

1996

Jerome K. Duncan v. Eileen M. Howard, Sandra Thorderson and Larry Thorderson : Reply Brief of Appellants

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

JEROME K. DUNCAN,	:	
Plaintiff/Respondent,	:	
vs.	:	Case No. 950227-CA
EILEEN M. HOWARD; SANDRA	:	
THORDERSON and LARRY THORDERSON;	:	Priority No. 4
STATE OF UTAH, Department of	:	
Human Services,	:	
Defendants/Appellants.	:	

REPLY BRIEF OF APPELLANTS/THORDERSONS

- - - - -

APPEAL FROM A PATERNITY ORDER OF THE THIRD
JUDICIAL DISTRICT COURT, SALT LAKE COUNTY,
HONORABLE JOHN A. ROKICH, PRESIDING

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FILED

MAR - 1 1996

COURT OF APPEALS



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IN THE UTAH COURT OF APPEALS

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Defendants/Appellants. :

REPLY BRIEF OF APPELLANTS/THORDERSONS

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INTRODUCTION

The appellants, Larry and Sandra Thorderson, will hereinafter be referred to as "Thordersons." The brief of appellants/Thordersons will hereinafter be referred to as "Thordersons' brief." The plaintiff/respondent will hereinafter be referred to "Jerry Duncan." The brief of respondent will hereinafter be referred to as "Duncan's brief."

An addendum is attached to this reply brief, which is the memorandum decision of the Honorable John A. Rokich, dated December 6, 1994.

Duncan's brief contains two major points with several subpoints under Point I. Thordersons' reply brief will correspond with Points I and II of Duncan's brief wherever possible.

REPLY TO STATEMENT OF FACTS

1. Jerry Duncan did not provide any means of financial support to the Thordersons for the care, support, maintenance and education of the minor child, Clel Howard. (R: 655, 862, 911.)

2. Thordersons were the sole means of support to Clel Howard and provided the stable and consistent home environment. (R: 751, 754, 761-62, 854, 862, 1031, 1065-66, 1071.)

3. Jerry Duncan portrays a consistent relationship with the minor child after his move to Utah. Nevertheless, Larry Thorderson reports that there were erratic visits by Jerry Duncan with the minor child and only sporadic telephone contact once the child moved to the State of Pennsylvania. (R: 856-57, 860.)

4. Eileen Howard testified that the reason Jerry Duncan moved to Salt Lake City, Utah, was to visit his relatives and decided to stay. (A: 59-60.)

5. Eileen Howard further testified that there was inconsistent contact by Jerry Duncan with the minor child and that the child returned from visits tired, soaked, hyperactive, violent, unbathed, unlaundered and with a rash. (A: 59-60.)

6. Sandra Thorderson testified that Jerry Duncan's visit were erratic and without advance notice. (R: 747-48.)

7. Sandra Thorderson further testified that there were no extensive telephone contacts with the minor child by Jerry Duncan while the child lived in Pennsylvania. (R: 725.)

8. Larry Thorderson testified that Jerry Duncan did not request many visits with the minor child while the boy lived in the State of Utah. (R: 865.)

9. During the period of September through November of 1992, when Eileen Howard brought the minor child to the State of Utah, she reports that the child returned agitated and with food allergies because Jerry Duncan did not follow the food lists. (R: 1059-63.)

10. Eileen Howard further stated that during the course of visits between Jerry Duncan and the minor child in September through November of 1992, the child did not like spending time with Jerry Duncan and that she was concerned about the child's safety. (R: 1059-63.)

11. The evaluation conducted by Todd Otanez involved only Jerry Duncan and Eileen Howard. (R: 162.)

12. Todd Otanez merely met Sandra Thorderson and had one telephone contact with Larry Thorderson. He did not address the interests of Sandra and Larry Thorderson in his custody evaluation report. (A: 30-48.)

13. Todd Otanez did not do any psychological testing of the natural parents, Jerry Duncan and Eileen Howard. (R: 553, 561, 564, 566, 569.)

14. Todd Otanez did not report that there was a strong mutual bond between Jerry Duncan and the minor child. (R: 541.)

15. Jerry Duncan did not take the minor child to any therapist or counselors prior to the transfer of the minor child in June of 1995. In addition, Jerry Duncan never took the minor child to visit Dr. Daniel Moore. (R: 710.)

