

1997

Lorin David Graves v. Tricia Kristina Clements : Brief of Appellant

Utah Court of Appeals

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DOCKET NO. 970103-CA

IN THE UTAH COURT OF APPEALS

LORIN DAVID GRAVES,

Plaintiff - Appellant,

vs.

**TRICIA KRISTINA CLEMENTS
(f.n.a. GRAVES),**

Defendant - Respondent.

BRIEF OF THE APPELLANT

APPELLATE COURT NO. 970103-CA

ARGUMENT PRIORITY 4

BRIEF OF APPELLANT

DAVID GRAVES

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH, JUDGE THORNE

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COURT

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PARTIES

PLAINTIFF BELOW / APPELLANT: LORIN DAVID GRAVES

DEFENDANT BELOW / APPELLEE: TRICIA KRISTINA CLEMENTS

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STATEMENT OF JURISDICTION

Appellant David Graves (“Graves”) files this appeal from a decision of the Third Judicial District Court of Salt Lake County modifying the original custody order regarding the parties’ children and granting custody of the children to Appellee Tricia Clements (“Clements”). This Court has jurisdiction over Graves’ appeal pursuant to Utah Code Ann. § 78-2a-3(2)(h) (Supp. 1996).

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

ISSUE: DID THE TRIAL COURT ABUSE ITS DISCRETION IN FINDING A MATERIAL CHANGE IN CIRCUMSTANCES HAD OCCURRED AND AFFECTED THE FUNCTIONING OF THE CUSTODIAL RELATIONSHIP BETWEEN GRAVES AND HIS CHILDREN?

STANDARD OF REVIEW:

A TRIAL COURT’S FACTUAL FINDINGS UNDERLYING A HOLDING OF MATERIAL CHANGE OF CIRCUMSTANCES IN A DIVORCE DECREE AND A DETERMINATION OF THE CHILDREN’S BEST INTERESTS MAY NOT BE DISTURBED UNLESS CLEARLY ERRONEOUS. A COURT’S LEGAL

CONCLUSION AS TO WHETHER A MATERIAL CHANGE IN CIRCUMSTANCES HAS OCCURRED THAT WOULD WARRANT RECONSIDERING THE DIVORCE DECREE IS REVIEWED FOR AN ABUSE OF DISCRETION. A TRIAL JUDGE'S AWARD OF CUSTODY AND SUPPORT IS ALSO REVIEWED FOR ABUSE OF DISCRETION.

AUTHORITY: Cummings v. Cummings, 821 P.2d 472, 476 (Utah App. 1991)
Wells v. Wells, 871 P.2d 1036, 1038 (Utah App. 1994)
Sukin v. Sukin, 842 P.2d 922, 923 (Utah App. 1992)

DETERMINATIVE PROVISIONS

There are no statutes or constitutional provisions that are determinative in this appeal.

STATEMENT OF THE CASE

Nature of the Case:

Graves appeals from the trial court's order amending the parties' decree of divorce. The amended order terminated the then-existing joint custody order and awarded Clements the sole care, control and custody of the parties' four (4) minor children. The trial court

found that the joint custody arrangement was “an extremely good way of doing things,” but that “things have changed drastically” since Clements remarried in March 1995.

Course of the Proceedings:

The parties were divorced April 7, 1992, in the Third Judicial District Court of Salt Lake County. The decree of divorce entered into at the time dictated that the parties be awarded the joint care and custody of the four minor children, and that Graves be the primary caretaker and have the physical custody of the children subject to Clements’ rights of reasonable visitation. In August 1995, Clements filed a petition to modify the divorce decree and sought to gain physical custody of the children. On October 24, 1995, Commissioner Lisa Jones of the above-mentioned court heard Clements’ motion for a change of custody. After interviewing the minor children, receiving proffers of testimony and argument from counsel on Clements’ motion for temporary order and Clements’ motion for independent custody evaluation, and taking the contested issues under advisement, Commissioner Jones ordered in a minute entry under advisement recommendation that “it is in the best interest of the minor children to remain in the physical custody of [Graves].” It was also found that “[Clements] attempted to influence the children.” A custody evaluation was

then ordered.

Disposition at Trial Court:

On October 17-18, 1996, Clements' Amended Petition to Modify Decree of Divorce came before the Third Judicial District Court, the Honorable Judge Thorne presiding. In his order, Judge Thorne held that "things have changed drastically resulting in the requisite material change in circumstance [and] that the above-referenced material change in circumstance occurred in March of 1995 when the Defendant [Clements] married Garry Waye Clements." Judge Thorne terminated the existing custody order and awarded Clements the sole care, control and custody of the children.

