

1985

Karla Kishpaugh (Kornmayer) v. Richard Bruce Kishpaugh : Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Michael Z. Hayes; Ronald L. Dunn; Larsen, Larsen, Mazuran & Verhaaren; Attorney for Appellant.
Jane Allen; Attorney for respondents.

Jane Allen Attorney for Respondents Judge Building, Suite 735 Salt Lake City, Utah 84111

Michael Z. Hayes and Ronald L. Dunn LARSEN, MAZURAN & VERHAAREN P.C. Attorneys for Appellant 100 Boston Building 9 Exchange Place Salt Lake City, Utah 84111

Recommended Citation

Reply Brief, *Kishpaugh v. Kishpaugh*, No. 198520423.00 (Utah Supreme Court, 1985).
https://digitalcommons.law.byu.edu/byu_sc1/509

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH

ENT

45.6

.59

DOCKET NO. 20423

IN THE SUPREME COURT

STATE OF UTAH

---ooo0ooo---

KARLA KISHPAUGH (KORNMEYER) :

Plaintiff/Respondent, :

vs. :

RICHARD BRUCE KISHPAUGH :

No. 20423

Defendant/Appellant. :

---ooo0ooo---

REPLY BRIEF

Appeal from Judgment

of the Third Judicial District Court of Salt Lake County

Dated December 7, 1984

The Honorable Dean E. Condor, District Judge

Michael Z. Hayes and Ronald L. Dunn
LARSEN, MAZURAN & VERHAAREN P.C.
Attorneys for Appellant
100 Boston Building
9 Exchange Place
Salt Lake City, Utah 84111

Jane Allen
Attorney for Respondents
Judge Building, Suite 735
Salt Lake City, Utah 84111

FILED

MAY 31 1985

Clerk, Supreme Court, Utah

IN THE SUPREME COURT

STATE OF UTAH

---ooo0ooo---

KARLA KISHPAUGH (KORNMEYER) :

Plaintiff/Respondent, :

vs. :

RICHARD BRUCE KISHPAUGH :

No. 20423

Defendant/Appellant. :

---ooo0ooo---

REPLY BRIEF

Appeal from Judgment

of the Third Judicial District Court of Salt Lake County

Dated December 7, 1984

The Honorable Dean E. Condor, District Judge

Michael Z. Hayes and Ronald L. Dunn
LARSEN, MAZURAN & VERHAAREN P.C.
Attorneys for Appellant
100 Boston Building
9 Exchange Place
Salt Lake City, Utah 84111

Jane Allen
Attorney for Respondents
Judge Building, Suite 735
Salt Lake City, Utah 84111

THE PARTIES

Richard Bruce Kishpaugh, Defendant-Appellant

Karla K. Kishpaugh, Plaintiff-Respondent

William A. Kornmayer, Petitioner-Respondent

Kathryn Kornmayer, Petitioner-Respondent

TABLE OF CONTENTS

The Parties	i
Table of Contents	ii
Scope of Argument	2
Argument	2
A. Substantial compliance with the <u>Hutchinson</u> standard does not support a conclusion of re- buttal of the parental presumption	2
B. Brian's express preference cannot support an award of custody to Petitioners.....	4
C. Petitioners correctly point out Kishpaugh has been effectively divested of his right ever to ob- tain custody of Brian	5
D. Petitioners erroneously conclude Kishpaugh in- tentionally misled this Court	6
Conclusion	7
Appendix D	

Richard Bruce Kishpaugh, Defendant-Appellant (Kishpaugh), by and through his attorneys of record, pursuant to Rule 24(c) and Rule 27, Utah Rules of Appellate Procedure, hereby submits his Reply Brief in response to certain new matters raised in William A. Kornmayer's and Kathryn Kornmayer's (Petitioners), Respondents' Brief.

