

1977

# Bruce Trego v. Cathryn Marie Trego : Brief of Defendant-Appellant

Utah Supreme Court

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S. Rex Lewis; Attorneys for Defendant-Appellant;  
Noall T. Wootton; Attorney for Plaintiff-Respondent;

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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

BRUCE TREGO,

Plaintiff and  
Respondent

vs.

CATHRYN MARIK

Defendant

APPEARANCE

NOALL T. WOOD  
Suite 12, California  
American Federation of  
Attorney for Plaintiff  
Respondent

IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

BRUCE TREGO,

Plaintiff and  
Respondent,

vs.

CATHRYN MARIE TREGO,

Defendant and  
Appellant.

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:  
:  
:  
:

Case No. 14,706

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BRIEF OF DEFENDANT-APPELLANT

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APPEAL FROM AN ORDER DENYING DEFENDANT'S PETITION  
FOR MODIFICATION OF DIVORCE DECREE ENTERED BY  
THE FOURTH JUDICIAL DISTRICT COURT, IN AND  
FOR UTAH COUNTY, STATE OF UTAH,  
HONORABLE ALLEN B. SORENSEN, JUDGE

---

S. REX LEWIS, for:  
HOWARD, LEWIS & PETERSEN  
120 East 300 North  
Provo, Utah 84601  
Attorneys for Defendant-  
Appellant

NOALL T. WOOTTON  
Suite 12, Geneva Building  
American Fork, Utah 84003  
Attorney for Plaintiff-  
Respondent

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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BRUCE TREGO, :  
 :  
 Plaintiff and :  
 Respondent, :  
 :  
 vs. :  
 : Case No. 14,706  
 CATHRYN MARIE TREGO, :  
 :  
 Defendant and :  
 Appellant. :

---

BRIEF OF DEFENDANT-APPELLANT

---

NATURE OF THE CASE

This is a petition to modify the default divorce decree entered by the District Court on June 6, 1974. Paragraph 2 of the Conclusions of Law in that decree gave custody of the parties' minor daughter to the plaintiff, Bruce Trego. Appellant claims that there has been a material change in the conditions and circumstances of the parties which justifies a modification of the decree of divorce to award the defendant custody of the child, Colleen Michelle Trego. Appellant claims that the modification would be in the best interests of the child and would improve her present and future welfare.

DISPOSITION IN THE LOWER COURT

The hearing on defendant-appellant's application for modification of the divorce decree was held on May 14, 1976, before the Honorable Allen B. Sorensen. On June 25, 1976, the trial court entered an Order denying the petition for

modification. The defendant appeals from this decision of the trial court.

#### RELIEF SOUGHT ON APPEAL

Appellant seeks to have this Court reverse the trial court because the decision was against the clear weight of the evidence and constitutes an abuse of judicial discretion. The appellant also contends that the order of the trial court will not serve the best interests and welfare of the child.

#### STATEMENT OF FACTS

The appellant, Cathryn Marie Trego, consented to a default divorce decree which was entered on June 6, 1974. At the time of her consent, Mrs. Trego was not represented by counsel and the divorce papers were drawn by her husband's attorney. Paragraph 2 of the Conclusions of Law in that decree awarded the father custody of the parties' minor daughter, Colleen Michelle Trego, born December 9, 1971. That paragraph reads as follows:

2. That the plaintiff is entitled to be awarded the care, custody, and control of Colleen Michelle Trego, the minor child of the parties hereto subject to the defendant's right to visit with said child and to have said child visit with her at reasonable times and places and under reasonable circumstances.

At the time of the divorce, the defendant was under a great deal of pressure, particularly from her husband who wanted custody of the child. (R. 45) Because of this pressure and the conditions that existed at the time of the divorce, defendant acquiesced to her husband's demands and allowed him to have custody of her daughter. (R. 59-60) This con-

sent was given without the assistance of legal counsel. (R. 44-45).