16. In accordance with the memorandum decision of the Honorable John A. Rokich, dated December 6, 1994, the child's therapist was to communicate with Jerry Duncan's therapist to establish a treatment program and a visiting schedule for the appellants which was to be submitted to the court for approval by the end of the school year. (Appendix, p. 7.) Dr. Steven Richfield was the child's therapist through the Thordersons. Jerry Duncan notified the appellants that his therapist was Newt Bryson. Dr. Steven Richfield and Dr. Newt Bryson communicated on several occasions. The necessary documents from the evaluations and reports of counselors and therapists was provided to Dr. Newt Bryson. As the child was to arrive to the State of Utah in his transfer from the State of Pennsylvania in June of 1995, Jerry Duncan advised the appellants that he was not going to use Dr. Newt Bryson and changed his therapist to Dr. Chris Wehl. As a result, the minor child never saw Dr. Newt Bryson. To this date, no treatment plan has been submitted to the court.

17. There was no evidence presented at trial of interference by the Thordersons with respect to the relationship between Jerry Duncan and the minor child. The Thordersons did not in any way brainwash nor did they indoctrinate the minor child

against his father. (R: 120-37, 768-70, 775-76, 784-88, 810, 884, 930; A: 80.)

18. Brynne Rivlin stated in her testimony that the child was afraid of his father, Jerry Duncan. (R: 745.)

19. Brynne Rivlin further testified of her concern over the parenting skills of Jerry Duncan. (R: 747-48.)

20. Dr. Steven V. Richfield testified that the psychological parents of the child were clearly Larry and Sandra Thorderson. (R: 230-33.)

21. Dr. Steven Richfield testified that the child would have great difficulty in communicating with his father by a move to the State of Utah. (R: 956-58.)

22. Dr. Steven Richfield further testified that Jerry Duncan would have difficulty in developing a close relationship with the minor child. (R: 956-68.)

23. Jerry Duncan never made a determination as to the behavioral problems of the minor child. (R: 659-60.)

24. Stewart C. Smith determined that Jerry Duncan did not understand the depth of the problems and illness of the minor child. (R: 884.)

25. Dr. Steven Richfield stated that the removal of the minor child to the State of Utah would seriously damage any bond that Jerry Duncan might hope to develop with the minor child. (R: 934-35, 956.)

ARGUMENT

POINT I

THE TRIAL COURT DID NOT PROPERLY APPLY THE HUTCHISON STANDARD IN THIS CASE

Jerry Duncan did not return to the State of Utah so that he could begin to establish a relationship with his son. He came to Utah to visit his relatives and decided to stay after his arrival. Jerry Duncan did not make an effort to build a relationship with his son while the child resided in the State of Utah. After the child moved to the State of Pennsylvania with the maternal grandparents and the natural mother, Jerry Duncan had very sporadic contact with the minor child. Even after he brought his motion to obtain temporary custody of the minor child, he maintained only sporadic contact with the child. Jerry Duncan refused to recognize that the child had serious behavioral problems and did not consult with the boy's therapist to make a determination of the child's needs.

Thordersons have set forth in their brief in depth the basis upon which they maintain that they met the requirements of the Hutchison standard. Thordersons maintain that they established that Jerry Duncan did not develop a strong mutual bond with the minor child. He did not have a willingness to sacrifice his own interest for that of the minor child. He did not demonstrate sympathy and understanding of the minor child. Thordersons not only met the requirements of the Hutchison standard but have further established that it is in the best interests of the minor

child that he live with them and be in their custody. There was no evidence at the time of trial that there was a strong mutual bond which existed between Clel Howard and Jerry Duncan.

Jerry Duncan maintains that there was testimony from numerous witnesses from his family to establish a close relationship with the minor child. All of these witnesses had very little opportunity to observe the interaction between Jerry Duncan and Clel Howard. These witnesses further indicated that they had little, if any, contact with the Thordersons. There was no evidence of any resistance by Thordersons with respect to Jerry Duncan's desire to develop a relationship with the minor child. A close relationship was never developed between Jerry Duncan and the minor child by virtue of his own inaction.

Thordersons object to footnote number 2 on page 31 of the reply brief in that the such information is clearly beyond the scope of the original record. In addition, this court denied Jerry Duncan's motion to remand the matter for further proceedings.