SCOPE OF ARGUMENT

This Reply Brief will cover only certain new matters raised in Respondents' Brief; viz., A. Substantial compliance with the Hutchinson standing will not support a conclusion of rebuttal of the parental presumption; B. Brian's express preference cannot support an award of custody; C. Petitioners correctly point out Kishpaugh has been effectively divested of his right ever to obtain custody of Brian; and D. Petitioners erroneously conclude Kishpaugh intentionally misled the Court.

ARGUMENT

A. SUBSTANTIAL COMPLIANCE WITH THE HUTCHINSON STANDARD DOES NOT SUPPORT A CONCLUSION OF REBUTTAL OF THE PARENTAL PRESUMPTION.

Petitioners agree the trial court was in "substantial compliance" with the Hutchinson v. Hutchinson, 649 P.2d 38 (Utah 1982), standard in basing its conclusion that the parental

presumption had been rebutted on a finding Kishpaugh lacked two of the three characteristics listed as elements of the three-pronged Hutchinson test. (Respondents' Brief at 5). The Hutchinson standard does not call for "substitutional compliance" or "two out of three". Hutchinson states "all three of the characteristics that give rise to the [parental] presumption" must be missing. 649 P.2d at 41; Cooper v. Deland, 652 P.2d at 908.

The standard actually applied by the trial court was not even in "substantial compliance" with Hutchinson. At the beginning of the trial, the court stated:

THE COURT: Well, lets not argue. I'm not going to argue it right now. I'm going to look in this case as the issue of one, I guess there is a presumption that the nature parents should have the child.

MR. HAYES: That is correct.

THE COURT: Assume that's the case, the good Lord gave it to them, why should I be involved in changing that. Two, then I've got to look at the next thing which is assuming both sides are equally competent, equally capable, equally reliable in taking care of the child; without any evidence of one side having some pluses or minuses insofar as the child is concerned. Then I've got to look at what is the child's best interest, what would the child like to do, where would the child be best and what would be for the best interests of the child. Who can best take care of this child. And I think that when I get through with the whole thing that's the kind of position, who can best take care of this child. Now, I'm going to kind of restrict to that area. Okay?

(T 9-10)

Later, in its memorandum decision, the trial court is silent on the question of whether the parental presumption had been rebutted. As to the standard actually applied, it stated:

The real issue in this case is what is for the best interest of Brian (see Cooper v. Deland, 652 P.2d 907 and Hutchinson v. Hutchinson, 649 P.2d 38). After much consideration, this court concludes that it is for the best interest of Brian that Mr. and Mrs. William Kornmayer be granted custody of Brian for the present time.

(Respondents' Brief, Appendix B, at 2-3)

B. BRIAN'S EXPRESS PREFERENCE CANNOT SUPPORT AN AWARD OF CUSTODY TO PETITIONERS.

Petitioners have made much of Brian's express preference to continue to live with Petitioners and Ona Landrum. From a finding thereof by the trial court (F.F. 9), Petitioners have inferred both that the parental presumption had been rebutted, that Brian's best interests favor awarding custody to Petitioners (Respondents' Brief at 4-5), and that Kishpaugh should never be awarded custody of Brian (Respondents' Brief at 9).

Too much is made of this expression of preference. Brian has lived with Ona Landrum and Petitioners since the divorce in 1981. He was then five years old. Since that time he has lived with Ona Landrum in her home during the week and with Petitioners in their trailer on the weekends. For four years Brian saw his mother and father only on visits: his father more frequently than his mother.

It comes as no surprise that Brian, or any other eight and one-half year old boy, would express a preference for living

where he has lived the past four years. Even though it is clear that Brian loves his father very much and has established a home of sorts in Reno (Respondents' Brief, Appendix E, at 1-3), he prefers to live where he has lived.

This preference should not be wholly determinative. Plaintiff's preference placed Brian in Ona Landrum's home, not Brian's. Plaintiff's preference kept him there for four years. Naturally Brian developed a preference for the place he has lived half of his young life. This preference does not indicate that Kishpaugh lacks typical parental characteristics, that Brian's best interests are best served by his remaining with Petitioners or that Kishpaugh should never obtain custody. This preference indicates only Brian's normal attachment to the familiar.

