2007

Hanson v. Hanson : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

CHAD JASON HANSON, Petitioner / Appellee, v. ALLISON SARA HANSON, Respondent / Appellant.	)	Case No. 20070575-CA

REPLY BRIEF OF APPELLANT

Appeal from the Memorandum Decision and Amended Order Modifying Decree of Divorce, of the Third Judicial District Court of Utah, Salt Lake County, the Honorable Robert P. Faust, presiding

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No Addendum is utilized pursuant to Utah Rule of Appellate Procedure 24(a)(11).

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None.

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ARGUMENTS

THE DIVORCE DECREE AND AWARDING CUSTODY OF THE CHILDREN TO MR. HANSON.

The arguments presented by Mr. Hanson neither rebut nor address the issues raised on appeal. Instead, without due regard to established case law and the attendant legal principles to be utilized in guiding child custody determinations, he attempts to simply argue that the trial court's decision amounts to the best interests of the children. Nevertheless, the record on appeal demonstrates that the trial court not only abused its discretion but erred as a matter of law in the course of its child custody determination.

A. The Trial Court Erred as a Matter of Law by Failing to Give Considerable Weight to the Primary Caregiver Factor.

This Court, in *Moon v. Moon*, 790 P.2d 52 (Utah Ct. App. 1990), articulated a number of factors to be considered by the trial court in performing the best-interests-of-the-child analysis prior to making a child custody determination:

> The need for stability in custodial relationship and environment; maintaining an existing primary custodial bond; the relative strength of parental bonds[;] [t]he relative abilities of the parents to provide care, supervision, and a suitable environment for the children and to meet the needs of the children; [p]reference of a child able to evaluate the custody question; [t]he benefits of keeping siblings together, enabling sibling bonds to form; [t]he character and emotional stability of the custodian; and [t]he desire for custody; the apparent commitment of the proposed custodian to parenting.

Id. at 54 (citations omitted).[1] While the trial court may consider

many factors in the course of its best-interests-of-the- child analysis, each is not on equal footing. *Hudema v. Carpenter*, 1999 UT App 290, ¶26, 989 P.2d 491. Generally, the trial court possesses the discretion to determine, based on the specific facts before it and within the constructs established by the appellate courts, where a particular factor falls within the spectrum of relevant importance and its appropriate weight. *See Davis v. Davis*, 749 P.2d 647, 648 (Utah 1988); *Childs v. Childs*, 967 P.2d 942, 945 (Utah Ct. App. 1998), *cert. denied*, 982 P.2d 88 (Utah 1999). However, the importance of the multitude of factors used in determining a child's best interests "ranges from the possibly relevant to the critically important." *Hudema*, 1999 UT App 290 at ¶26. "At the critically important end of the spectrum, when the child is thriving, happy, and well-adjusted, lies continuity of placement." *Id*. (citing *Davis*, 749 P.2d at 648 ("In considering competing claims to custody between fit parents under the 'best interests of the child' standard, considerable weight should be given to which parent has been the child's primary caregiver."); *Paryzek v. Paryzek*, 776 P.2d 78, 82 (Utah Ct. App. 1989) ("[T]rial courts must examine a child's need for stability, and therefore, consider prior custody arrangements, and the potential harm to the child if the arrangement is changed.").

In this case, the trial court erred as a matter of law by failing to give considerable weight to the primary caregiver factor. This is demonstrated by the trial court's Memorandum Decision, in which it stated the following:

> Mr. Peterson[, the custody evaluator,] found that [Ms. Hanson] had been the 'children's primary care giver' and she appears to do a good job of meeting their basic needs." However, the Court does not put much weight on the determination that [Ms. Hanson] is the primary care giver because her being in Louisiana necessitates this fact.

(R. 448, ¶34). This statement, while demonstrating the trial court's failure, as a matter of law, to duly consider Ms. Hanson's status as the primary caregiver, also inaccurately portrayed Ms. Hanson solely as the primary caregiver while residing in Louisiana. At the time to trial, Ms. Hanson had been the primary caregiver for essentially the children's entire lives, not to mention since the divorce in October 2001 (R. 45, ¶2).