The Duncan brief makes reference to the Utah Supreme Court decision of Tuckey v. Tuckey, 649 P.2d 88, 91 (Utah 1982). Duncan's brief state that appellants completely ignore the fact that the Supreme Court remanded the Tuckey case in order that the trial court could make findings regarding the presumption set forth in Hutchison. This is simply not the case. The Tuckey case was remanded on the basis of inadequate findings and the remand had nothing to do with the presumption set forth in Hutchison.

Duncan's brief further refers to the case of State ex rel. H.R.V., 278 Adv. Rep. 13 (Ct. App. 11/22/95). Duncan's brief states that this decision is distinguishable from the case at bar. Duncan's brief states that Jerry Duncan never lost custody of his son nor did the appellants ever rebut the presumption and gain custody of the child. The Thordersons have, in fact, had custody of the minor child by virtue of an order from the State of Pennsylvania and an order for temporary custody from the Utah Court. Jerry Duncan never had custody of his son. It is true that Jerry Duncan did not lose the custody of his son to a nonparent by court proceeding; however, there is important language in this recent case. This court stated the following concerning the parental presumption articulated in Hutchison v. Hutchison, 649 P.2d 38, 40 (Utah 1982):

The presumption normally works "in favor of a natural parent who has the care, custody and control of his or her child." Kishpaugh v. Kishpaugh, 745 P.2d 1248, 1250 (Utah 1987) (emphasis added). Indeed, all the Utah cases previously requiring a trial court to consider the parental presumption have involved situations where a natural parent is, for the first time, in danger of losing legal custody to a nonparent. See, e.g., Cooper v. DeLand, 652 P.2d 907 (Utah 1982); Hutchison v. Hutchison, 649 P.2d 38; Walton v. Coffman, 110 Utah 1, 169 P.2d 97 (1946).

Furthermore, sound policy dictates that the parental presumption should not apply once the natural parent has lost custody of his or her child. The presumption recognizes the benefits of having loving and able parents raise their children despite the willingness of nonparents who may possess superior caretaking skills. However, the parental presumption is based on the characteristics pertaining to a health parent-child relationship. When custody has

been transferred from a natural parent to a nonparent, it is because the parent has been shown to lack those parental characteristics which give rise to the presumption. To allow the parent to later rely on the presumption in petitioning for restoration of custody would allow the parent to rely on a nonexistent relationship and to benefit from a biological designation lacking any real meaning.

Most importantly, children have a right to be loved, protected, and cared for, and society has an interest in seeing that they are. Allowing a natural parent to reassert the parental presumption after the parent's own conduct has destroyed that presumption would do nothing to further the children's rights or society's goals. Neither would such a practice serve the children's long-recognized need for stability in relationships. See Elmer v. Elmer, 776 P.2d 599, 602 (Utah 1980). ("[T]he emotional, intellectual, and moral development of a child depends upon a reasonable degree of stability in its relationships to important people and to its environment.")

This court noted that the parental presumption is based upon the characteristics pertaining to a healthy parent-child relationship. The trial record in the case at bar is replete with information that there was not a healthy parent-child relationship which existed between Jerry Duncan and Clel Howard. This court further states that to allow a parent to rely on the presumption where there is a nonexistent relationship for the purpose of benefiting from a biological designation as the parent lacks any real meaning. To place a child with an actual parent where there has not been a healthy parent-child relationship defeats the child's long-recognized need for stability. In this recent case, the court stated that the Hutchison case does not require an inflexible, formulaic approach. The evidence presented need only prove a

"general" lack, rather than a complete lack, of parental characteristics. *Id.* at 15. The Thordersons maintain that since Jerry Duncan did not have a healthy parent-child relationship with Clel Howard, the reasoning set forth in State ex. Mel. H.R.V. is applicable.

Duncan's brief further makes reference to Walton v. Coffman, 110 Utah 1, 169 P.2d 97 (1946). The Supreme Court of Utah in this decision recognized that the presumption is one of fact, not one of law, and may be overcome by any competent evidence which is sufficient to satisfy a reasonable mind. *Id.* at 103. Reference is further made of the Walton decision in Kishpaugh v. Kishpaugh, 745 P.2d 1248 (Utah 1987). In the Kishpaugh case, the natural father appealed from an order awarding custody of his natural child to the maternal grandparents. The natural parents were divorced from one another and the natural mother was awarded the custody of the minor child. She never assumed actual custody of the child and the boy continued to reside with the maternal grandparents. The natural father was aware that the maternal grandparents had actual custody and were caring for the minor child. He subsequently filed a petition for custody. The maternal grandparents responded by filing a petition to obtain guardianship over the minor child. The facts in Kishpaugh are similar to the facts in the case at bar.

