

1997

Lorin David Graves v. Tricia Kristina Clements : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

UTAH
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CKET NO. 970103-CA

IN THE UTAH COURT OF APPEALS

LORIN DAVID GRAVES,

Plaintiff - Appellant,

vs.

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

Defendant - Respondent.

REPLY BRIEF OF THE APPELLANT

APPELLATE COURT NO. 970103-CA

ARGUMENT PRIORITY 4

REPLY 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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ARGUMENT

I. THE RULE REQUIRING MARSHALING OF THE EVIDENCE IS NOT DISPOSITIVE OF THIS APPEAL

Appellee devotes a considerable portion of her appellate brief to emphasizing Appellant's claimed failure to marshal the evidence supporting the trial court's rulings. Clearly, Appellee has misconstrued and misunderstood Appellant's arguments. The marshaling rule requires appellants to marshal the evidence in support of a court's findings, then demonstrate that despite this evidence the court's findings are erroneous and against the weight of the evidence. See State in the Interest of S.T., 928 P.2d 393, 400 (Utah App. 1996); Saunders v. Sharp, 806 P.2d 198, 199 (Utah 1991). However, the duty to marshal the evidence arises only where the appellant challenges the trial court's findings of fact. See Saunders v. Sharp, 806 P.2d at 199. Where the factual findings of the lower court are not challenged, the appellate court reviews the trial court's conclusions of law and the application of the law to the facts of the case. See Saunders v. Sharp, 806 P.2d at 199-200.

In the present case, appellee mistakenly argues that appellant has failed to marshal the evidence supporting certain findings of fact, when actually appellant has not directly challenged the findings of fact. First, appellee attempts to assert the marshaling rule regarding a finding the court never made. Appellee states that the court specifically found appellant's relationship with the children had materially changed. Review of the court's findings does not support appellee's assertion; the court did not make such a finding. Rather, the court found that the co-parenting

relationship had deteriorated.

Appellee also asserts the marshaling rule with regard to the court's finding that the joint parenting relationship had broken down. However, appellant does not challenge this finding, and thus the marshaling rule is irrelevant. Appellee again turns to the marshaling rule with regard to the court's finding that vesting custody of the children with appellee is in the children's best interests. Appellant does not challenge this factual finding, but rather advances the legal argument that the court should not have reached the best interests analysis. Accordingly, the marshaling rule is inapplicable and is not dispositive of the issues raised in this appeal.

II. UTAH CODE SECTION 30-3-10.4(2) IS NOT APPLICABLE TO THE FACTS OF THIS CASE

Utah Code Section 30-3-10.4 provides, in pertinent part:

“(1) On the motion of one or both of the joint legal custodians the court may, after a hearing, modify an order that established joint legal custody if:

(a) the circumstances of the child or one or both custodians have materially and substantially changed since the entry of the order to be modified, or the order has become unworkable or inappropriate under existing circumstances; and

(b) a modification of the terms and conditions of the decree would be an improvement for and in the best interest of the child.

“(2) The order of joint legal custody shall be terminated by order of the court if both parents file a motion for termination. At the time of entry of an order terminating joint legal custody, the court shall enter an order of sole legal custody under Section 30-3-10. All related issues, including visitation and child support, shall also be determined and ordered by the court.”

Appellee incorrectly relies on subsection (2), which requires the order of joint legal custody to be terminated by order of the court “if both parents file a motion for termination.” In the present case, however, appellant did not file a motion for termination of the joint custody arrangement. Although appellant sought sole custody of the children, he did so in the course of the litigation, and only in direct response to appellee’s petition for an award of sole custody. Appellee raised the custody issue and brought it before the court, and appellant was forced to respond.