STATEMENT OF THE FACTS

David Graves and Tricia Clements were married in Salt Lake City on August 7, 1982. To their union were born Amy and David, twins - 12 years old, Michael - 9 years old, and Daniel - 7 years old. Graves worked as an insurance agent for New York Life Insurance Company and for ten years in the banking industry. He left his job as an insurance agent in 1990 to return to the University of Utah to earn his college degree. Graves and Clements arranged that Clements would work while Graves completed his studies.

Around March 1991, Clements stated that she wanted a divorce from

Graves and moved out of the family home. (Transcript, p. 331.) As the reason for the separation, Graves alleges that Clements had an extra-marital affair; she denies this claim. (Transcript, p. 518-22.) The parties were divorced on April 7, 1992, and they were awarded joint care and custody of the children, with Graves being designated as the primary caretaker with physical custody, and Clements being granted visitation rights. (Transcript, p. 183.) Clements was ordered to pay child support, but did not meet her obligation and presently owes over \$15,000 in past due child support. (Transcript, p. 448-50.)

Since 1990, Graves has rented a three-bedroom apartment in a middle-class neighborhood at 147 University Village, Salt Lake City. The apartment contains its own kitchen and bathroom, and when the children lived with Graves, each child had his or her own bed. The custody evaluator, Manuel de la Torre, L.C.S.W., toured the home and noted "it was fairly clean and orderly. The furnishings appeared to be in good repair. The apartment has a common outside area with swings, a merry-go-round and other play toys." (Custody Evaluation, p. 3.) For six years the children lived with their father at the same address, attending the same schools, and playing with the same friends. Graves received a total of \$1,742 a month from AFDC, student aid and child support while he was in school.

Clements began living with Garry Waye Clements in June 1992. (Transcript, p. 383.) Since that time, they have resided in a 5-bedroom home in a middle-class neighborhood in West Jordan. (Transcript, p. 424, 437.) They were married in March 1995.

In August 1995, Clements sought sole custody of the children by filing a petition to modify the divorce decree. On October 17-18, 1996, Clements' Amended Petition to Modify Decree of Divorce came before the Third Judicial District Court, the Honorable Judge Thorne presiding. During the trial, Graves provided the court seven (7) separate character references supporting his skills and abilities as a parent. The wide variety of references included: an LDS clergyman relating his observations of Graves with his children, several University classmates and professors commenting on Graves's dedicated efforts at school and his care and concern for his children, and the director of the child care center where the four minor children have attended since June of 1994, commenting that Graves was "cooperative, sensitive to the children's needs, and kind and nurturing with the children." In addition, Graves offered an affidavit from a neighbor, a registered nurse who knew both Graves and Clements for eight years, stating that "Graves has always possessed a calm, caring attitude toward his children."

The trial court found that the joint custody arrangement was "an extremely good way of doing things," but that "things have changed drastically" since Clements remarried in March 1995. (See Transcript, p. 570-71.) The court found that since that time, the joint custody co-parenting relationship had deteriorated. The court specifically held that at the time of Clements' remarriage, Graves began treating his relationship with her as a "'tug-of-war'" to see who would keep the children. (Transcript, p. 571.) The court held that a material change in circumstances occurred in March of 1995 when Clements remarried, and the court

terminated the joint custody order and awarded Clements sole custody of the children.

SUMMARY OF THE ARGUMENT

Utah courts have clearly outlined the two-part procedure for modification of child custody decrees. The first step involves a determination that a “substantial” change of circumstances has occurred since the time of the last decree, and the second step focuses on the best interests of the children. In this case, the trial court incorrectly applied the first step of the test. The trial court relied too heavily on the fact that Clements remarried, and ignored the effect the bitter custody dispute had on the joint custody co-parenting relationship. The court erred in allowing Clements to rely on circumstances she created by initiating the custody battle. The artificially created “change in circumstances” is not sufficient to remove the children from Graves and put them in Clements custody.

The Utah Supreme Court has stated that the requisite change must substantially and materially affect the custodial parent’s parenting ability or the functioning of the custodial relationship. In this case, the evidence did not show a material change in the custodial parenting relationship between Graves and the children. Nothing “substantial” or “material” changed in David Graves’ relationship with his children to warrant Clements being awarded custody. Since the original divorce decree, Graves and the children have lived in the same home and attended the same schools and the same day care center. The only change in

this case is that Clements remarried and initiated a custody battle. The first test of the Utah courts that the change must essentially affect the custodial relationship was never met, and the trial court erred in awarding physical custody of the four children to Clements.

ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING A MATERIAL CHANGE IN CIRCUMSTANCES OCCURRED AND AFFECTED THE FUNCTIONING OF THE CUSTODIAL RELATIONSHIP BETWEEN GRAVES AND HIS CHILDREN. THE TRIAL COURT THEREFORE ERRED IN MODIFYING THE CUSTODY ORDER.