In Kishpaugh, the trial court recognized that under Hutchison, there is a presumption that the custody of a child should be awarded to a natural parent. The trial court found that the presumption was rebutted and proceeded with the determination

and placement of the child for his best interests. The Supreme Court of Utah in Kishpaugh, stated the following:

The presumption favoring natural parents is analogous to the presumption favoring an existing custody arrangement. Like the natural parent presumption, the existing placement presumption is based on the assumption that it will normally serve the best interests of the child.

Id. at 1251. The natural father contended that the trial court erred in evaluating his claim and that of the maternal grandparents on an equal footing. He maintained that there was a showing of a strong mutual bond between himself and his son and, therefore, the Hutchison requirements were not met. The Supreme Court pointed out that case law was silent on whether Hutchison's three negative findings must be made in almost mechanical fashion before a trial court can properly conclude that the presumption in favor of the natural parent has been overcome. *Id.* at 1252.

The Supreme Court continued to state that Hutchison itself indicates that it does not establish a wooden formula to which all trial court findings must conform. The Supreme Court held that Hutchison states that the parental presumption can be rebutted only by evidence establishing that a particular parent at a particular time generally lacks all three of the characteristics that give rise to the presumption. Obviously, a "general" lack is not an absolute lack. Thus, the standard articulated in Hutchison is somewhat flexible. *Id.* at 1252. The Supreme Court held Hutchison requires an overall evaluation of the relationship between the parent and the child. The very purpose of the

presumption is in no way advanced by requiring a formulaic statement of the trial court's conclusions regarding the three characteristics. *Id.* at 1252.

The Supreme Court concluded that the natural parent presumption has been rebutted when a court finds a general lack of the three characteristics set forth in Hutchison. It found that the trial court did not characterize the bond as a "strong mutual" one in Kishpaugh. On the other hand, it found that there was a "deep bond between" Brian (the minor child) and his grandparents. Given the inherent imprecision of words when used and characterized emotional attachments and the highly fact-dependent, interdependent, and individualized nature of these determinations, the Supreme Court concluded that trial judge's findings, read as a whole, satisfied the requirements of the Hutchison test.

In the case at bar, the memorandum decision of the trial court does not make a finding of any strong mutual bond between the minor child, Clel Howard, and the natural father, Jerry Duncan. The trial court found that Clel's strongest bond appeared to be with his maternal grandmother. In fact, the trial court indicated from the testimony of the custody evaluators that Clel had the ability to develop a strong bond with his father; however, this would clearly infer that there was not a strong mutual bond which existed between the boy and his father.

The Thordersons maintain that the court erred in finding that there was a willingness by the natural father to sacrifice his own interest and welfare for that of the child. There was no

evidence that the Thordersons were not cooperative with the natural father in developing a father/son relationship. The Thordersons defer to their original brief which is on file with this court.

The trial court further erred in stating that there was no significant evidence that the natural father lacked the sympathy for and understanding of the minor child as characteristic of parents generally. The trial court erred in making its finding that the natural father understood the problems of the minor child. The Thordersons again defer to their original brief on file with this court. The natural father did not make any attempt to understand the problems of the child nor did he have any regular contact with the boy. The Thordersons did not interfere with his relationship with the minor child nor did they brainwash the child against the natural father.

A maternal grandmother instituted a proceeding in the district court to restrain the State Division of Family Services from placing her grandchild out for adoption. Wilson v. Family Services Div., Reg. 2, 554 P.2d 227 (Utah 1976). The court made a determination that the child should not be placed with the natural parents and that the child should be placed for adoption. The Supreme Court of Utah held that the matter of a family relationship may be a factor which should be given due and serious consideration. The court held that according to the laws of nature and human experience that such immediate relatives, often referred to as next of kin, have some legitimate concern for children of the family and interest in their welfare. *Id.* at 230. The court went

on to reason that in "custody matters" all things else being equal, near relatives generally being an equal, near relatives should generally be given preference over nonrelatives. The maternal grandmother in this case came forward promptly to express her love and concern for the grandchild and offered to provide him with a home and support. The restraining order was ordered to be reinstated by the Supreme Court. *Id.* at 231. It is clear in this case that grandparents are seriously to be considered for custody, all things else being equal.