C. PETITIONERS CORRECTLY POINT OUT KISHPAUGH HAS BEEN EFFECTIVELY DIVESTED OF HIS RIGHT EVER TO OBTAIN CUSTODY OF BRIAN.

Petitioners point out in response to point C of Kishpaugh's argument (Appellants' Brief at 8-10):

It would be a great hardship for Brian if custody was to be changed at a later date because the Defendant had somehow "redeemed" himself, for example, by visiting and writing more often, and by paying his child support. None of those things change the fact that the longer Brian stays with the Petitioners, the more bonded he will become, and the more difficult it would be for him to leave his home and friends. [Emphasis added]

(Respondents' Brief at 9).

The very wrong Kishpaugh complains of the Petitioners admit to. In large part, the trial court based its decision on the fact that Brian has lived with Petitioners for four years, (T 135) and upon Brian's express preference, as noted above. These matters are outside Kishpaugh's control and, as Petitioners stated, "the longer Brian stays with the Petitioners, the more bonded he will become", and the less likely Kishpaugh will ever be able to acquire custody. Thus, under the standard apparently followed by the trial court, nothing Kishpaugh can ever do will enable him to regain custody of Brian.

D. PETITIONERS ERRONEOUSLY CONCLUDE KISHPAUGH
INTENTIONALLY MISLED THIS COURT.

Petitioner pointed out (Respondents' Brief at 10), that in Kishpaugh's Brief, it states incorrectly that the trial court in Cooper v. DeLand, 652 P.2d 902 (Utah 1982) awarded custody of an eight year old to the stepfather upon petition for custody by the noncustodial natural father following the death of the natural mother. (Appellant's Brief at 4).

Petitioners argue that Kishpaugh, thus, "attempts to wilfully mislead the Court as [sic] the disposition of [Cooper]" (Respondents' Brief at 10). This is not the case. Kishpaugh cites Cooper to support his proposition that the Hutchinson standard applies in custody disputes between parents and nonparents. In Cooper the trial court erred in applying an

incorrect legal standard, much as the trial court in the instant case has erred.

Any errors in Kishpaugh's Brief are those of his counsel. They are not intended to mislead this Court, but are only the result of Kishpaugh's counsel's unfortunate misreading of the facts of Cooper. A copy of the Cooper decision is attached as Appendix D.

CONCLUSION

Substantial compliance with the Hutchinson standard will not support a conclusion of rebuttal of the parental presumption. The standard requires all three characteristics to be missing, not merely two of three. The trial court erred in concluding otherwise. Second, Brian's preference is but one factor to be considered among many in establishing his "best interests". Third, Petitioners have agreed Kishpaugh has been effectively divested of his right ever to obtain custody of Brian and Brian has been effectively divested of his right to be raised by this natural parent. This was error.

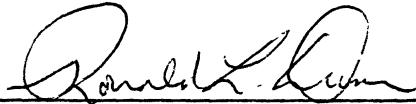
Respectfully Submitted this 31 day of May,
1985.

LARSEN, MAZURAN & VERHARREN, P.C.
Attorneys for Appellant

By: Ronald L. Larsen

CERTIFICATE OF SERVICE

I do hereby certify that on the 31 day of May,
1985, true and correct copies of the foregoing Reply Brief were
served upon Jane Allen, Attorney for Respondents, at 735 Judge
Building, Salt Lake City, Utah.



safety of others by driving erratically and on the wrong side of the traffic divider in his efforts to elude pursuers. We therefore hold that substantial evidence supported the jury in finding that the state had established both the act and the intent components of attempted first degree murder by defendant.

[4] The instructions to the jury correctly described the elements of attempted first degree murder and defined the terms "intentionally" and "knowingly" in precisely the language used by the Utah Criminal Code.⁹ The instructions also correctly stated:

You are instructed that in every crime or public offense there must be a union or joint operation of the act and intent. The intent or intention is manifested by the circumstances connected with the offense and the sound mind and discretion of the accused.

