1987

Fullmer v. Fullmer : Brief of Respondent

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

LAURA LEE BLOXHAM FULLMER,	:	
Plaintiff-Appellant,	:	Case No. 870499-CA
vs.	:	
BRIAN KEITH FULLMER,	:	Category No. 7
Defendant-Respondent.	:	

BRIEF OF RESPONDENT

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH, JUDGE BOYD L. PARK.

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BRIEF OF RESPONDENT

JURISDICTION

The Court of Appeals has appellate jurisdiction over this domestic relations matter pursuant to Utah Code Annotated Section 78-2a-3(2)(g).

NATURE OF PROCEEDING

This is an appeal from a final order modifying a decree of divorce in the Fourth Judicial District Court, Judge Boyd L. Park presiding, in which the lower court modified the previously entered Decree of Divorce as to child custody, child support, alimony and federal and state tax exemptions.

STATEMENT OF THE ISSUES ON APPEAL

I. Did the trial court err when it found that there had been, since the time of the decree, changes in the circumstances upon which the previous custody award was based?

II. Was the court's finding that plaintiff-appellant's work schedule, which necessitated the placement of the minor child in a day care center, a sufficient substantial and material change of circumstances to justify the reopening of the issue of custody?

III. Does the remarrige of defendant-respondent to a full-time homemaker constitute a material change of circumstances to justify reopening the question of custody?

IV. Did the trial court err in its determination of a material change in circumstances which resulted in the reopening the issue of custody?

V. Did the trial court err when it did not set an appropriate amount for plaintiff-appellant to pay to defendant-respondent as child support?

VI. Did the trial court abuse its discretion in failing to terminate the previous award of alimony?

VII. Did the trial court err when it awarded the 1987 and 1988 federal and state income tax exemption for the minor child to defendant-respondent?

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATE STATUTES

Utah Code Annotated, Section 30-3-5(3):

> The court has continuing jurisdiction to make subsequent changes of new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of the property as is reasonable and necessary.

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

This is an appeal from a final order modifying a decree of divorce entered after a trial on defendant-respondent's Amended Petition to Modify a decree of divorce and plaintiff-appellant's Counter Petition to Modify a decree of divorce in the Fourth Judicial District Court, Judge Boyd L. Park presiding, in which the Decree of Divorce signed by Judge David Sam on February 19, 1985, was modified in regards to child custody, child support, and tax exemptions.

B. COURSE OF THE PROCEEDINGS.

The original decree of divorce in this matter was entered pursuant to a "default divorce" in which defendant-respondent, who was unrepresented by counsel, entered into a stipulation with plaintiff-appellant. Subsequently, on February 19, 1985, Judge David Sam of the Fourth Judicial District Court signed the decree of divorce, which became final three months later on May 19, 1985. (R. 22 through 23) The decree of divorce awarded plaintiff-appellant custody of the minor child, but the findings of fact in support of said decree did not designate either party as being a fit and proper person to be awarded the permanent care, custody and control of the minor child. Child support was set at $150 per month, and alimony was set at $200 per month. The issue of tax exemptions was not addressed.

A petition to modify decree of divorce was filed in September of 1986 by defendant-respondent in which he requested that child custody be awarded to him. (R. 28) Subsequently, defendant-respondent filed an amended petition to modify in February of 1987 requesting termination of alimony and award to him of the federal and state income tax exemptions for the minor child. (R. 62) Plaintiff-appellant filed a counter petition to modify decree of divorce in October of 1986 requesting an increase in child support. (R. 49) Trial was held on October 13, 1987 before the Honorable Judge Boyd L. Park of the Fourth Judicial District Court. (R. 183)

C. DISPOSITION IN THE COURT BELOW.

After hearing the proffered evidence of counsel, and reviewing the child custody evaluation performed by Bert Peterson of Child Custody Evaluation Services, Judge Boyd L. Park found that there had been a material change of circumstances with regard to child custody which was sufficient for reopening the custody issue, and that he was entitled to reconsider the issue of custody. After reviewing the evidence and proffered testimony, Judge Park awarded custody of the minor child, Dagin, to defendant-respondent.

