

2006

Miguel David Gedo v. Shacke Rose : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MIGUEL DAVID GEDO,)	Case No. 20060147
)	_____
Petitioner and Appellee,)	
)	Civil No. 054400798
vs.)	
)	Judge Anthony W. Schofield
Shacké ROSE)	_____
)	
Respondent and Appellant.)	

REPLY BRIEF OF APPELLANT

ON APPEAL FROM THE FOURTH DISTRICT COURT

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Orem, UT 84058
Pro se Appellee

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ARGUMENT

This Reply Brief addresses two new issues raised in the Brief of Appellee: 1) Appellant failed to marshal evidence to show that the trial court's findings contradict the clear weight of the evidence; and 2) Dr. Darin Featherstone's affidavit was stricken from the record.

I. THE TRIAL COURT'S FINDINGS CONTRADICT THE CLEAR WEIGHT OF THE EVIDENCE.

The trial court did not take evidence. The trial court did consider the sworn affidavits that were submitted to the court. However, the trial court was not able to weigh the credibility of said affidavits. Further, the affidavits that were considered presented conflicting facts to the trial court. Therefore, contrary to Appellee's assertion, it is unnecessary for Appellant to marshal the evidence. However, in the event that the Court disagrees with Appellant, Appellant marshals the evidence for the Court.

To challenge a court's findings, "an appellant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." Chen v. Stewart, 2004 UT 82, ¶ 76, 100 P.3d 1177 (quoting Wilson Supply, 2002 UT 94 at ¶ 21, 54 P.3d 1177). "[T]o properly marshal the evidence the challenging party must demonstrate how the court found the facts from the evidence and then explain why those findings contradict the clear weight of the evidence." Chen v. Stewart, 2004 UT 82, ¶ 78. Essentially, "appellants must provide a precisely focused summary of all the evidence supporting the findings they challenge" and convince the appellate court that "the trial

court erred in [its] assessment of that evidence to its findings.” Chen v. Stewart, 2004 UT 82, ¶ 78 (citing W. Valley City v. Majestic Inv., Co., 818 P.2d 1311, 1315 (Utah Ct.App.1991)).

The findings which Mrs. Rose challenges and upon which the trial court based its order for genetic testing are found on page 9 of the Transcript of Oral Argument, December 6, 2005. They are as follows:

1. “For a long time Mr. Gedo has had some relationship with the child.”
2. “For a long time he’s had considerable contact with the child.”
3. “There’s at least allegation made that the natural mom . . . has acknowledged possibility of paternity.”

The trial court based these findings on “a number of affidavits filed by both sides.” See Transcript of Oral Argument, pg. 9.

Mrs. Rose challenges findings 1 and 2. Below is a list of the affidavits filed by both sides and a precisely focused summary of all the evidence supporting the findings Mrs. Rose challenges:

1. Verified Petition for Paternity and Custody: Mr. Gedo’s affidavit alleged that during “the last 7 (seven) years” he was allowed visitation of “only about 10 (ten) visits of only about 1 (one) hour in duration.” R. at 5. Mr. Gedo’s affidavit stated that “Douglas Rose is the presumed father.” R. at 5. Additionally, Mr. Gedo ‘s affidavit alleged that “Respondent [Mrs. Rose] received payment of \$41,000.00 (forty-one thousand dollars) from Petitioner in form of real property in support of the child.” R. at 5.

2. Affidavit of Petitioner in Support of Motion for Genetic Testing: Mr. Gedo's affidavit alleged that he is the natural father of the child because "as a result of the Parties' sexual intercourse, Respondent became pregnant and delivered [the] child [at issue]."
3. Affidavit of Danell Sorensen: Danell Sorensen, an employee of Covington Capital Corporation, stated in his affidavit that Mr. Gedo did not give written instructions to deed property to the Respondent, Mrs. Rose. (R. 12). Mr. Sorensen attached the current deed for the property which indicates that the property remains in the names of David Gedo and Maria A. Sanchez. (R. 11).
4. Affidavit in Support for Order to Show Cause: Mr. Gedo's affidavit, again, alleged that the child was conceived as a result of sexual intercourse between him and Respondent, (R. 48), and that he paid \$41,000 in support of the child in the form of real property. (R. 46).
5. Affidavit of Shaké Rose for Reply to Order to Show Cause: Mrs. Rose's affidavit stated that Mr. Gedo never gave her property or any money for property. (R. 78).
6. Affidavit of Petitioner in Support of Motion for Genetic Testing: Mr. Gedo's affidavit alleged that Mrs. Rose told Mr. Gedo that she was pregnant and that Mr. Gedo may be the father of the child. (R. 207-08).
7. Affidavit of Dr. Darin Featherstone: Dr. Featherstone's expert affidavit stated that he had performed an evaluation regarding the child's attachment to Mr. and Mrs. Rose. (R. 221). Dr. Featherstone's evaluation indicated that the child's "concept of 'family'" includes his father, Mr. Rose; that the child's primary male