Subsequent to the original decree, the defendant remarried on June 13, 1975, and is now the wife of Larry Stallings. (R. 42-43, 60). The couple are buying a two-bedroom trailer and are living at 1455 South, 400 East in Springville. (R. 43, 60, 70). The defendant is presently employed but has stated to the trial court that she would terminate her employment and spend full-time at home with her daughter if she were awarded custody of the child. (R. 60-61). Her husband is willing to support the family if his wife does not work (R. 61, 71) and is desirous of having the girl child in their home. (R. 70-71). Mr. Stallings loves Colleen (R. 60), as do the members of his family. (R. 71). The child is apparently fond of the Stallings family. (R. 71).

The family surroundings and circumstances of the appellant have changed significantly since the divorce was granted. The appellant is now much more secure than she was at the time of the divorce. (R. 60, 68) In addition to her remarriage, the defendant now lives in a permanent home which provides a suitable play area for the child. Her husband is permanently employed by the City of Springville (R. 71), loves the child, and desires to have her live in the home. (R. 70-71) Appellant is willing to devote all of her time to the child and give her the necessary maternal care and attention.

The care that Colleen would receive in her mother's home contrasts sharply with the care she is presently receiving. The father is still single and lives alone with the child. (R. 80). He leaves his daughter at a nursery school at approximately seven-thirty a.m. every weekday and picks her up at about five o'clock p.m. (R. 81-82). He has followed this procedure since he has had the child, with the exception of two months when he left the child with his girlfriend. (R. 82). When the respondent has to work on the weekends, the child is taken along and is left to entertain herself while her father works. (R. 82).

On several occasions when the child has come to visit her mother, her clothes have been torn and have been too small to wear. (R. 62-63, 75-76). This condition has been apparent to others. (R. 77-78). Her mother (the appellant) has had to buy shoes for Colleen on several occasions because the ones she was wearing when she came to visit were too small or were worn out. (R. 61-62, 74). New clothes have been bought for the child by her father only on her birthday or Christmas. (R. 62).

The child's health care has been less than adequate. During visitation periods, the mother has had to take Colleen to the doctor for treatment of several problems. On one occasion, the child was delivered for visitation when she had untreated impetigo and a viral infection. (R. 63-65, 73, 85-86). On another occasion, she had untreated chicken pox, for which the appellant was required to seek medical

attention for the child. (R. 64, 73, 86). On several other occasions, the child has been sick (R. 74-75) and it has been necessary for the appellant to take Colleen to see the family doctor and to have the required inoculations given. (R. 63-65, 74).

THE TRIAL COURT'S ORDER DENYING APPELLANT'S PETITION FOR CUSTODY OF JUDICIAL DISCRETION BECAUSE THE FACTS CLEARLY SHOW THAT THERE HAS BEEN A MATERIAL CHANGE IN THE CIRCUMSTANCES OF THE PARTIES AND THE CHANGE OF CUSTODY WOULD CLEARLY SERVE THE BEST INTERESTS OF THE CHILD.

The appellant recognizes that the standard on appeal in a matter of this type is that the appellant must show that the trial court's order was an abuse of sound judicial discretion. Cox v. Cox, 532 P.2d 994 (Utah 1975). However, appellant firmly believes that the facts in this case clearly show that the trial court did abuse its discretion when it did not find that there had been a material change in the circumstances and conditions of the parties which merited a change in the custody of Colleen Trego, the four-year-old daughter of the parties. As an analysis of the facts and the law of this state will disclose, the court should have ordered that the young daughter should now be returned to the custody of her mother.

The material change has occurred because the quality of care given by the father has deteriorated somewhat, but more particularly because the situation of the mother has changed markedly for the better. As the above facts demonstrate,

the plaintiff-father is unable to provide quality care for the child because he has to leave her in a nursery school and has not remarried. The child's clothing is not repaired unless the mother does so and her health needs have apparently been neglected. On the other hand, Mrs. Trego (now Stallings) has now remarried and is living in a comfortable stable environment. She has demonstrated an eagerness and an earnest desire to quit work and to have her daughter come to live with her in her home, where she can give her the full-time attention which she needs and deserves. This is a very definite change from the situation as it existed at the time of the divorce. In 1974, the appellant was subjected to extreme pressure and could not care for her daughter due to the necessity of working and her personal problems. She has now matured and has developed a situation in her life and home which is much more conducive to properly raising a child than that in which she previously lived or that in which the child is presently living. From these facts, it is apparent that the best interests of the child would be better served by allowing the young girl to live with her mother in a wholesome family environment and to allow the respondent-father liberal visitation rights. The mother's love and concern are obvious and their benefit to the child are readily discernible.

