

MONTANA SUPREME COURT

In re the Parenting of N.S.

360 Mont. 288 (2011) · Decided May 10, 2011

SUMMARY

The Montana Supreme Court reviewed a parenting and child-support dispute involving unmarried parents. The Court affirmed the designation of the father as the primary residential parent and upheld the district court's handling of the child's stated preference, but remanded the child-support award because the district court improperly included earned income credits and mischaracterized imputed income.

CASE DETAILS

COURT	Montana Supreme Court
WRITING FOR THE COURT	Justice Morris; Chief Justice McGrath; Justice Cotter; Justice Nelson; Justice Rice
JURISDICTION	Montana
DECIDED	May 10, 2011
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Valerie Smith appealed a final parenting plan and child-support order entered by the Seventh Judicial District Court, Richland County. The Montana Supreme Court affirmed the primary-residential-parent determination, reversed the child-support calculation, and remanded for recalculation.
STANDARD OF REVIEW	Child-custody findings are reviewed for clear error and may be reversed if unsupported by substantial evidence, based on a misapprehension of the effect of the evidence, or if the record leaves the Supreme Court with a definite and firm conviction that a mistake was made. The application of statutes and regulations is reviewed for correctness. The district court's custody and interview-related decisions are reviewed for abuse of discretion where applicable.
PRECEDENTIAL VALUE	Published Montana Supreme Court opinion; precedential
PARTIES	Valerie Smith v. Seth Hilliard

TOPICS

child custody

child support

family law procedure

standard of review

preservation of error

PRACTICE AREAS

family law

appellate procedure

QUESTIONS PRESENTED

1. Whether the District Court erred by naming Hilliard the primary residential parent despite the child's preference to live with Smith.
2. Whether the District Court properly calculated Smith's child-support obligation, including imputed income and earned income credits.
3. Whether the District Court afforded Smith a fair trial by failing to provide Hilliard's financial information, asking the child questions during an in-chambers interview, and denying Smith an opportunity to cross-examine the child.

HOLDINGS

1. The District Court did not err in designating Hilliard as the primary residential parent. A court need not follow a child's custody preference, but it must consider the preference and state a reason for declining to follow it; the District Court satisfied that requirement by finding that Hilliard provided a more stable home life and greater continuity and stability of care.
2. The District Court did not abuse its discretion by imputing income to Smith, but it incorrectly calculated her income by adding her earned income credit and characterizing imputed income as actual income. The child-support award therefore had to be remanded for recalculation.
3. The District Court did not deny Smith a fair trial. The Supreme Court declined to consider Smith's unpreserved challenge concerning access to Hilliard's financial information, and it held that the court properly interviewed the child in chambers without permitting cross-examination because the interview was authorized to assess the child's custody wishes and was made part of the record.

KEY QUOTATIONS

"We do not require the district court to follow the child's wishes." (293)

"The court improperly added Smith's EIC to her total income." (296)

"Nothing in §40-4-214, MCA, requires the court to give the parties an opportunity to cross-examine the child." (297)

FACTUAL BACKGROUND

Smith and Hilliard had one child together but were never married and separated shortly after Smith became pregnant. The child lived primarily with Smith during his early childhood, while Hilliard began having summer visits in approximately 2005 or 2006 and retained the child after the summer of 2009. After trial, the District Court found that Hilliard offered greater continuity and stability of care during the school year in Sidney, despite the child's stated preference to live with Smith, and designated Hilliard as the primary residential parent. The

court also imputed income to Smith, who had recently moved and was unemployed but testified that she intended to obtain full-time work, and calculated a monthly child-support obligation.

PROCEDURAL HISTORY

Hilliard petitioned pro se for a permanent parenting plan after retaining the child following the summer of 2009. The District Court initially entered a default judgment for Hilliard, but granted Smith's motion to set it aside and held a new trial. After trial, the court designated Hilliard as the primary residential parent, ordered Smith to pay \$197 per month in child support, and entered a final parenting plan. Smith appealed.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Remand to the District Court to recalculate Smith's child-support obligation in accordance with the opinion, including by excluding her earned income credit from income when income is imputed and correctly characterizing imputed income. Smith may challenge the validity of Hilliard's financial statements through cross-examination or other means in proceedings on remand.

CASES CITED

- In re Marriage of Dennison, 2006 MT 56, 331 Mont. 315, 132 P.3d 535
- Kulstad v. Maniaci, 2009 MT 326, 352 Mont. 513, 220 P.3d 595
- In re Marriage of Toavs, 2006 MT 68, 331 Mont. 437, 133 P.3d 202
- In re Custody of J.H., 231 Mont. 301, 752 P.2d 194 (1988)
- In re Marriage of Kovash, 260 Mont. 44, 858 P.2d 351 (1993)
- In re Marriage of Murphy, 205 Mont. 162, 666 P.2d 755 (1983)
- In re Marriage of McKenna, 2000 MT 58, 299 Mont. 13, 996 P.2d 386
- In re Marriage of Williams, 2009 MT 282, 352 Mont. 198, 217 P.3d 67
- In re Marriage of Bee, 2002 MT 49, 309 Mont. 34, 43 P.3d 903
- Foston v. State, 2010 MT 281, 358 Mont. 469, 245 P.3d 1103
- In re M.L.H., 220 Mont. 288, 715 P.2d 32 (1986)

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