attachment figure is to his ‘father,’ Mr. Doug Rose, ” (R. 216); and that Mr. Rose has “been available [to the child] as a strong male role model and nurturing father figure.” (R. 214). Further, Dr. Featherstone’s affidavit stated that the child’s attachment to Mr. Rose is strong and healthy, and disruption of the relationship “would only act to destabilize [the child’s] emotions and developmental needs.” (R. 214).

8. Affidavit of Douglas Rose: Mr. Rose’s affidavit stated that he was present at the child’s birth, is listed as “father” on the child’s birth certificate, and has provided for the child’s physical, emotional, and spiritual needs during the child’s entire life, (R. 250-55). Further, Mr. Rose’s affidavit stated that he is “the only man who [the child] looks to as his father.” (R. 251).
9. Affidavit of Elisa Gedo in Support of Motion for Genetic Testing: Ms. Gedo’s affidavit alleged that Mrs. Rose brought the child to her home on several occasions. Her affidavit also alleged that Mrs. Rose has kept Elisa and her family “apart from [the child] and ‘the other children,’” and that J.R. told her that he has two daddies.¹ Attached to her affidavit were pictures of J.R. at about ages 1 – 2 years.
10. Affidavit of Carolina Nielson in Support of Motion for Genetic Testing: Ms. Nielson’s affidavit alleged that early in J.R.’s life, Mrs. Rose would come to Ms.

¹ Ms. Gedo did not indicate a time frame for the visits or the child’s age when the child told her this.

Nielson's home "all the time," and that J.R. "grew up around [Mr. Gedo] and his family." (R. 306). Ms. Nielson's affidavit also alleged that Mrs. Rose "got really angry . . . and she didn't come around anymore and [Mrs. Rose] wouldn't let [J.R.] come visit."² (R. 305). Ms. Nielson's affidavit also alleged that "Joseph needs to know who his real father is." (R. 304).

11. Affidavit of Maria Sanchez in Support of Motion for Genetic Testing: Ms.

Sanchez' affidavit alleged that Mrs. Rose told her that "her new baby was from [Mr. Gedo]," (R. 312), and that J.R. "has been told since he was very young, 2 -3 years old that [Mr. Gedo] is his Dad."

12. Motion for Reconsideration and Verification: Mrs. Rose's affidavit stated that

J.R. has not had significant contact with Mr. Gedo; that J.R. does not have a substantial relationship with Mr. Gedo; and that there has not been considerable contact between J.R. and Mr. Gedo. (R. 337-38). Mrs. Rose's affidavit also stated that J.R. has not seen Mr. Gedo for years and prior to that, contact was extremely limited. (R. 337). Further, Mrs. Rose's affidavit stated that J.R. has never been informed that "there was even a possibility that [Mr. Gedo] was his father." (R. 337).

The evidence found in these affidavits is legally insufficient to support the trial court's findings even when viewed in a light most favorable to the trial court. Mr. Gedo's affidavit stated that he was allowed visitation of "only about 10 (ten) visits of

² Again, this affidavit makes no reference to dates or age of the child.

only about 1 (one) hour in duration,” (R. 5), and that “Douglas Rose is the presumed father.” This evidence clearly contradicts the trial court’s findings that Mr. Gedo “had considerable contact with” J.R. and “for a long time has had a relationship with” J.R. No other part of Mr. Gedo’s affidavit alleges that he had considerable contact with J.R. or that he had a relationship with J.R.