In summary, Clel Howard has had a long-standing close relationship with the maternal grandparents. This presumption places the Thordersons on equal footing with the natural father, Jerry Duncan. The Thordersons seriously question the parental presumption in favor of Jerry Duncan in that there was not a healthy parent-child relationship existing between father and son when Jerry Duncan sought custody of the minor child. Jerry Duncan's inaction was the reason for the absence of this relationship. This lack of relationship between father and son was not caused by the Thordersons. The Thordersons further maintain that they rebutted the presumption of the natural parent under Hutchison standard at the time of trial. The trial record has numerous reports and testimony from therapists and counselors that the stability of the minor child was found in his close relationship and his residence with the Thordersons. The conclusions of the experts clearly place Clel Howard with the Thordersons.

POINT II

THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION FOR RECONSIDERATION

Duncan's brief cites Watkiss & Campbell v. Foa & Son, 808 P.2d 1061 (Utah 1991). In this specific case, the plaintiffs filed a motion for summary judgment and the district court determined that no genuine issue of material fact existed resulting in summary judgment. In the case at bar, the matter did not involve a motion for summary judgment. The entire matter was heard at trial. In Watkiss & Campbell, the Supreme Court of Utah treated a motion for reconsideration by the defense as a motion for new trial. The facts of that case are clearly distinguished from the case at bar. In the case at bar, there was extensive evidence in the form of witnesses and exhibits presented at the time of trial. The motion of the Thordersons was, in fact, a motion for reconsideration based upon the material facts and evidence presented at the time of trial.

The Duncan brief further references Crookston v. Fire Insurance Exchange, 860 P.2d 937 (Utah 1993). This case involved an action against a property insurer asserting multiple claims under contract and tort theories in connection with failure to pay a claim. The jury verdict awarded slightly more than \$800,000.00 in compensatory damages and \$4,000,000.00 in punitive damages. The insurer appealed. The Supreme Court of Utah remanded the case for reconsideration of whether the punitive damages award was excessive. The Supreme Court ruled that a new trial to allow the

jury to reconsider its award after receiving new instructions under the holding of the Supreme Court on a prior appeal was not necessary. The facts of this case are clearly distinguishable from the case at bar. In the Crookston case, the insurer was seeking a new trial. The Thordersons were not seeking a new trial by filing a motion for reconsideration. There was no signed order or judgment entered at the time of the filing of the motion for reconsideration. The trial court brought counsel into chambers after the trial and prior to the issuance of the memorandum decision and stated that there would be a hearing at the end of a 120 day period after the minor child had been placed with the natural father to determine whether the child had made the adjustment from the Thordersons to Jerry Duncan. This decision of the trial court did not appear in the memorandum decision. In addition, the Thordersons filed a supplemental brief after the date of trial and prior to the issuance of the memorandum decision referring the court to Tuckey v. Tuckey, 649 P.2d 88 (Utah 1982) and Kishpaugh v. Kishpaugh, 745 P.2d 1248 (Utah 1987). These cases clearly interpreted the Hutchison standard and addressed the equal footing of the maternal grandparents in that the presumption in favor of an existing custody arrangement should be carefully considered against the presumption in favor of a natural parent.

Duncan's brief states that with the passing of almost a full month before the minute entry is difficult to say that Judge Rokich did not consider the motion of the appellants. There is no evidence to support this statement. The motion for reconsideration

was clearly relevant to the issues at bar in the denial of such motion by the trial court was error.


CONCLUSION

The close relationship of Clel Howard with the maternal grandparents was of long standing. There was a very healthy relationship between the maternal grandparents and the minor child. This presumption clearly placed the Thordersons on at least an equal footing with the natural father, Jerry Duncan. The Thordersons further maintain that there was not a healthy parent-child relationship between Jerry Duncan and Clel Howard and, as a result, the parental presumption would not even apply. The trial court clearly erred in failing to find that the parental presumption did not apply or, in the alternative, that the Thordersons were on equal footing with the natural father. As a result, the best interests of the minor child was at issue before the trial court. Overwhelming evidence from both lay witnesses and experts, clearly indicate that the child should remain with the maternal grandparents and that there would be substantial injury by transfer of the child to the natural father. In addition, Thordersons claim that they clearly met the three requirements of the Hutchison standard at the time of trial anyway.