Findings of fact and conclusions of law were subsequently entered by the court on the 10th day of November, 1987. In relation to material change of circumstances with regard to

custody, the court stated as follows:

a) "That since the entry of the decree of divorce, the defendant on September 28, 1985 married Lynda Fullmer. That the marriage to the present Mrs. Fullmer has created a stable environment for the rearing of Dagin." (R. 194)

b) "That at the time of the entry of the decree of divorce in this matter, the plaintiff was working on a part-time basis and attended school from one to four hours a day." (R. 194)

c) "That the part-time work schedule of the plaintiff enabled her to spend considerable time with the minor child." (R. 194)

d) "That in August, 1987, the plaintiff has become gainfully employed on a full-time basis working at least eight hours per day. That during such time as she is working on a full-time basis, the child has been placed in a day care center." (R. 194)

e) "That subsequent to the entry of the decree of divorce for that period of time beginning in May of 1985 and continuing through the beginning of the summer of 1986, the defendant, at the request of the plaintiff, had the child visiting with him a significant period of time. From time to time when the mother needed assistance with the care of the child, she brought the child to the father." (R. 194, 195)

Having found that there had been a material change of circumstances justifying the court's reopening of the custody

issue, the court awarded the parties joint custody of the minor child, with defendant-respondent to be given the physical care, custody and control of the minor child, subject to review in one year, October 13., 1988, at the hour of 9:00 a.m. (R. 195, 196) In determining what was in the best interests of the minor child, the court took into consideration the following factors: primary caretaker, time availability, stability of the environment and relationship to step-parent and step-sibling. (R. 198,199) After determining all relevant factors, the court concluded that the best interests of the child would be best served by living with his father, defendant-respondent. (R. 318) In addition, the court ordered defendant-respondent to pay to plaintiff-appellant the sum of $250 per month as child support during the three summer visitation months which she would have custody (R.196 through 197), and awarded defendant-respondent the 1987 and 1988 federal and state income tax exemptions for the minor child (R. 321).

D. STATEMENT OF THE FACTS.

Plaintiff-appellant and defendant-respondent were married on November 22, 1980 in Salt Lake City, Utah. One child was born as issue of this marriage, to wit: Dagin Lester Fullmer, born May 19, 1983. Plaintiff-appellant filed her complaint in September of 1984. On October 5, 1984, the parties entered into a stipulation where both parties agreed that plaintiff-appellant was a fit and proper person to care for the physical needs and emotional needs

of the child. During all negotiations pursuant to said Stipulation, defendant-respondent was unrepresented by counsel. An amended stipulation was filed on February 19, 1985, which contained no provision regarding custody, but does set child support in the amount of $150 per month. Findings of fact and conclusions of law were signed on the 19th day of February, 1985, in which plaintiff-appellant was awarded custody of the minor child, Dagin. The findings do not find anybody to be a fit and proper person to be awarded the care, custody and control, but they do award custody and discuss child support. The decree of divorce also signed the 19th day of February, 1985, does not make any particular findings but simply awards custody. (R. 1 through 23)

Prior to the implementation of the decree of divorce, plaintiff-appellant fulfilled the role of primary caretaker for the minor child. Defendant had standard visitation, but the minor child was cared for and dwelled with his mother. Then, after the implementation of the summer visitation for 1985, the pattern materially changed where, rather than plaintiff-appellant as the custodial parent, defendant-respondent had the child residing with him, and in fact cared for him for three-fourths of the time. (R. 256 through 280)

Subsequent to the finalization of the decree of divorce, defendant-respondent remarried and has had a child. The current

Mrs. Fullmer tended the minor child subsequent to the remarriage for three to ten hours a day, six to seven days a week. (R. 256)

Defendant-respondent filed a petition to modify the decree of divorce in September of 1986, requesting that he be given child custody over the parties' minor child. (R. 28) The filing of the petition to modify was precipitated because plaintiff-appellant had informed defendant-respondent that she had decided to move to New York City, New York where she was going to pursue a modeling career. In addition, she informed defendant-respondent that she would be living there with a boyfriend and another male individual and that she was taking the minor child of the parties to live in that environment. (R. 259) Defendant-respondent later filed his amended petition to modify in February of 1987, requesting modification of the decree regarding alimony and the state and federal tax exemptions. (R. 62) Plaintiff-appellant filed the counter petition to modify in October of 1986 requesting an increase in child support. (R. 49)