Also contradicting the trial court’s findings are Carolina Nielson’s and Mrs. Rose’s affidavits. Carolina Nielson’s affidavit alleged that Mrs. Rose did not “come around any more” and did not allow J.R. to visit. Carolina Nielson’s affidavit also alleged that “[J.R.] needs to know who his real father is,” indicating that J. R. has not been told that Mr. Gedo is his father. Mrs. Rose’s affidavit stated that J.R. has not had significant contact with Mr. Gedo; that J.R. does not have a substantial relationship with Mr. Gedo; and that there has not been considerable contact between J.R. and Mr. Gedo. Although Elisa Gedo’s and Maria Sanchez’ affidavits alleged that J.R. had been told he had two fathers, Mr. Rose’s affidavit and Dr. Featherstone’s expert affidavit contradict this and state that Mr. Rose is J.R.’s father figure and the only man J.R. looks to as father.

Additionally, although Mr. Gedo’s affidavit alleged that he gave Mrs. Rose property for the support of J.R., Danell Sorensen, an employee of Covington Capital Corporation stated in his affidavit that Mr. Gedo failed to take the necessary steps to deed the property to the Respondent, Mrs. Rose. (R. 12). Mr. Sorensen also provided the current deed for the property which indicates that the property remains in the names of David Gedo and Maria A. Sanchez. (R. 11). Additionally, Mrs. Rose’s Affidavit for Reply to Order to Show Cause stated that Mr. Gedo never gave her property or any

money for property. (R. 78).

The clear weight of the evidence is found in the affidavit of Mr. Gedo, Ms. Nielson, Mrs. Rose, Mr. Rose, Mr. Sorensen, and Dr. Featherstone, all of which indicate that the nature of the relationship between J.R. and Mr. Gedo is only that of a distant family friend that J.R. has not seen for years. This evidence contradicts the trial court's findings that Mr. Gedo has "had considerable contact with" J.R. and has "had a relationship with" J.R. "for a long time." Thus, the trial court erred in its assessment of the evidence to its findings.

Even if this Court were to find that the evidence is legally sufficient to support the trial courts findings, the trial court abused its discretion in failing to deny Mr. Gedo's Motion for Genetic Testing. A trial court abuses its discretion when it fails to consider enumerated factors and make sufficient findings on each factor. Marshall v. Marshall, 915 P.2d 508, 516 (Utah App. 1996). Significantly, in the current case the trial court failed to consider the factors pertaining to the best interest of the child as required by Utah Code Annotated §78-45g-608 and failed to consider §78-45g parts 5 and 6 as required by §78-45g-502. Additionally, the trial court did not make sufficient detailed findings on each factor to enable this Court to determine whether the trial court rationally used its discretion when ordering genetic testing. Discussion of these enumerated factors and of Parts 5 and 6 is found in the Brief of Appellant.

II. THE TRIAL COURT DID NOT STRIKE THE TESTIMONY CONTAINED IN DR. FEATHERSTONE'S AFFIDAVIT.


Mr. Gedo claims that Dr. Darin Featherstone's affidavit was stricken from the

record and that Mrs. Rose has alleged that Dr. Featherstone testified at a hearing on genetic testing. Nothing in the record indicates that Dr. Featherstone's affidavit was stricken from the record and Mrs. Rose does not claim that Dr. Featherstone testified at a hearing on genetic testing. Mrs. Rose simply refers to and relies on the testimony contained in the affidavit entitled "Affidavit of Dr. Darin Featherstone." (R. 221). The trial court did not take or hear testimony from any party or witness during the hearing in which it ordered genetic testing. Rather, the court heard only oral argument from Mr. Gedo and from Mrs. Rose's counsel. The trial court then ordered genetic testing based on "a number of affidavits filed by both sides." See Transcript of Oral Argument, pg. 9. The Affidavit of Dr. Darin Featherstone was one of the referenced affidavits and at no time did the trial court strike Dr. Featherstone's affidavit or any part thereof.

CONCLUSION

For the reasons set forth herein, Appellant Shacké Rose requests that this Court reverse the trial court's order for genetic testing and conclude that Mr. Rose is J.R.'s father.

Respectfully Submitted,



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**IN THE UTAH COURT OF APPEALS IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH**

MIGUEL DAVID GEDO,

Petitioner, Appellee,

v.

SHACKE ROSE

Respondent, Appellant.

CERTIFICATE OF MAILING

Case No.: 20060147-CA

I, hereby, certify that a true and correct copy of Respondent, Appellant's REPLY BRIEF was served by US POSTAL SERVICE on the following, this 19 day of December 2006:

Miguel David Gedo
1451 S. 50 E.
Orem, UT 84058