Appellee construes U.C.A. 30-3-10.4(2) to apply and mandate termination of joint custody when both joint legal custodians seek sole custody in the course of litigation. Appellee’s construction of subsection (2) is incorrect, because it renders language in subsection (1) meaningless. Subsection (1) applies when “one or both of the joint legal custodians” seek to change a joint custody order on the grounds that it has become unworkable or a material and substantial change of circumstances has occurred. If appellee’s construction of the statute were correct, anytime “both joint legal custodians” sought a change in custody arrangements under subsection (1), the court would be forced to terminate the joint legal custody without considering whether joint custody had become unworkable or whether a material and significant change in circumstances had occurred. In other words, in certain situations appellee’s construction of subsection (2) would force courts to bypass subsection (1), thus rendering that part of the statute meaningless.

In determining the meaning of statutory provisions, the court “must attempt to give each part of the provision a relevant and independent meaning so as to give effect to all its terms.” In

re Worthen, 926 P.2d 853, 866 (Utah 1996). If uncertainty exists as to the meaning or application of a statute's provisions, the court should "analyze the act in its entirety and harmonize its provisions in accordance with the legislative intent and purpose." Id. Further, "statutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and ... interpretations are to be avoided which render some part of a provision nonsensical or absurd." Millett v. Clark Clinic Corp., 609 P.2d 934, 936 (Utah 1980)." Perrine v. Kennecott Min. Corp., 911 P.2d 1290, 1292 (Utah 1996).

A more reasonable construction of subsection (2) is that it applies where both joint legal custodians act together to affirmatively seek termination of joint custody. Subsection (2) should not apply where one joint legal custodian unilaterally seeks to end the joint custody arrangement by commencing litigation and forcing the other joint legal custodian to respond. The legislature clearly intended subsection (1) to govern such a situation, and intended the courts to inquire as to a material and substantial change of circumstances or the workability of continued joint custody. These elements are in place in subsection (1) specifically to prevent one joint legal custodian from unilaterally destroying the joint legal custody.

In the present case, appellant's actions should not be construed as a motion for termination of joint custody under U.C.A. 30-3-10.4(2). Rather, this case should fall under subsection (1), which applies to a motion of "one or both of the joint legal custodians" seeking modification of a joint custody order. Accordingly, contrary to appellee's contention, subsection (2) does not apply to the case at bar. The trial court correctly proceeded under subsection (1) and inquired into whether a material and substantial change of circumstances had occurred.

III. THE TRIAL COURT ERRED IN ITS APPLICATION OF UTAH CODE SECTION 30-3-10.4(1) TO THE FACTS OF THIS CASE

U.C.A. 30-3-10.4(1) is applicable to the instant case. However, the trial court applied the statute to the facts of the case in an incorrect manner. U.C.A. 30-3-10.4(1) (a) provides a two-step inquiry. First, the trial court must determine whether “the circumstances of the child or one or both custodians have materially and substantially changed since the entry of the order to be modified,” or whether the joint custody order “has become unworkable or inappropriate under existing circumstances.” U.C.A. 30-3-10.4(1)(a). See Hogge v. Hogge, 649 P.2d 51, 54 (Utah 1982) (stating that determination of whether substantial and material change of circumstances has occurred is the first step in the change of custody analysis). Second, the trial court considers whether a change in custody arrangements is in the best interest of the child. U.C.A. 30-3-10.4(1)(b). In the present case, the trial court incorrectly applied the first step of the analysis.

In determining whether a substantial and material change of circumstances has occurred, the court should not consider changes in circumstances caused by the conduct of the noncustodial parent now seeking custody. In Fullmer v. Fullmer, 761 P.2d 942, 948 (Utah App. 1988), the court essentially held that changes in circumstances which were a consequence of the noncustodial parent’s conduct should not be considered by the trial court. 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.

In the present case, the court found that a material change of circumstances had occurred,

namely, the joint parenting relationship had broken down. However, in applying U.C.A. 30-3-10.4(1)(a), the court failed to consider whether the change in circumstances had been caused by the noncustodial parent, in this case the appellee. Under the rationale of Fullmer, the court should not have considered changes in circumstances directly caused by the appellee's conduct. Here, the breakdown in the joint custody relationship was a direct consequence of appellee's conduct in initiating the "tug-of-war" custody battle. This case presents exactly the type of situation Fullmer sought to proscribe: appellee created havoc in appellant's circumstances and the joint custodial relationship in order to obtain reconsideration of the custody arrangement. By failing to recognize the rule of law set forth in Fullmer, the trial court applied U.C.A. 30-3-10.4(1)(a) incorrectly and considered the changes in circumstances wrought by appellee's conduct.