The trial judge met with counsel in chambers after trial and before the memorandum decision and made certain findings. These findings were not reflected in the memorandum decision. In addition, the supplemental brief of the Thordersons was presented to the court prior to the entry of a signed order and judgment.

Thordersons maintain that the trial court should have granted the motion for reconsideration under Rule 59 of the Utah Rules of Civil Procedure and erred in the denial of this motion.

RESPECTFULLY SUBMITTED this 1st day of March,
1996.



JOHN SPENCER SNOW
Attorney for Appellants
Larry and Sandra Thorderson

MAILING CERTIFICATE

I hereby certify that I am an employee of the law office of John Spencer Snow; and that in said capacity and pursuant to Rule 21(d) of the Utah Rules of Appellate Procedure, two true and accurate copies of the foregoing reply brief of appellants was mailed to Wendy M. Lewis, attorney for respondent, 50 West Broadway, Suite 400, Salt Lake City, Utah 84101; and to Leslie W. Slaugh, attorney for appellant, Eileen Howard, 120 East 300 North, Provo, Utah 84606, postage prepaid, this 1st day of March, 1996.



ADDENDUM

DEC 06 1994

SALT LAKE COUNTY

By _____
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JEROME K. DUNCAN,	:	MEMORANDUM DECISION
Plaintiff,	:	CASE NO. 910905919
vs.	:	
EILEEN M. HOWARD, et al.,	:	
Defendants.	:	

This case was tried on September 28, 29, 30, 1994. Plaintiff was represented by Dean B. Ellis. Defendants Sandra and Larry Thorderson were represented by John Spencer Snow. Defendant Eileen Howard was represented by Leslie Slaugh. The Court heard oral testimony, admitted documentary evidence and reviewed in detail the custody evaluations submitted by the respective parties. The Court took the matter under advisement.

FACTS

The child, Clel Howard, who is the subject matter of these proceedings is the natural child of Jerome Duncan and Eileen Howard. Clel was born out of wedlock on October 12, 1988.

Plaintiff learned of Clel's birth three months after Clel's birth and commenced paying \$150 per month for Clel's support.

Plaintiff paid support for about four and one-half years and established a regular routine of weekly visits with Clel.

In 1991, plaintiff filed a paternity action and established that he was the natural father of Clel. Upon the establishment of paternity, visitation with Clel was resumed until April 7, 1992 when defendant Howard allowed Clel to live with his natural grandmother in Pennsylvania.

A series of hearings were held in the Utah court and in the Pennsylvania court regarding visitation and custody of Clel during the pendency of this action. Defendants Thorderson were granted custodial rights to Clel with the final resolution of custody and visitation issues.

Defendant Howard left Clel when he was nine months old with his maternal grandmother. Defendant Howard did not exhibit an interest in Clel. Defendant did not develop parental skills or develop a bond with Clel. Defendant's lifestyle did not create an environment where Clel could be nurtured, loved, shown affection or attention that would allow him to have the normal mother/son relationship.

Defendant left the responsibility of raising Clel to her mother, who with her husband assumed the role of parents for Clel.

Plaintiff, Duncan, is now in his third marriage and exhibited a lack of stability in his early adulthood. Plaintiff had two adult children by a prior marriage. Plaintiff has not maintained a relationship with these children.

Plaintiff is presently married to Diane Duncan who was previously married and had three children by her first marriage. She is employed at Stauffers in Utah County.

Plaintiff is a college graduate and is also employed at Stauffers. Plaintiff and his present wife have adequate living quarters and income to provide for Clel.

The defendants Thorderson have had custody of Clel since April of 1992 and have assumed the role of parenting Clel. Mrs. Thorderson was previously married and had four children by her first marriage. This is Mr. Thorderson's first marriage. He is 52 years old and Mrs. Thorderson is 41 years old. Defendants have a stable marriage, and more than adequate living facilities. Defendants Thorderson provide a stable environment for Clel.

As a result of the instability in Clel's life, he has developed emotional problems which will require continued therapy in order for him to adjust to the custodial and visitation orders entered by the Court.

