1996

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JEROME K. DUNCAN, Plaintiff-Appellee, vs. EILEEN M. HOWARD, SANDRA THORDERSON, and LARRY THORDERSON, Defendants-Appellants.	Case No. 950227-CA Oral Argument Priority 4

REPLY BRIEF OF APPELLANT EILEEN M. HOWARD

APPEAL FROM THE FINAL JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, UTAH
THE HONORABLE JOHN A. ROKICH

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RESPONSE TO STATEMENT OF FACTS

Duncan's brief demonstrates some confusion as to the timing and cause of Duncan's requests for custody. The brief claims, on pages 3 and 8, that Duncan's paternity action was filed after Eileen Howard refused visitation on the basis that Duncan was not the father of the child. Duncan gives no citation to the record for this claim. There is no evidence that Ms. Howard denied Duncan's paternity prior to the filing of the paternity action, and a reading of the paternity petition and accompany papers shows that visitation, not paternity, was the impetus for the filing. (R. 2-9.) More importantly, the evidence shows that Duncan acknowledged that Ms. Howard never denied him visitation (R. 677-78) except for one short period when she believed the court had ordered her to deny visitation (R. 1070).

Duncan's brief also claims (page 9) that his complaint seeking custody was filed in response to Clel staying in Pennsylvania in

January 1993, nearly a year and a half after Duncan commenced this action. Duncan cites to pages 116-17 (R. 630-31) of the transcript to support this statement, but that portion of the transcript only states that Mr. Duncan sought some visitation. Duncan never filed any pleading which sought an award of custody.

Of a more critical nature, Duncan's brief states:

> Although Mr. Otanez was hired to do an evaluation comparing Mr. Duncan to Ms. Howard, he stated at trial that he did meet with Mr. and Mrs. Thorderson and took their position into account in making his determination. *See id.* at 20 [534]. Mr. Otanez went so far as to state that one of the reasons that he was recommending that custody go to Mr. Duncan as opposed to Ms. Howard was that placing the child with Ms. Howard would be the same as placing him with the Thordersons. *See id.* at 34 [548].

(Duncan brief p. 10.) The record pages cited do not support the text. Page 20 of the transcript (R. 534) states only that Mr. Otanez talked to the Thordersons, not that he took their position into account. Page 34 (R. 548) makes comments about Thordersons, but does not purport to consider whether they should receive custody. The record, including the pages cited by Duncan, shows Mr. Otanez was not competent to, and did not, render any opinion regarding whether the best interest of Clel required placement with Thordersons. The trial court properly excluded any testimony from Otanez on the subject for lack of foundation, and Duncan has not challenged that ruling. (R. 548-50.)

Duncan's statement of facts also asserts (p. 10) that Mr. Otanez testified that Mr. Duncan "had established a good bond with the child," and cites as support pages 22-24 (R. 536-38) of the

transcript. The citation appears to be in error; those pages do not even use the word "bond." Page 27 of the transcript (R. 541) does address the issue, but contradicts the statement in the brief. Mr. Otanez's testimony was that "I certainly see that there's a bond. I don't know if it's a strong one." The trial court noted this distinction, and find only that "with continued therapy sessions, Clel can develop a strong bond with his father," not that such a bond presently existed. (R. 431 ¶ 13.)

ARGUMENT

POINT I

THE HUTCHISON PRESUMPTION DOES NOT APPLY.

The inapplicability of the natural parent presumption, Hutchison v. Hutchison, 649 P.2d 38, 40-41 (Utah 1982), is most clearly stated in State ex rel. H.R.V., 906 P.2d 913 (Utah Ct. App. 1995). Duncan attempts to distinguish the case on its facts, but misses the primary thrust of the case. The Hutchison "presumption" is really an observation, "rooted in the common experience of mankind," concerning what is *normally* the relationship between a parent and child. Hutchison, 649 P.2d at 40. The presumption is not a property right of a parent, but rather a judicial mechanism to protect the best interest of a child. Applying the presumption here, where Mr. Duncan never had custody and only an occasional visitor, "would allow the parent to rely on a nonexistent relationship and to benefit from a biological designation lacking any real meaning." H.R.V., 906 P.2d at 917.