The same rationale applies to the language in U.C.A. 30-3-10.4(1)(a) directing the court to inquire whether the joint custody order "has become unworkable or inappropriate **under existing circumstances.**" U.C.A. 30-3-10.4(1)(a) (Emphasis added). Following the Fullmer rationale, the phrase "existing circumstances" should be construed to exclude changed circumstances caused by the conduct of the noncustodial parent. In addition, it should be noted that the trial court did not proceed under this line of inquiry; rather, the trial court found a material change of circumstance. Thus, even assuming the joint custody order was unworkable under existing circumstances, this court cannot rely on such assumption, because the trial court did not make that finding for this court to review.

Finally, appellee attempts to distinguish Fullmer on its facts. First, appellee alleges that Fullmer is distinguishable because in the present case appellant posed a threat to the children's emotional and physical health. Appellee's assertion is ludicrous; the trial court made no such

finding. Next, appellee contends Fullmer is distinguishable because the cases are factually different. In Fullmer, the custodial parent's circumstances changed because the noncustodial parent sought modification of the child custody order on the night before the custodial parent was scheduled to move to another state, thus forcing the custodial parent to hire an attorney and hurriedly arrange temporary living accommodations and employment. In the present case, circumstances changed when the joint custody co-parenting relationship was damaged by appellee's initiation of the bitter custody dispute. The factual differences between the cases are of no consequence and do not lessen the import of the rationale advanced by the Fullmer court.

IV. THE TRIAL COURT'S FINDINGS REGARDING THE BEST INTERESTS OF THE CHILDREN ARE NOT DISPOSITIVE OF THIS APPEAL.

Appellee mistakenly argues that because appellant does not challenge the factual finding that granting custody to appellee is in the children's best interests, the trial court's decision must be affirmed. Appellee could not be more wrong. The trial court never should have reached the issue of the children's best interests, because under a proper application of the law, the trial court would not have progressed beyond the material and substantial change of circumstances inquiry. In Cummings v. Cummings, 821 P.2d 472, 475-76 (Utah App. 1991), the court held that "[o]nly if a substantial change of circumstances is found should the trial court consider whether a change of custody is appropriate given the child's best interests." See U.C.A. 30-3-10.4(1); Hogge v. Hogge, 649 P.2d 51, 54 (Utah 1982). See also Crouse v. Crouse, 817 P.2d 836, 839 (Utah App. 1991) (affirming trial court's decision not to change a stipulated joint custody order, and finding trial court properly based its refusal to change custody on the lack of a substantial change in

circumstances without reaching the issue of the best interests of the children).

Appellee contends that because the initial joint custody order arose from a stipulation of the parties, the children's best interests are dispositive. This court flatly rejected appellee's argument in Stevens v. Collard, 837 P.2d 593 (Utah App. 1992). In that case, the court noted that Elmer v. Elmer, 776 P.2d 599 (Utah 1989), modified the Hogge test and liberalized the scope of evidence allowed on the issue of changed circumstances to allow parties to introduce evidence of a change's effect on a child's best interest. Stevens v. Collard, 837 P.2d at 596-97. The court held, however, that the "fundamental burden to establish a material change of circumstances was not diminished" merely because the challenged custody decree was based on default. Id. at 597. In other words, even though Elmer allows evidence of a child's best interests to be introduced, the fundamental burden of establishing a substantial and material change of circumstances remains. See Stevens v. Collard, 837 P.2d at 596-97; Walton v. Walton, 814 P.2d 619, 621-22 (Utah App. 1991). Therefore, the trial court's finding regarding the children's best interests is not dispositive of this appeal.

Moreover, it should be noted that the evidence regarding the children's best interests related solely to the breakdown in the joint custody relationship, and did not independently establish some other material change in circumstances. Even if the best interests evidence could establish an alternative change in circumstances, a change not caused by appellee's conduct, the trial court did not make any such finding for this court to review.

