

1987

K. Russell Myers v. Tawnya Myers (Luke) : Brief of Respondent

Utah Court of Appeals

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CKET NO. 870379-CA IN THE COURT OF APPEALS
STATE OF UTAH

K. RUSSELL MYERS

Plaintiff/Appellant

v.

TAWNIA MYERS (LUKE)

Defendant/Respondent

:

:

: RESPONDENT'S BRIEF

: Civil No. D 85-1828

:

870379-CA

AN APPEAL FROM THE DECISION OF THE THIRD
JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE MICHAEL R.
MURPHY, PRESIDING.

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ARGUMENT PRIORITY CLASSIFICATION: CATEGORY 14b

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COURT OF APPEALS

IN THE COURT OF APPEALS

STATE OF UTAH

| | |
|----------------------|-----------------------|
| K. RUSSELL MYERS | : |
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IN THE COURT OF APPEALS
STATE OF UTAH

K. RUSSELL MYERS :
Plaintiff/Appellant, :
v. :
TAWNYA MYERS (LUKE) : RESPONDENT'S BRIEF
Defendant/Respondent : Civil No. D 85-1828

JURISDICTION OF THE COURT OF APPEALS

The Utah Court of Appeals has jurisdiction to hear this matter pursuant to the provisions of Utah Code Ann. Section 78-2a-3(g) (1987) and Rule 4(a) of the Rules of the Utah Court of Appeals.

NATURE OF THE PROCEEDINGS

On October 14, 1986, the defendant filed a Motion for Order Permitting Minors to Leave State to permit her to move from the State of Utah with the parties' minor children. On December 23, 1987 the plaintiff filed a Motion for Immediate Change of Custody and Determination of Contempt against defendant. A trial on both Motions was held on February 10, 1987. The plaintiff/appellant has filed this appeal from the decision denying the plaintiff's motion and granting the defendant's rendered by the Third Judicial District Court for Salt Lake County, State of Utah, the Honorable Michael R. Murphy presiding as announced after trial in open court on February 26, 1987.

ISSUES PRESENTED BY RESPONDENT

1. Did the trial court err by allowing the defendant to maintain her residence in the State of Washington with the parties' minor children and was that move and change of locale part of the Court's determination that for the Defendant to maintain custody of the children was in the said children's best interests?

2. Did the trial court err in awarding defendant custody of the parties' minor children?

3. Did the trial court err by not finding the Defendant in contempt for leaving the State of Utah without court approval?

STATEMENT OF THE CASE

In May of 1985 an action for divorce was filed by the Plaintiff. (R. 2) One of the issues raised in said complaint was that of custody of the parties two minor children. Custody evaluations were completed by Kim Peterson (Ex. 3-P) and psychological evaluations were performed by Barbara Liebroder. (Ex. 4-P) Kim Peterson recommended that custody be awarded to Defendant (Tawnya) stating that the Plaintiff (Russ)

"has a history of infidelity and data indicates he is abusive when pushed to the limits. . . . Tawnya has been more involved with the children and has been the primary caretaker. The bonding between Melanie and her mother appears to be stronger, and she seems to prefer living with her mother.

Since Tawnya has been in the role of primary parent and given her relative

strengths as well as the perceived bonding between her and the children, it is recommended custody remain with the mother . . . To disrupt the current situation without evidence that the children would be better off with Russ is clearly not in the children's best interest. (Ex. 3-P)

Dr. Liebroder did not examine the children and thus was "not in a position to assess which parent is better able to met the needs" of the children though stating it was "preferable to avoid the disruption of a change in custody." (Ex. 4-P) On the date of trial the parties entered into a stipulation which was made part of the Findings of Fact and Conclusions of Law and Decree of Divorce. (R. 99-118) As part of the Findings of Fact and Conclusions of Law and Decree of Divorce the parties agreed that the Defendant would be awarded the custody of the parties' minor children and she would reside within 50 miles of Salt Lake County and that she would not move from the area without the permission of the Plaintiff or of the Court. (R. 100-101)

On or about August 14, 1986 the Defendant caused to be served on the Plaintiff a Motion for permission to move from the State of Utah with the children. (R. 138) The matter was set for hearing twice in the month of October, 1986 but was continued so that custody evaluations could be performed. (Tr. 3-5)

On or about December 13, 1986, after attempting on numerous occasions without success to contact Plaintiff's counsel to obtain permission to leave the State of Utah, and after the hearing set for December 12, 1986 was continued (the third such continuance) the Defendant moved to Washington with the parties'

minor children. (Tr. 185, 176-178)

On or about December 23, 1986 the Plaintiff filed a Motion for Immediate Change of Custody and Determination of Contempt. (R. 153) All issues made part of said motion were reserved for time of trial. (R. 159-162)

Trial was held on February 10, 1982. Dr. Barbara Liebroder, Kim Peterson, Tawnya Luke, Garth Luke, and Russell Myers testified at the trial.