The trial court erred by focusing on the fact that Clements remarried and by ignoring the detrimental effect the child custody litigation had on the joint custody co-parenting relationship. In doing so, the trial court misapplied longstanding Utah case law on the subject, and therefore the custody modification should be overturned by this court.

The Utah Supreme Court has outlined the two-part procedure which trial courts must follow in modifying custody arrangements. The trial court must first “receive evidence only as to the nature and materiality of any change in those circumstances upon which the earlier award of custody was based.” Hogge v. Hogge, 649 P.2d 51, 54 (1982). The Utah Supreme Court revisited this first step in Becker v. Becker, where it added “it is not sufficient merely to allege a change which, although otherwise substantial, does not essentially affect the custodial relationship . . . [and] the asserted change must, therefore, have some material relationship to and substantial effect on parenting ability or the functioning of the

presently existing custodial relationship.” 694 P.2d 608, 610 (1984) (holding that the trial court was justified in finding no substantial change in circumstances since the divorce, despite fact that the former wife had matured, settled down and remarried).

The reasoning behind the Supreme Court’s rulings on this subject is clear. The two-part procedure was designed “to protect the custodial parent from harassment by repeated litigation and protect the child[ren] from ‘ping-pong’ custody awards.” Hogge, 649 P.2d at 53-54. “The rationale is that custody placements, once made, should be as stable as possible unless the factual basis for them has completely changed.” Becker, 694 P.2d at 610. The Court in Hogge noted that the Oregon courts emphasized “the importance of a stable and secure home life for children who are shifted from one parent to another and required to make adjustments attendant upon such changes.” Id. at 54, quoting Remillard and Remillard, 30 Or. App. 1111, 569 P.2d 651, 653 (1977). Moreover, “[t]he ‘change of circumstances’ threshold is high to discourage frequent petitions for modification of custody decrees.” Kramer v. Kramer, 738 P.2d 624, 626 (Utah 1987).

In the present case, the facts show that the custodial relationship between Graves and his children did not substantially or materially change since the original divorce. All the vital, relevant aspects of a child’s life remained the same for the Graves’ children during this time. They slept in the same beds, lived in the same home, attended the same day care center and schools, and played with the same

friends. More importantly, the parent-child relationship with their father did not substantially or materially change during this time. And, although Clements has remarried, “it is not sufficient merely to allege a change which, although otherwise substantial, does not essentially affect the custodial relationship.” Becker, 694 P.2d at 610. A noncustodial parent’s change of circumstances is not relevant. Kramer, 738 P.2d at 627.

It could be argued that in a joint custody situation, the circumstances of both parents are relevant because both have a custodial relationship with the children. However, such a position is inconsistent with Utah law. In Crouse v. Crouse, 817 P.2d 836 (Utah 1991), the divorce decree provided for joint legal custody of the parties’ two children, and granted primary physical custody to Mrs. Crouse. Seeking primary physical custody of the children, Mr. Crouse filed a petition to modify the divorce decree. In support of his petition, Mr. Crouse offered evidence that he had moved from an apartment into a house. The trial court denied the petition, finding that Mr. Crouse failed to prove a material change in circumstances sufficient to alter the custody order. The Utah Court of Appeals affirmed the trial court and noted that a noncustodial parent’s change in housing arrangements is generally not sufficient to justify a modification of custody. Crouse, 817 P.2d at 839-40. The Crouse decision illustrates that the Hogge change in circumstances test applies in a joint custody situation, and the parent with primary physical custody of the children is considered the custodial parent. Accordingly, in the case at bar Clements had the burden to prove a material change

in the custodial parenting relationship between Graves and the children. The evidence shows this burden was not met.

The court found that the joint custody parenting arrangement deteriorated and broke down after Clements remarried in March 1995. However, the record contains no evidence indicating that the breakdown in the co-parenting arrangement was tied to or caused by Clements' remarriage. Clements has lived with her new husband since 1992, and there is no evidence showing that her 1995 marriage affected the joint custody relationship. Rather, the evidence clearly shows that the breakdown in the co-parenting arrangement was caused and facilitated by the commencement of child custody litigation.

Graves testified that "the entire court case has created an artificial problem here." (Transcript, p. 229.) He characterized the litigation as a "bitter court battle," (Transcript, p. 230), and felt it appropriate that "under the circumstances" he should not directly communicate with Clements regarding the children's welfare. (Transcript, p. 191-92.) Graves stated that he used to have a very good co-parenting relationship with Clements, and "that's the way it will be again when this is all over." (Transcript, p. 212.) Graves also testified that "once the case is over and settled, things will settle down and we can begin again." (Transcript, p. 201.) Finally, Graves admitted that in the last year, because of the court case, he did not involve Clements in decisions concerning attention deficit disorder (ADD) counseling and medication for Michael or David. (Transcript, p. 270.) Prior to the litigation, Graves involved Clements in every such decision. (Transcript, p.

