth herein.

Reversed and remanded with directions.