The Defendant, Mrs. Luke, testified that she left without Court order because she had not been able to contact counsel to obtain permission. She testified that she had lost her job in Salt Lake County, that she had no income since the Plaintiff had refused to pay child support, the last payment having been received on November 3, 1986. The Plaintiff further testified that she was residing with her parents and driving 120 miles every day to ensure that her daughter remained in school. She had given up her apartment in anticipation of the December court date. Mrs Luke was at the time of her departure for Washington in her third trimester of pregnancy and was anxious to move to Washington where her husband was working. (Tr. 176-178)

Mr. Luke, the husband of the Defendant, testified that the income he was able to earn in the State of Washington allowed the Defendant now to stay home full-time and be a full-time caretaker of the children. (Tr. 188)

Dr. Liebroder recommended that custody of the children be awarded to the plaintiff because she stated that Defendant's

stability had deteriorated and that Plaintiff had made significant gains. However Dr. Liebroder acknowledged that Plaintiff had problems with immaturity, difficulty controlling his temper, and had a history of sexual acting out. (Tr. 24) She further acknowledged that if the Plaintiff were granted custody the children would require babysitters (Tr. 57) and that her concerns regarding the parties' minor child, Nathan, and his aggression may have been caused by his observing the Plaintiff abuse the Defendant. (Tr. 60) During her testimony Dr. Liebroder acknowledged that the stresses which were indicated in her recent testing of the Defendant may have been caused by Defendant's pregnancy, living with her parents, unemployment, and her separation from her husband. (Tr. 58, 86) Dr. Liebroder agreed that the Defendant/Respondent had been the primary caretaker during the marriage and the children had a strong bond to their mother. (Tr. 80-82) Further Dr. Liebroder testified that the Plaintiff had rehabilitated himself through therapy but that he was not currently married nor had the custody of the children and therefore was not under any stress from such. (Tr. 24, 50, 63). However Plaintiff was anticipating being married and had a profile inconsistent with marital stability. (Tr. 63) Also the minor child Nathan had expressed to Dr. Liebroder fears of separation from his mother. (Tr. 54)

Kim Peterson reported that in his opinion the Defendant should maintain custody of the parties' minor children.

(Ex. 1-P) He stated that it is difficult to tell if the

Plaintiff will revert to his past history of sexual acting out and abusive behavior if again placed in a position of stress as a result of marriage. (Tr. 127) Mr. Peterson testified that the fact that the Defendant can now be with the children essentially 24 hours a day weighed heavily in his recommendation that she retain custody. (Tr. 128) He further noted that the bond with mother is stronger and that she had been the primary caretaker. (Tr. 128-129) Mr. Peterson stated that in weighing the two possibilities of either having the Defendant come back to Utah and financially have to resume full-time employment or having the Defendant stay in Washington and be a full-time caretaker, the better circumstance would be that the Defendant stay in Washington and be a full-time mother. Mr. Peterson stated that he had intentionally not reviewed the reports of Dr. Liebroder because his report was to be independent of Dr. Liebroder's. (Tr. 143, 144)

The trial court, by and through the Honorable Judge Michael Murphy, ruled that it would be in the best interests of the children for the Defendant to maintain custody of the children and the Court in awarding custody to the Defendant took into account the fact that the children would continue to reside out of the State of Utah. Judge Murphy stated when announcing his ruling in open court on February 26, 1987, "I did not condition the order on Mrs. Luke's residing in Utah. To the extent I can I don't want to create additional marital problems and I just don't think that is appropriate." (Tr. 212) Judge Murphy also

required, and went to great lengths to ensure, that modification of visitation was made to allow continued visitation rights for the Plaintiff out of the State of Utah, and even apportioned responsibility for the costs of transporting the children from state to state between the parties. (Tr. 205-208)

The Defendant/Respondent considers the following Findings of Fact probative in her response to the appeal filed by the Plaintiff/Appellant:

4. Defendant filed a Motion for Permission to Leave the State of Utah based on defendant's husband's employment, but when the hearing of said motion was continued, defendant removed herself and the minor children to the State of Washington without the court's permission and in knowing violation of the Order of this Court.

5. As a further and changed circumstance, the plaintiff has undergone therapy in an effort to improve the emotional problems he was advised existed when the original custody evaluations were performed.

