

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-1164

Summary Calendar

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STEPHEN ALLEN LYNN, on behalf  
of David Samuel Lynn,

Plaintiff-Appellant,

v.

FLORENCE VERONICA LYNN,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Northern District of Texas  
(3:93 CV 0015 P)

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(March 24, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:\*

Stephen Allen Lynn, as next friend of David Samuel Lynn, filed a motion in district court entitled "Emergency Ex-Parte Application for Temporary Restraining Order and Injunction to Protect a Child from the Deprivation of his Liberty Interest in

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

not being Abused." The district court dismissed the case. Mr. Lynn appeals. We affirm.

I.

This case represents the latest chapter in a protracted battle between Stephen and Florence Lynn over their ten-year-old son David. On June 24, 1992, a state district court entered a final judgment in the Lynns' divorce case which decided all custody and property issues between the Lynns. An appeal concerning this final judgment is pending in the Texas state courts.

Mr. Lynn filed this suit in federal court in January 1993. In his application for emergency relief, Mr. Lynn sought the following relief: (1) an order that he retain custody of David pending psychiatric evaluation of the child, (2) an order preventing Mrs. Lynn access to David pending a psychiatric evaluation of the child, (3) an order that David be given a psychiatric evaluation by Dr. Mark Unterberg, (4) an order that Mrs. Lynn undergo a psychiatric evaluation by Dr. Unterberg, (5) and a hearing. Mr. Lynn argued that the district court had jurisdiction over the action because "Applicants' action is born out of civil rights deprivations of fundamental constitutional rights and the deprivation of Applicants' liberty interests in not being abused."

On January 23, 1993, the district court conducted a hearing concerning Mr. Lynn's emergency application. Mr. Lynn introduced the testimony of at least three expert witnesses. Mr. Lynn also

sought to examine David; however, the district court declined Mr. Lynn's initial request to call David as a witness. After hearing Mr. Lynn's witnesses, the court concluded that David was not in immediate danger and that "the essence of what we have is a continuation of a custody dispute that started sometime back and is still not over." The court then dismissed the case.

Mr. Lynn filed a timely notice of appeal. Mr. Lynn also moved to file irregular record excerpts. Mrs. Lynn filed a motion to strike an affidavit by David on the grounds that the affidavit was not a part of the record before the district court. Because both of the motions are moot, we deny them.

On appeal, Mr. Lynn asserts that the district court abused its discretion in not allowing him to call David as a witness. Mr. Lynn, however, does not address the district court's suggestion that it did not have subject matter jurisdiction over the suit. We conclude that the district court correctly perceived that this case is a custody case and that it did not have subject matter jurisdiction over the suit.

Pursuant to 28 U.S.C. § 1912 and FED. R. APP. P. 38 this court may award sanctions for a frivolous appeal. We conclude that Mr. Lynn's appeal of the district court's judgment is frivolous, and we award double costs to appellee as a sanction.

## II.

Mr. Lynn's motion to file irregular record excerpts is DENIED. Mrs. Lynn's motion to strike an affidavit is DENIED. For the foregoing reasons, we AFFIRM the district court's

judgment. Further, because the appeal is frivolous, we assess double costs against the appellant.