Further guidance is provided in *Elmer v. Elmer*, 776 P.2d 599 (Utah 1989), where the Utah Supreme Court stated:

> Nevertheless, if an existing custody arrangement is not inimical to the child, the continuity and stability of the arrangement are factors to be weighed in determining a child's best interests. What particular weight to be accorded those factors in a given case must depend on the duration of the initial custody arrangement, the age of the child, the nature of the relationship that has developed between the child and the custodial and noncustodial parents, and how well the child is thriving physically, mentally, and emotionally. A very short custody arrangement of a few months, even if nurturing to some extent, is not entitled to as much weight as a similar arrangement of substantial duration. *Of course, a lengthy custody arrangement in which a child has thrived ought rarely, if at all, to be disturbed, and then only if the circumstances are compelling*.[2]

Id. at 604 (citation omitted and emphasis added). In addition to *Elmer*, other Utah Supreme Court cases dictate that stability is a

fundamental consideration in original custody awards as well as subsequent modifications. For example, in *Pusey v. Pusey*, 728 P.2d 117 (Utah 1986), the Court stated that decisive factors in child custody determinations should be function related, and include the "identity of the primary caretaker during the marriage." *Id*. at 120. The Court in *Pusey* also stated that another factor to be considered is the "identity of the parent with whom the child has spent most of his or her time pending custody determination if that period is lengthy." *Id*.

Another example evincing the importance of the primary caregiver factor is found in *Davis v. Davis*, 749 P.2d 647 (Utah 1988), where the father had custody of the child for over a year prior to trial on the issue of permanent custody. The trial court considered a number of factors, including the stable environment provided by the father, and that he had been the primary caretaker during the interim period. In the course of affirming the custody award to the father, the Utah Supreme Court stated, "In considering competing claims to custody between fit parents under the 'best interests of the child' standard, *considerable weight* should be given to which parent has been the child's primary caregiver." *Id*. at 648 (emphasis added).

The trial court, in the case at bar, stated that it did "not put much weight on the determination that [Ms. Hanson] is the primary care giver because her being in Louisiana necessitates this fact." (R. 448, ¶34). As demonstrated by the record, the trial court explicitly disregarded the undisputed facts that the

children had resided with Ms. Hanson for well over five years prior to the custody trial, that the children progressed well in the Louisiana environment (R. 599:96-97; R. 599:97:13-20). The record also demonstrates that the trial court basically ignored not only the factor of stability, and discounted, if not ignored, the potential harm to the children that would result if a change in the lengthy custody arrangement with their mother occurred (R. 599:83:15-21; 599:104:7-11).

In the course of trial, on direct examination by Mr. Hanson's counsel, Mr. Peterson, the custody evaluator, testified as follows:

> I do not feel that there is sufficient justification to say - grant dad custody. They have a very significant bond with their mother. She's a good mother. She's responsible and I can't for the life of me in weighing each one of their strengths or weaknesses say that based on parenting skills alone that dad would be the preferable parent. Dad was a very good parent too. He's had some problems in the past. He's grown up a lot in the last few years, he's really matured and the children have become much more of a priority to him.

(R. 599:83:15-24). In addition, he testified that the children are "happy and well adjusted in their mother's home" and that he would not recommend removing the children from their mother's custody inasmuch as "they would be stressed." (R. 599:97:13-15; R. 599:104:7-11).

In fact, in response to questioning performed by the district court, itself, concerning the possible removal of the children from their mother, Mr. Peterson adamantly testified, "Well, I

would not remove the children from their mother. I'm opposed to that. So I'm not talking about leaving mom in Louisiana and

having the kids come here. I do not support that." (R. 599:112:111-12).

Perhaps even more telling is the failure of Mr. Hanson to even mention in his Brief this Court's case of *Larsen v. Larsen*, 888 P.2d 719 (Utah Ct. App. 1994), a case that is eerily similar to the case at bar. In *Larsen,* father and mother were divorced after nine years of marriage and three children, with mother receiving by way of stipulated settlement custody of the children. *Id*. at 721. Shortly after the divorce, mother decided to move with the children to Oregon where she intended to marry her fiancé. *Id*. Father filed a petition to modify custody because he believed that the move would inhibit his relationship with the children, disrupt the children's religious training, and remove them from their family and friends. *Id*. The trial court granted the petition, ordering that if mother moved from Summit County, Utah, physical custody of the children would transfer to father. *Id*. at 721-22. On appeal, this Court reversed the trial court's modification, concluding that there was not compelling evidence that residing in Summit County would be better for the children than allowing them to continue to reside with their life-long primary caregiver. *Id.* at 723, 727.