6. Plaintiff has acted in the best interests of the children of the parties.

7. Defendant's stability has degenerated since the entry of the Decree of Divorce herein, a large part of which degeneracy has been caused by post-divorce problems.

8. Dr. Barbara Liebroder has conducted psychological and custodial evaluations on the parties, their children, the husband of defendant and the girlfriend of plaintiff, and concluded it

would be in the best interests of the parties' minor children for the plaintiff to be awarded the care, custody and control of said minor children even though the minor children are bonded to the defendant, the defendant has been primary caretaker of said children and can spend more time with said children.

9. Kim Peterson, MSW, LCSW, recommended that it would be in the best interests of the parties' minor children for the defendant to retain custody of the said minor children based upon the findings of plaintiff's prior conduct and psychological reports, and based upon the defendant's being a full-time caretaker, having bonded with said children, and to avoid unnecessary trauma to the children of a change of custodial parent. He also recommended that the first choice of action in the best interest of the children would be that they remain in Salt Lake City, Utah with the defendant as their custodial parent. If that was not the order of the court, then it was slightly better that they remain in the custody of the Defendant and reside in Washington than if custody was transferred to plaintiff.

10. The court finds that the parties' minor child, Nathan, is hyperactive and is in need of therapy and that continued psychological reports of Nathan's progress should be provided to the court and to plaintiff.

11. It is reasonable that the parties should equally divide the cost of therapy for the minor child, Nathan.

12. The court finds that both parents are fit and proper

persons to be awarded custody of said minor children.

13. The court finds that it is in the best interest of the parties' minor children to remain in the custody of the defendant who is a full-time caretaker and who has bonded with said children, and that it would not be in the best interest of said children to change custody.

17. The plaintiff should be awarded a specific minimum visitation schedule with the parties' minor children based upon said children residing out of the State of Utah as follows:

a. Monthly visitation of at least one weekend with reasonable prior notice, no less than two weeks before visitation;

b. Two (2) months during the summer, upon sixty (60) days prior notice;

c. Christmas vacation commencing the day before Christmas Day and the day after Christmas Day on alternating years running until January 2nd of each year;

d. Alternate Thanksgiving or Easter Holiday visitation with plaintiff electing which holiday to commence with in 1987;

e. Holiday vacations should be upon prior notice of at least thirty (30) days;

f. Prior notice of intent to exercise visitation should be made in writing;

g. The Plaintiff should be entitled to free telephone access to the parties' minor children.

18. It is reasonable that the defendant should notify the

plaintiff when the parties' minor children are visiting with the children's grandparents in Salt Lake City, Utah so that plaintiff may visit with said children during such visits.

21. The court finds that plaintiff is past due in the payment of his child support obligation for the months of December, 1986 and January and February, 1987.

22. The defendant should be granted judgment against the plaintiff in the sum of \$1,350.00 (retroactive from court date) for said past due support, provided that no execution should be issued on said judgment as long as the plaintiff makes his ordered child support payments each month plus \$100.00 on the arrearage until it is paid in full.

26. Plaintiff's motion to hold defendant in contempt should be denied.

These conditions were incorporated into the Court's Order.
(R. 185 and 188)

SUMMARY OF ARGUMENTS

Point I

Pursuant to stipulation an Order was entered by the Court requiring the Defendant to petition the Court to move the children from the State of Utah. A Motion for Permission to Leave the State of Utah was served upon Plaintiff by the Defendant in August, 1986. The matter was heard before the Court in February, 1987. The Plaintiff/Appellant argues that the trial court erred in awarding custody of the children to the Defendant

without determining that the move was in the children's best interest. Defendant/Respondent contends that the trial court did indeed consider the move and in its Findings of Fact considered the move in determining and finding that it was in the best interests of the children for them to remain in the custody of the Defendant. The Court substantially modified and included provisions for out-of-state visitation and costs of transportation showing there was an understanding and consideration of the out-of-state move in determining the best interests of the children.

The trial court did not err in awarding custody to the Defendant. The trial court has broad discretion in determining the best interests of children.

Point II

The trial court did not err in not finding the Defendant in contempt under the exigent stresses and circumstances the Defendant was under. The continued court dates, pregnancy, loss of job, failure of Plaintiff to pay support, separation from husband, loss of residence and transportation of the children 120 miles per day to school, all placed the Defendant under extreme stress during the period between August and December, 1986. Further the Defendant exhibited her willingness to comply with the Court order by filing her motion for permission and waiting for a period of four months for a hearing to take place.