All presumptions of law, independent of evidence, are in favor of innocence, and a defendant is innocent until he is proven guilty beyond a reasonable doubt. And in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to be found not guilty.

Having received proper instruction concerning the act and intent requirements for the crime charged and the applicable standard of proof beyond a reasonable doubt, it lay within the province of the jury to decide the factual question of whether the state had met this standard of proof. Because substantial evidence supported the jury's guilty verdict, the trial court erred in interfering with the jury's exercise of its fact-finding role. We order that the verdict be reinstated.

Reversed.

STEWART, OAKS and HOWE, JJ., and DAVID B. DEE, District Judge, concur.

DURHAM, J., does not participate herein; DEE, District Judge, sat.

9. U C A , 1953, 76-2-103(1), (2).

**Michael J. COOPER, Plaintiff
and Respondent,**

v.

**Walter DeLAND, Richard Vigor, et al.,
Defendants and Appellants.**

No. 18101.

Supreme Court of Utah.

July 26, 1982.

Natural father of minor child brought action against minor's maternal grandparents, maternal uncles and aunts, and stepfather, seeking appointment as guardian of the minor. The Third District Court, Salt Lake County, Dean E. Conder, J., entered judgment in favor of natural father, and appeal was taken. The Supreme Court held that case had to be remanded to the trial court with instructions to enter findings on whether parental presumption had been overcome and on the best interests of the child.

Remanded.

1. Parent and Child ⇐2(8)

Presumption that child's best interests are most adequately served by granting custody to natural parent is not conclusive.

2. Parent and Child ⇐2(3.1, 8)

Party seeking to deprive a natural parent of custody of a minor child can rebut parental presumption only by evidence establishing that no strong mutual bond exists, that the parent has not demonstrated a willingness to sacrifice his or her own interest and welfare for the child's interest and welfare, and that the parent lacks the sympathy for and understanding of the child that is characteristic of parents generally; only after parental presumption has been rebutted, will parties compete on equal

footing, and custody shall then be granted to party who will most adequately protect and promote the best interests of the child.

3. Parent and Child \S 2(20)

Custody dispute between minor child's natural father and stepfather had to be remanded to trial court with instructions to enter findings on whether parental presumption had been overcome and on the best interests of the child.

David S. Dolowitz of Parsons, Behle & Latimer, Salt Lake City, for defendants and appellants.

Phil L. Hansen of Hansen & Hansen, Salt Lake City, for plaintiff and respondent.

PER CURIAM:

This case involves a custody dispute between a minor child's natural father and stepfather.

Plaintiff-respondent, Michael J. Cooper, is the natural father of a minor child, born July 22, 1973, as the issue of his marriage with Lisa DeLand. The marriage terminated in divorce in 1975, and Lisa DeLand was granted custody of the minor child. Lisa DeLand married the defendant-appellant, Richard Vigor, on July 24, 1980. Lisa DeLand Vigor died on October 13, 1980. The respondent initiated this action against the minor's maternal grandparents, maternal uncles and aunts, and appellant, seeking custody of his son. The defendants filed a counterclaim, seeking to have the appellant appointed as the guardian of the minor.

The trial court determined that neither the appellant nor the respondent was unfit to have custody of the minor child. However, the court ruled that the appellant had failed to show, by clear and convincing evidence, that it was not in the best interests of the minor to be placed in the custody of his natural father. Thus, the trial court granted custody to the minor's natural father, with an order that the minor's maternal grandparents be granted reasonable visitation privileges. On appeal, the appellant alleges that the trial court erred when it required the defendants to meet the "clear

and convincing evidence" standard set out in *In re Castillo*, Utah, 632 P.2d 855 (1981).

This Court stated in *Castillo* that a party seeking to deprive the natural parent of his parental rights must prove by "clear and convincing evidence" that it is not in the best interests of the child to reside with his natural parent. *Id.* at 857. Appellant claims that since the present case involves a custody dispute rather than a permanent termination of parental rights, the *Castillo* standard does not apply here.