There are several legal principles which compel the same conclusion.

Utah courts have always stated that a child of tender

years should be cared for by his or her mother. This rule

is well stated in Chase v. Chase, 15 U.2d 81, 387 P.2d 556 (1963):

It is a universally recognized principle, well grounded in reason and experience, that a child of such tender years should be in the care of his mother unless there is some substantial and compelling reason to deprive her of his custody. See Steiger v. Steiger, 4 Utah 2d 273, 293, P.2d 418, and Briggs v. Briggs, 111 Utah 418, 181 P.2d 223.

This principle is also expressed statutorily in Utah Code Annotated, §30-3-10:

In any case of separation of husband and wife having minor children, or whenever a marriage is declared void or dissolved the court shall make such order for the future care and custody of the minor children as it may deem just and proper. In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties and the natural presumption that the mother is best suited to care for young children. (Emphasis added)

This rule is particularly applicable since the child in question is a young girl who will particularly need a mother's care and advice as she grows and become a young lady. Such care is not given at the present time because the respondent has not remarried and the child, therefore, has no substitute for her mother's care and affection.

Consideration should also be given to the circumstances under which the appellant originally relinquished control of the child. As stated above, she was under severe mental and emotional pressure. The decision was made without the counsel of an attorney, who could have advised Mrs. Trego as to the lasting consequences of such a decision. Instead,

the papers were drawn by her husband's attorney and the order was entered in a default proceeding. All of this is indicative of the state of mind and condition of the appellant at the time of the original divorce. The present situation evidences the materiality of the changes that have occurred since that time. The remarriage of the appellant, coupled with the financial and emotional security of her new home, certainly constitute a material change which would benefit the child, Colleen.

Circumstances such as those in the present case have been held to show that the best interests of the child would be best served by a transfer of custody in several other jurisdictions. Cases in which the mother had remarried but the father had not are Anderson v. Anderson, 41 Ariz.App. 195, 481 P.2d 881 (1971); Moore v. Jordan, 463 S.W.2d 378 (Ark.); Aylor v. Aylor, 478 P.2d 302 (Colo. 1970); and particularly Re Bowen, 7 N.C.App. 236, 172 S.E.2d 62, in which the mother had also been willing to terminate employment in order to care for the child. All of these cases held that circumstances such as those in the present case justified changing the custody of the children to the mother.

The facts of this case demonstrate the wisdom of these rulings. A child who is left in a nursery school all day and who has less than full attention is not receiving all that is necessary to grow up in a normal and healthy manner. To allow the child to come and live with her mother,

who will give her loving, full-time attention, is obviously preferable and, in the words of the law, clearly in the child's best interests. This is clearly the standard by which this case should be judged (see Steiger v. Steiger, supra.) Its application to this case clearly shows that the trial judge did not use sound discretion when he denied appellant's request that her daughter be allowed to come and live with her where she can give her the necessary motherly care and guidance. For these reasons, the appellant asks that this Court reverse the trial court's holding and award custody of Colleen Michelle Trego to the appellant.

Respectfully submitted this 7<sup>th</sup> day of October, 1976.

S. Rex Lewis, by Bruce  
S. REX LEWIS, for:  
HOWARD, LEWIS & PETERSEN  
120 East 300 North  
Provo, Utah 84601  
Attorneys for Defendant-Appellant

MAILED a copy of the foregoing Brief to Noall T. Wootton, Suite 12, Geneva Building, American Fork, Utah 84003, Attorney for Plaintiff-Respondent, this 7<sup>th</sup> day of October, 1976.

Marianne Peterson  
Secretary