ARGUMENT

Point I

THE DEFENDANT/RESPONDENT CONFORMED WITH AND COMPLIED WITH THE STIPULATION MADE PART OF THE DECREE OF DIVORCE AND THE COURT CONSIDERED THE MOVE OF THE DEFENDANT AND THE PARTIES' CHILDREN IN DETERMINING THE BEST INTERESTS OF THE CHILDREN AND ACTED WITHIN ITS DISCRETION IN AWARDING CUSTODY TO THE DEFENDANT.

The Appellant argues that the Court failed to make a finding of best interests of the children to be located out of the State of Utah. Appellant argues that this matter came on for hearing as a result of his Motion for Immediate Change of Custody and Determination of Contempt. Respondent contends that this matter was heard as a result of the filing of her Motion to Move from the State of Utah filed three month's before Plaintiff/Appellant's Motion and some two and one-half (2 1/2) months before the Defendant/Respondent left the State of Utah. The Defendant/Respondent did not attempt to avoid the requirements of the stipulation and Decree that she procure a court order before being permitted to move. Immediately upon determining that her husband had to relocate out of the State of Utah, Defendant/Respondent served upon Plaintiff, in August, 1986, a Motion to Move as required by the Decree of Divorce. This matter had been set for hearing three times and continued three times before Plaintiff filed his Motion for Custody and Contempt.

Appellant cites the precedents incorporated in Despain vs. Despain 627 P.2d. 526 (Utah 1980) and Kinsman v. Kinsman 73 Utah

Adv. Rep. 110 (January 12, 1988). In Despain the modification filed by the Respondent dealt with the value of a trust fund. In Kinsman the court dealt with a stipulated waiver of alimony incorporated in a divorce decree. In these cases the petitioner moved that the court disregard previous stipulations entered into by the parties. In this case at hand the Defendant/Respondent did not move that the court disregard the stipulation. She specifically complied with the Court order in moving and having heard a Motion to move out of the State as required by the parties' stipulation which stated:

"That she would not move from that area without either the permission of the plaintiff or the Court obtained by petitioning the court for permission to leave the area and establishing that such move would be in the best interests of the children after evaluation by follow-up evaluation to be performed by Kim Peterson."
(R. 100, 101 and 111)

Follow-up evaluations were performed by Kim Peterson and Dr. Liebroder as required under the terms of the stipulation. Both evaluators testified at the hearing held in February, 1987 and the Court had the benefit of said testimony in making its determination. The Defendant/Respondent transported and provided the children and submitted herself and her husband to all testing and evaluations required by the evaluators appointed by the Court.

As a result of the stipulation entered into by the parties a determination of what would be in the best interests of the children was required be made by the Court.

By its action the trial court fulfills the proper standard for reviewing a change of custody as set out in Hogue v. Hogue, 649 P.2d 51 (Utah 1982). The standard requires that the trial court first determine whether there has been a substantial and material change in the circumstances which justifies reopening the question of custody. Id at 54. If this issue is resolved in the affirmative, the Court then proceeds to decide whether the requested change in custody will best serve the welfare of the child. Id.

Under U.C.A., 1953, 30-3-5(3), as amended, a divorce court sits as a court of equity so far as child custody is concerned. The trial court is afforded particularly broad discretion in the area of child custody. In Hirsh v. Hirsh, 725 P.2d 132, (Ut. 1986), the Supreme Court states that a determination of the "best interests of the child" turns on factors which the trial court is best able to assess, and only when the action taken by the trial court is so unjust as to constitute an abuse of discretion should this Court substitute its own judgment.

In Ebbert v. Ebbert, 744 P.2d 1019 (Ut. App. 1987), the Supreme Court found that the trial court abused its discretion when awarding a former husband visitation, by failing to make findings in the best interests of the children. The Supreme Court based its decision on the fact that the trial court's findings were silent on the best interests of the children with regard to the visitation schedule. Moreover, the Court only makes mention of the intended move without any findings as to

whether the move would be in the childrens' best interest. Id. at 1023.

The trial court deficiencies alluded to in Ebbert are not repeated in the case before you. The trial court, in acting on respondent's Motion for Permission to Leave the State and appellant's Motion for Modification of the Divorce Decree commissioned a custody evaluation to be conducted by Kim Peterson and a psychological evaluation by Dr. Barbara Liebroder. Both witnesses had been associated with the parties in question since May 20, 1985 when the Appellant initiated the Complaint for dissolution of the parties' marriage, and were properly qualified to testify and aid the Court in determining the best interests of the children.