270.)

The causal relationship between the beginning of the custody battle and the breakdown of the co-parenting arrangement is illustrated by the timing of the problems noted by the trial court. In the 1994-95 school year, Graves and Clements shared custody of the children; each had them for 2 weeks per month. (Transcript, p. 341.) They discontinued this system because it caused problems with the children's schoolwork. (Transcript, p. 342, 401.) Then, in August 1995, Clements initiated the custody battle, and the co-parenting difficulties followed.

Beginning in October 1995, Graves refused to accept Clements' telephone calls at home because they led to chaos with the children. (Transcript, p. 199-200, 343-44.) The court noted that Graves made a vulgar remark to Clements; this occurred in June 1996. (Transcript, p. 197.) The school registration forms which failed to include Clements were prepared in 1996. (Transcript, p. 202.) The evidence showed a visitation problem occurred on June 14, 1996, and also on August 11, 1996. (Transcript, p. 225-26.) According to Clements, her visitation has not been very liberal since November 1995. (Transcript, p. 395.) Graves testified that he has had almost no contact with Clements in the last 9 to 10 months, and that they handle matters through their attorneys. (Transcript, p. 211-12.)

When considering the effect the bitter custody dispute has taken on Graves and the joint parenting relationship, it is important to remember that Graves suffers from chronic fatigue syndrome (Transcript, p. 213, 294), has been diagnosed with

depression (Transcript, p. 297-99), and is under significant stress. (Transcript, p. 299.) He admitted that all the fighting upset him and that he sometimes says inappropriate things "in the heat of battle." (Transcript, p. 229, 234.) In fact, at one point Graves even advocated splitting the children up for the purpose of ending the litigation. (Transcript, p. 287.) It is obvious that the custody battle Clements initiated has taken its toll on Graves and on the co-parenting relationship.

The evidence clearly shows that the breakdown in the joint custody parenting arrangement was directly caused by the child custody litigation. The trial court erred in allowing Clements to rely on and benefit from the problematic circumstances she created by initiating the custody battle.

In Fullmer v. Fullmer, 761 P.2d 942 (Utah App. 1988), the court considered a similar situation. In that case, Mrs. Fullmer, the custodial parent, was preparing to move to New York City and had quit her job, moved out of her apartment, and sold most of her belongings. The night before her scheduled departure, Mr. Fullmer served her with his petition to modify the child custody order, together with a restraining order prohibiting her from leaving the state. Mrs. Fullmer was forced to hire an attorney and hurriedly arrange temporary living accommodations and employment. The trial court modified the custody order and awarded custody to Mr. Fullmer, based on his solid employment and more stable environment. In reversing the trial court, the appellate court noted that although Mrs. Fullmer's housing accommodations and employment were unstable after the filing of the petition, "any changes in her circumstances were, in large part, a

consequence of respondent's [Mr. Fullmer's] conduct." Id. at 948. The court concluded that "Respondent [Mr. Fullmer] cannot use the circumstances he created to reopen the child custody issue. To hold otherwise would provide incentive to noncustodial parents to create havoc in the custodial parent's circumstances in order to justify reconsideration of the custody award." Id. at 948.

The same rationale applies to the present case. The breakdown in the joint custody co-parenting relationship was a direct consequence of Clements' conduct in initiating the "tug-of-war" custody battle. By commencing this emotionally difficult litigation, Clements essentially facilitated the deterioration of the co-parenting relationship. She cannot now rely on those circumstances to obtain custody.

CONCLUSION

Because there was no change of circumstances which materially affected the custodial relationship that Graves had with his four children, the trial court erred in terminating the existing custody order and awarding Clements sole custody. In addition, the trial court erred by allowing Clements to rely on the negative circumstances she created by initiating the custody dispute. The trial court misapplied Utah case law on the subject, and thus the amended order in this case should be overturned.

RESPECTFULLY SUBMITTED this 22^d day of August, 1997.

LEN R. ELDRIDGE, P.C.

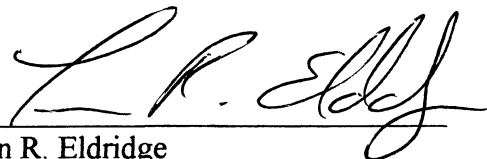
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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that two true and correct copies of the foregoing
Brief of Appellant David Graves were mailed, postage prepaid, this 22nd day of
August, 1997, to:

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No addendum required.

Aug. 22, 1997