ARGUMENT

In custody disputes between a parent and a non-parent, the Utah State Supreme Court has ruled that there is a presumption in favor of custody being awarded to the parent which can only be rebutted by showing that: (1) no strong mutual bond exists; (2) the parent has not demonstrated a willingness to sacrifice his or her own interests and welfare for the child's interest and welfare; and (3) the parent lacks a sympathy for and understanding of the child that is characteristic of parents generally. Hutchinson v. Hutchinson, 649 P.2d 38 (Utah 1982).

Clel's strongest bond appears to be with his maternal grandmother which is understandable, because he was placed with her shortly after birth. However, his bonding to plaintiff has been hampered because plaintiff has not had the opportunity to develop the bonding relationship with the child. The review of the file and the transcript of those proceedings evidences the resistance plaintiff has met in establishing a close relationship with Clel. The testimony of the custody evaluators in this case led the Court to believe that with continued therapy sessions, Clel can develop a strong bond with his father.

Clel has suffered a great deal of trauma in his life because of his mother abandoning him at three months of age, and not being

allowed to establish a normal relationship with his father. As a result of the trauma in his life, Clel suffers from emotional problems which are presently being treated and must be treated for an extensive period of time.

Plaintiff understands that Clel must continue in a therapy program in order for Clel to overcome the fears and anxieties he has developed as a result of the custodial issue. Plaintiff and defendants have expressed a willingness to continue to work with therapists to resolve Clel's emotional problems.

Plaintiff has demonstrated a willingness to sacrifice his own interest and welfare for the child's. It is evident that plaintiff cared about Clel and is willing to sacrifice his own interests for the child's, however, the defendants were not cooperative and did not further a father/son relationship between Clel and plaintiff.

There was no significant evidence that plaintiff lacked the sympathy for and understanding of the child that is characteristic of parents generally. The Court believes that plaintiff understands the problems that have been created by Clel being born out of wedlock, the abandonment of Clel by his mother, and the lack of regular visitation by him with Clel.

Plaintiff's extended family testified about the importance of family and are desirous of making Clel an integral part of the extended family.

The Court has considered Clel's feelings in this case and understands the apprehension he may have in establishing a new home, a new environment and the sense of security he may have with the defendants Thordersons. However, the Court is convinced that with the cooperation of all of the parties and the continued therapy sessions for Clel, that Clel can make the adjustment to new surroundings satisfactorily.

Clel would probably prefer to remain with defendants Thorderson, because they have been the primary caretakers for most of his life. However, defendants Thordersons created much of the problem in Clel accepting his father because of their resistance to allowing plaintiff to become the father he desired to be. The fact that he had to file a lawsuit is indicative of the defendant's resistance to allow plaintiff to be a father.

There is no evidence that plaintiff is now engaged in immoral activity. The Court believes that the plaintiff has matured from the time he met defendant Howard and is a much more stable person than he was in 1988.

Granted, plaintiff does not enjoy the same economic status of the Thordersons, but he has the financial means by which to adequately provide for Clel's needs.

In this case plaintiff and defendants are of the same religious faith and are active members, assuring Clel of compatible religious training with plaintiff and defendants.

CONCLUSION

The Court awards custody to plaintiff, subject to the following conditions.

1. Clel shall remain with the Thordersons until the end of the present school year. Ten days after the school year ends, Clel shall be delivered to plaintiff at Salt Lake City at plaintiff's expense.

2. Clel shall remain in the therapy program that he is presently enrolled, and the therapist shall prepare Clel for the transition of custody to his father. Plaintiff and defendants Thorderson shall bear the costs equally.

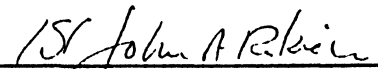
3. Plaintiff's therapist and Thorderson's therapist shall communicate and establish a treatment program and a visiting schedule for defendant Howard and defendants Thorderson to visit with Clel which shall be submitted to the Court for approval by the end of the school year.

4. Plaintiff and defendant shall name their therapists within 30 days from the date of entry of this Judgment.

Each party shall bear their own fees and costs.

Plaintiff's counsel shall prepare Findings of Fact and Conclusions of law, and a Judgment in accordance with this Memorandum Decision.

Dated this 6th day of December, 1994.



JOHN A. ROKICH
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 6 day of December, 1994:

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