Kim Peterson's report recommended that it would be in the best interest of the parties' children for the Respondent to retain custody of the children. Mr. Peterson based his recommendation on the strong bond formed between the children and their mother given her full-time caretaker status. He also stated that it would avoid unnecessary trauma to the children of a change of custodial parent. His report also took into account the move from one state to another since he concluded that the ideal situation would be that they remain in Utah with the respondent as custodial parent but if that was not the order of the court, then it was slightly better that they remain in the custody of respondent and reside in Washington than if custody was transferred to appellant. (R. 174). All the above reasons

and recommendations were echoed by the Court in the Findings.

There are ample reasons and evidence upon which the Court's Findings were based. In child custody determinations, the trial court's decision should be upheld on appeal unless the trial court's action is so flagrantly unjust as to constitute an abuse of discretion. Lembach v. Cox, 639 P.2d 197 (Utah 1981).

The evidence in this case clearly shows the trial court did not abuse its discretion. Dr. Liebroder and Mr. Peterson acknowledged that the Defendant had been the primary caretaker of the children and both acknowledged that the children were bonded to the defendant mother. The evidence showed that due to the move the defendant was now able to stay home and take care of the children on a full-time basis. The evaluators both testified that the plaintiff had a history of sexual acting out, abusive behavior and marital instability which might surface if exposed to ongoing stresses of remarriage or custody of the children, stresses he was not exposed to while undergoing testing and therapy.

Point II

THE TRIAL COURT DID NOT ABUSE ITS
DISCRETION WHEN IT DID NOT HOLD
RESPONDENT IN CONTEMPT FOR HER FAILURE
TO COMPLY WITH THE PARTIES' STIPULATION.

The Decree of Divorce entered in this matter on June 9, 1986 awards the custody of the children to the respondent provided she remain in and reside within the jurisdiction of the Court. In order to leave the State of Utah, the respondent filed a Motion

for Permission to Leave the State of Utah based on her husband's employment in the State of Washington. Mr. Kim Peterson's evaluation supports the grounds for the Motion when he finds that respondent's husband worked in Seattle, Washington for a year and one-half as a sales manager and earned \$42,000.00 per year. A return to Utah would cut is income in half and this would mean that respondent would have to seek employment thus depriving her of her full-time caretaker status as a mother. (Ex. 1)

Respondent's Motion for Permission to Leave the State was continued on numerous occasions. At no time during the proceedings did respondent's actions impair the course of the process or hamper the Court's mandated evaluations. Throughout respondent attempted to fulfill all obligations by appearing in Court and having the children available. "One who puts forth every reasonable effort to comply with the court order, but is unable to do so, is not guilty of contempt on account of such failure." Limb v. Limb, 113 Utah 385, 195 P.2d 263 (1948).

By analogy, Butler v. Butler, 461 P.2d 727 (Utah 1969) seems to illustrate the powers of the trial court. In Butler, even though the evidence strongly suggested Plaintiff's failure and refusal in every respect to cooperate with Defendant's efforts to see his children pursuant to the terms of the divorce decree, the Court did not hold the Plaintiff in contempt. Though Butler stands for the proposition that the "duty to hold contempt in a civil matter in order to afford relief to another party does not lie within the discretion of the trial court," Id at 729, the

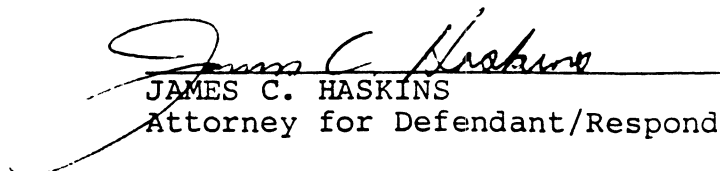
trial judge is in a better position than the Supreme Court to make a determination in the matter. Id at 728. The trial court is obviously best situated to judge the credibility of the witnesses, and this court will not substitute its judgment for that of the trial court on a disputed factual issue. Hughes v. Stusser, 415 P.2d 89 (Utah 1963).

The trial court heard evidence that the Defendant/Respondent was under extreme stresses and circumstances during the period before her move out of state, including the continuance of hearings on her Motion for Permission to Leave, the loss of her employment, her pregnancy, the failure of Plaintiff/Appellant to pay support, separation from her husband, loss of residence and subsequent residence with her parents, and the transporting of her daughter 120 miles each day to attend the same school. In taking such evidence into considering and denying Plaintiff/Appellant's Motion to find Defendant/Respondent in contempt of Court the trial court did not abuse its discretion.

CONCLUSION

Based upon the foregoing points and authorities, Defendant/Respondent herein requests this Court to uphold the findings and rulings of the trial court.


RESPECTFULLY SUBMITTED this 4 day of April, 1988.


JAMES C. HASKINS
Attorney for Defendant/Respondent

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of
the foregoing Respondent's Brief this 4 day of April, 1988 to:

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