After this appeal was filed, this Court refined the standard adopted in *Castillo* in regard to cases involving permanent termination of all parental rights. In *In re J.P.*, Utah, 648 P.2d 1364 (1982), we stated that before a natural parent can be permanently deprived of all parental rights, it must be shown by clear and convincing evidence that the parent is unfit, abandoning, or substantially neglectful. However, *In re J.P.* was carefully limited to cases involving permanent termination of parental rights, and does not extend to cases involving custody disputes.

[1] In another recent case, *Hutchison v. Hutchison*, Utah, 649 P.2d 38 (1982), this Court set out the standard to be applied in custody disputes. In *Hutchison*, we reaffirmed the position that a child's best interests are of paramount importance in a custody dispute, and that those interests are presumed to be most adequately served by granting custody to the natural parent. However, as stated in *Hutchison*, the parental presumption is not conclusive.

[2] A party seeking to deprive a natural parent of custody of a minor child can rebut the parental presumption only by evidence establishing that: "no strong mutual bond exists, that the parent has not demonstrated a willingness to sacrifice his or her own interest and welfare for the child's, and that the parent lacks the sympathy for and understanding of the child that is characteristic of parents generally." Only after the parental presumption has been rebutted, will the parties compete on equal footing, and custody shall then be granted to the

party who will most adequately protect and promote the best interests of the child. For the factors that may be considered in determining the child's best interests, see *Hutchison*.

[3] The standard applied by the trial court in the instant case is not in conformity with that adopted in *Hutchison*. The case is therefore remanded to the trial court with instructions to enter findings consistent with the holding in *Hutchison*. Pending further disposition of this matter in the trial court, custody of the minor child shall remain with his natural father, the respondent herein.

No costs awarded.



Gwen A. JACOBSON, Plaintiff
and Appellant,

v.

KANSAS CITY LIFE INSURANCE CO.,
Defendant and Respondent.

No. 17790.

Supreme Court of Utah.

July 27, 1982.

Personal representative of estate of insured appealed summary judgment of the Sixth District Court, Sanpete County, George E. Ballif, J., dismissing action to recover proceeds of temporary binder of life insurance. The Supreme Court, Hall, C.J., held that insurer was not liable under temporary binder.

Affirmed.

Insurance ⇐ 132(2)

Insurer was not liable to personal representative of estate of deceased insured under temporary life insurance binder

where language on receipt governing temporary life insurance policy clearly set forth requirement to complete a medical examination, insured was agent of defendant insurer and was aware of condition precedent but failed to complete medical examination before his death and insured's physician did not become an agent for insurer when he cashed sight draft sent by insurer so as to shift risk to insurer as doctor was independently selected by insured to provide information on insurance forms and was thereby responsible to him only.

Lawrence E. Stevens, John B. Wilson of Parson, Behle & Latimer, Salt Lake City, for plaintiff and appellant.

Ray R. Christensen of Christensen, Jensen, Kennedy & Powell, Salt Lake City, for defendant and respondent.

HALL, Chief Justice:

Plaintiff Gwen A. Jacobson, as personal representative of the estate of Rawlin Jacobson, appeals a summary judgment which dismissed her action to recover the proceeds of a temporary binder of life insurance. The basis for the appeal is that the evidence presented at trial was sufficient to raise a genuine issue of material fact as would preclude the entry of summary judgment.

Rawlin Jacobson was president and chairman of the board of the Utah Independent Bank of Salina and president of the Bank of Ephraim. He was also an agent for defendant Kansas City Life Insurance Company and occasionally wrote life insurance policies covering persons taking out loans with his bank.

In July, 1978, a public health nurse visited the Bank of Ephraim and took Mr. Jacobson's blood pressure. She informed him that it was dangerously elevated and recommended that he consult a physician. On July 18, 1978, Dr. Bruce Harless examined Mr. Jacobson's eyes, ears, nose, throat, thyroid, heart and lungs, took his blood pressure and performed a computer blood analysis. Although the blood pressure reading was high, Dr. Harless did not diagnose hy-