Similar to *Larsen*, the trial court in the instant case determined that the children should be removed from the custody of

their mother and placed in their father's custody if, and only if, their mother were to reside "in Salt Lake County, or a nearby county within reasonable distance (less than 150 miles)" of their father's residence. Based on the trial court's analysis and findings, the court's ruling basically means that the it believed the children's domicile in Salt Lake County is so essential to their welfare that not residing there would be more detrimental than separating them from their life-long primary caregiver. In light of the previously mentioned case law, statutory law, and legal principles, the record on appeal is devoid of a compelling reason why residing in Salt Lake County or thereabouts would be better for the children than allowing them to reside with their life-long primary caregiver where they undisputedly thrived and flourished.

The trial court, in the course of its ruling, focused on the children being in close proximity to extended family in Utah. While this factor is an appropriate factor for the court's consideration, "this, by itself, is insufficient to disturb a previously established custody arrangement in which the children are happy and well-adjusted." *Id*. at 726. In fact, according to Utah case law, this factor, on the spectrum of relevant and important factors, is at the less significant end of the spectrum. *See Hudema v. Carpenter*, 1999 UT App 290, ¶36, 989 P.2d 491.

As in *Larsen*, it is undisputed that Mr. Hanson is and can continue to be a positive factor in the children's lives. Addressing this, the evaluator stated that sharing longer blocks

of time together,[3] in contrast to more frequent visitation, could facilitate relationships between Mr. Hanson and the children.

B. The Trial Court Abused its Discretion by Failing to Enter Specific, Detailed Findings Supporting its Child Custody Determination.

Besides what appear to be broad generalizations, Mr. Hanson fails to address how the trial court's analysis and findings in this case are defective in several respects. There is essentially no reference by the trial court to the evaluator's adamant recommendation and insistence that the children not be removed from their mother. The trial court's findings also failed to consider undisputed evidence of the children's "very significant bond with their mother", Ms. Hanson's lengthy status as the primary caregiver, and the evidence that the children thrived while living with their mother in Louisiana. These omissions constitute an abuse of discretion.[4]

The trial court also ignored Mr. Peterson's warnings of the negative impact to the children if they were removed from their mother. In fact, the expert testimony of Mr. Peterson as well as his recommendation expressly preponderated in favor of continuing custody at the very least with Ms. Hanson in some fashion or another. The trial court gave little of no explanation for its refusal to follow this recommendation. "[A]lthough the trial court is not bound to accept the evaluation [of the court appointed evaluator], . . . some reason for rejecting the recommendation . . . is in order." *Sukin v. Sukin*, 842 P.2d 922, 925-26 (Utah Ct. App. 1992) (quoting *Tuckey v. Tuckey*, 649 P.2d

88, 91 (Utah 1982)). Contrary to the assertions of Mr. Hanson, the record demonstrates that the court's disregard of the need for consistency and stability, especially given the rather even parenting abilities, constitutes an improper application of the law and a resulting abuse of discretion.

CONCLUSION

Based on the foregoing, as well as that set forth in the previously filed Brief of Appellant, Ms. Hanson respectfully requests that this Court reverse the trial court's modification ruling and remand the case to the trial court for further proceedings consistent with the Court's opinion, including a reconsideration of her request for reasonable attorney fees.

RESPECTFULLY SUBMITTED this 31st day of August, 2009.

ARNOLD & WIGGINS, P.C.

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Scott L Wiggins
Counsel for Appellant

CERTIFICATE OF SERVICE

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed by First-Class Mail, postage prepaid, two (2) true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** to the following on this 3rd day of September, 2009:

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ADDENDA

No Addendum is utilized pursuant to Utah Rule of Appellate Procedure 24(a)(11).