V. THE TRIAL COURT FAILED TO ACKNOWLEDGE AND RECOGNIZE THAT THE BREAKDOWN IN THE JOINT CUSTODIAL RELATIONSHIP WAS A RESULT OF THE CUSTODY LITIGATION.

The trial court found a material change of circumstances occurred in March of 1995 when the appellee remarried. Although the trial court established March 1995 as the time frame for when some difficulties first arose, the trial court did not expressly find that appellee's remarriage was the sole or even the primary cause of the joint parenting problems. It is important to remember that appellee had lived with her new husband since 1992, and that therefore her 1995 remarriage did not create any substantive changes in visitation, living arrangements, or any other relevant aspect of the joint parenting arrangement. Appellant contends that even assuming for the sake of argument that the remarriage did play a minor part in the problems with the joint parenting arrangement, the record clearly shows that the initiation and continuation of the custody litigation played a more serious role and was the dominant cause of the joint parenting problems. The trial court failed to acknowledge this crucial evidence and failed to recognize the effect the custody litigation had on the joint custody relationship.

The record contains direct evidence, some in the form of appellant's testimony, unequivocally showing that the breakdown in the joint custody relationship was caused and facilitated by the commencement of the child custody litigation. However, appellee contends that appellant's testimony cannot be considered because the trial court found his credibility lacking. While the trial court did offer its belief that appellant had been "playing games" during the pendency of the litigation, including during discovery, the trial court did not expressly find that appellant was not a credible witness at trial. More importantly, the trial court did not find that appellant's testimony regarding the cause of the joint parenting problems was not credible. Contrary to appellee's assertion, the trial court's statement regarding appellant's pre-trial conduct

cannot be read as a blanket indictment of his credibility on the witness stand. Further, this court cannot independently judge appellant's credibility. See Riche v. Riche, 784 p.2d 465, 467 (Utah App. 1989). Appellee's contention lacks merit. Appellant's testimony concerning the detrimental effect of the custody litigation is uncontroverted and should have been recognized by the trial court.

VI. APPELLANT'S APPEAL IS NOT FRIVOLOUS, AND AN AWARD OF ATTORNEY FEES IS NOT WARRANTED.

Rule 33 of the Utah Rules of Appellate Procedure provides that if the court determines an appeal is frivolous, the court "shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party." Rule 33(b) defines a frivolous appeal as "one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law."

In Erickson v. Wasatch Manor, Inc., 802 P.2d 1323, 1328 (Utah App. 1990), the court discussed the practice of penalizing frivolous appeals:

"Sanctions for frivolous appeals have only been applied in egregious cases, such as when an appeal was filed in order to 'take unconscionable advantage' of the other party and therefore fails to meet the standards of good faith. Eames v. Eames, 735 P.2d 395, 398 (Utah Ct.App.1987). 'Egregious cases may include those obviously without merit, with no reasonable likelihood of success, and which result in the delay of a proper judgment.' Maughan [v. Maughan], 770 P.2d [156] at 162. . . . We have interpreted 'without merit' to mean an appeal 'without a reasonable legal or factual basis.' O'Brien v. Rush, 744 P.2d 306, 309 (Utah Ct.App.1987)."

“The ‘sanction’ for bringing a frivolous appeal is applied only in egregious cases, ‘lest there be an improper chilling of the right to appeal erroneous lower court decisions.’ Porco v. Porco, 752 P.2d 365, 369 (Utah App.1988).” Maughan v. Maughan, 770 P.2d 156, 162 (Utah App. 1989). Moreover, “an unsuccessful appeal which has some merit is not frivolous. See Hinckley v. Hinckley, 815 P.2d 1352, 1355-56 (Utah App.1991).” Roberts v. Roberts, 835 P.2d 193, 199 (Utah App. 1992).