Because all prior cases applying the Hutchison presumption have involved situations where the parent already had custody, id., the Hutchison holding is dictum as applied to the instant case where Mr. Duncan never had custody. This Court should hold that, in a custody dispute between a nonresident parent and a grandparent with whom a child has lived since birth and who has been the primary caretaker for at least most of that time, there is no presumption in favor of the parent.

The trial court made no findings concerning the best interests of Clel, but, as shown in Howard's initial brief, the record compels the conclusion that his best interests would be served by keeping him with the Thordersons and Ms. Howard.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO CONSIDER MAINTAINING CUSTODY WITH THE MOTHER.

Page 38 of Duncan's brief claims, without any supporting citation to the record, that Ms. Howard "has maintained since the beginning of this matter that she in [sic] not interested in having custody of her son . . . ." This statement is false, as demonstrated by Mr. Duncan's own statements. Mr. Duncan's initial petition prayed that custody be awarded to Ms. Howard. (R. 2-7.) In an affidavit file February 2, 1993, Mr. Duncan claimed that Ms. Howard had enlisted his help in getting Clel back from her parents. Mr. Duncan further promised that he "would never interfere with [Ms. Howard's] right to be with" Clel. (R. 51.) The opening

statement of Ms. Howard's counsel at trial reaffirmed that Ms. Howard sought custody. (R. 525.)

The record does not support Mr. Duncan's claim that all the experts agreed that Ms. Howard should not have custody. (Duncan's brief at 38-39.) Although no expert advocated giving Ms. Howard custody in preference to the Thordersons, there was expert testimony that custody to Ms. Howard, who was living with Thordersons, was preferable to custody to Mr. Duncan. (R. 809-10.) No expert testified to the contrary.[1]

Mr. Duncan disputes Ms. Howard's claim that the trial court refused to consider her custody request prior to hearing any evidence. (Duncan brief at 40-41.) Mr. Duncan misunderstands Ms. Howard's position. In the opening statement for Ms. Howard, before any evidence was presented, counsel suggested that the best interests of Clel would be served by an award of joint custody to Ms. Howard and the Thordersons. (R. 526-27.) The trial court abruptly foreclosed the idea on hearing the phrase "joint custody" (R. 526), and refused to even allow argument on the subject. (R. 527.) The trial court was similarly unwilling to listen during closing arguments. (R. 1092, 1101.)

The trial court viewed this case as presenting only two options, custody to the father or custody to the maternal grandparents. Because of some preconceived prejudice against any type

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[1]Mr. Otanez's opinion was based on the assumption that Ms. Howard was not living with Thordersons. (R. 582.) The trial court properly did not allow Mr. Otanez to testify concerning what would be in Clel's best interests based on the circumstances at the time of trial. (R. 587.)

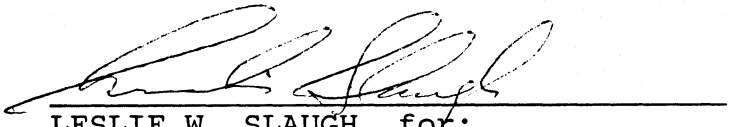
of joint custody award, the trial court refused to even consider an award of custody to Ms. Howard contingent on her living with her mother. Expert testimony supported such an award as being in Clel's best interest, in preference to an award of custody to Mr. Duncan. The trial court abused its discretion by refusing to consider that method which would clearly be in Clel's best interest.

CONCLUSION

Hutchison does not apply to favor a noncustodial parent over a primary caretaker grandparent. Mr. Duncan has never had custody of Clel, and the factual predicates for the Hutchison presumption do not exist. The trial court erred in awarding custody to Mr. Duncan contrary to the compelling testimony which showed his best interest required continued custody with his mother and grandparents.

This Court should remand with instructions to award custody to Ms. Howard contingent on her living with Thordersons, or to award custody directly to Thordersons. At a minimum, the Court should vacate the custody award and remand for a new trial.

DATED this 6th day of March, 1996.



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MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing were mailed to each of the following, postage prepaid, this 6th day of March, 1995.

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