In the present case, appellant’s appeal is soundly based upon and warranted by existing law. Appellant has made good faith arguments regarding the interpretation and construction of U.C.A. 30-3-10.4, has raised in good faith a viable legal argument regarding the Fullmer case, has challenged the trial court’s application of existing law to the facts of this case, and has argued that the trial court failed to make a finding of fact, regarding the cause of the joint custody relationship breakdown, in conformance with the evidence adduced at trial.. As the preceding arguments demonstrate, this appeal clearly has a strong factual and legal basis. Appellee’s request for attorney fees is unwarranted and must be denied.

Appellee also claims attorney’s fees should be awarded based on appellee’s financial need. “Attorney fees on appeal may be granted in the discretion of the court in conformance with statute or rule. Management Services Corp. v. Development Assocs., 617 P.2d 406, 408 (Utah 1980). Utah Code Ann. Sec. 30-3-3 (1984) provides that either party to a divorce action may be ordered to pay the adverse party to prosecute or defend the action. This includes attorney fees incurred on appeal.” Maughan v. Maughan, 770 P.2d 156, 162 (Utah App. 1989).

In the present case, both parties sought an award of attorney’s fees at the trial court level. The trial court, however, ordered each party to bear their own costs and attorney’s fees. Because

the trial court did not award attorney's fees to appellee, she is not entitled to an award of attorney's fees on appeal. In Larson v. Larson, 888 P.2d 719, 727 (Utah App. 1994), the court addressed a similar situation:

“Generally, when a trial court awards fees in a divorce action to a party who then prevails on appeal, that party will also be entitled to fees on appeal. Crouse v. Crouse, 817 P.2d 836, 840 (Utah App.1991). However, in the present case, the trial court did not award attorney fees to either party in the action below. Therefore, regardless of which party prevails on appeal, and absent any showing that the parties' financial situation has changed subsequent to the time of the trial court's decision, both parties must bear their own fees on appeal. Cf. Riche v. Riche, 784 P.2d 465, 470-71 (Utah App.1989) (remanding to trial court for determination of whether financial circumstances of party who was denied attorney fees incurred at trial had changed such that an award of fees incurred on appeal was appropriate).”

In the case at bar, appellee has not made any showing that the parties' financial situation has changed since the time of the trial court's decision. Accordingly, Larson dictates that appellee must bear her own attorney fees on appeal.

In the alternative, this court may choose to remand the matter for a hearing to determine “the need of the claiming spouse, the ability of the other spouse to pay, the reasonableness of the fees and the amount, if any, to be paid.” Schaumberg v. Schaumberg, 875 P.2d 598, 604 (Utah App. 1994). The Schaumberg court held that where new allegations of a change in financial condition are not a matter of record and have not been adjudicated by a finder of fact, the appellate court cannot evaluate that claim, and it may be remanded to the trial court for determination. Id. at 604. However, a remand is not required, because the decision to award

attorney's fees lies within the sound discretion of the appellate court.

CONCLUSION

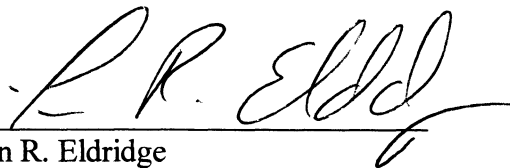
Appellee's contentions are devoid of legal merit. First, the rule requiring marshaling of the evidence has no application to this appeal, as appellant has not directly challenged the factual findings made by the trial court. Second, U.C.A. 30-3-10.4(2), reasonably and properly construed, is not applicable to the facts of this case. Third, contrary to appellee's contention, the trial court's findings regarding the best interests of the children are not dispositive of this appeal, because the trial court never should have reached that step in the analysis.

The trial court erred by failing to recognize that the breakdown in the joint custodial relationship was a result of the custody litigation initiated by appellee. As a result, the trial court erred in its application of U.C.A. 30-3-10.4(1) to the facts of this case, because the trial court should not have considered changes in circumstance unilaterally created by appellee in an attempt to reopen the custody issue. Lastly, it is clear that this appeal is not frivolous, and an award of attorney fees is not warranted.

The trial court's decision should be reversed.

RESPECTFULLY SUBMITTED this 25th day of October, 1997.

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CERTIFICATE OF SERVICE

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

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