Trial was held before the Honorable Judge Boyd L. Park of the Fourth Judicial District Court on October 13, 1987. (R. 183) After hearing the proffered testimony, Judge Park ruled that there had been a material change of circumstances since the decree of divorce, that defendant-respondent should be awarded the permanent care, custody and control of the minor child of the parties, that child support during the three summer months in which plaintiff-

appellant had visitation should be increased to $250 per month; and that defendant-respondent should be entitled to the 1987 and 1988 federal and state income tax exemptions for the minor child. (R. 315 through 326)

SUMMARY OF ARGUMENTS

Judge Boyd L. Park of the Fourth Judicial District Court did not abuse his discretion when he found that there had been a material change of circumstances, sufficient and material for purposes of reopening the custody issue. The original decree of divorce was entered pursuant to a "no-contest type" divorce in which defendant-respondent was unrepresented by counsel. The findings of fact and conclusions of law signed in the original Divorce Decree do not designate either party as being a fit and proper person to be awarded the permanent care, custody and control of the minor child of the parties. Defendant-respondent's proffered testimony at the hearing regarding change of custody stated that when he signed the stipulation he anticipated that the minor child would live with his mother, and that defendant-respondent would have visitation. That subsequent to the entry of the decree of divorce, defendant-respondent had the minor child with him three-fourths of the time and in fact became the custodial parent for the minor child. In addition, plaintiff-appellant began working on a full-time basis, thus reducing her time availability to spend with the minor child.

After having found there existed a material change of circumstances sufficient to justify reopening the custody issue, the court correctly decided de novo which custody arrangement would be in the best interests of the child. In doing so, the court took into consideration function-related factors, i.e. primary caretaker, time availability, stability of the environment and relationship to step-parent and step-sibling. The court also relied heavily on a child custody evaluation report submitted by Bert Peterson, LCSW of Child Custody Evaluation Services, wherein he recommended that custody of the minor child be given to defendant-respondent.

Once deciding that defendant-respondent would be the appropriate person to be awarded the permanent care, custody and control of the minor child, the court failed to enter an order requiring plaintiff-appellant to pay to defendant-respondent child support, based on her ability to pay, for the minor child of the parties. Instead, the trial court ordered defendant-respondent to pay to plaintiff-appellant $250 a month in child support for the three summer months that she would have visitation with the minor child. However, in light of its order requiring defendant-respondent to pay child support for the three months in which he did not have the minor child residing with him, the court correctly awarded defendant-respondent the 1987 and 1988 income tax exemptions. The court's reasoning for increase in child

support was based on creating a greater stream of income for the child, and said award was justifiably within the trial court's discretion.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR WHEN IT FOUND THAT THERE HAD BEEN, SINCE THE TIME OF THE DECREE CHANGES IN THE CIRCUMSTANCES UPON WHICH THE PREVIOUS CUSTODY AWARD WAS BASED.

Hogge v. Hogge, 649 P.2d 51 (Utah, 1982) adopted a bifurcated procedure for petitions to modify decrees of divorce in regards to child custody. Pursuant to said procedure outlined in Hogge, the court first must make a determination that a substantial change of circumstances has occurred warranting the court to reopen the issue of child custody. If the court finds that a substantial change in circumstances has taken place since the entry of the decree of divorce, the court may "determine denovo which custody arrangement will serve the welfare or best interests of the child, and modify, or refuse to modify, the decree accordingly." Id. at 54.

It is true that the attorneys for the parties presented evidence to the court in accordance with the Hogge analysis by first making opening statements regarding a material change of circumstances in regards to child custody. (R. 254, 260). The court acknowledged the bifurcated process as articulated in Hogge and expressed its familiarity with all of the cases that had been

cited by both counsel (R. 315). As such, the court was also expressing its familiarity with Moody v. Moody, 715 P.2 507 (Utah, 1985), which held that the court may receive child custody evaluation reports for purposes of making its threshold decision regarding substantial changes in circumstances pursuant to Hogge. Id. at 509 (R. 298).

Plaintiff-appellant takes issue with the fact that the court allowed counsel for defendant-respondent to commence presenting evidence on all issues in the case prior to making a ruling regarding substantial change of circumstances. The bifurcated procedure as enumerated in Hogge v. Hogge is often difficult to implement at the trial level in that much of the evidence presented with regard to step 2 of the Hogge analysis regarding trial denovo is also relevant to step 1 of the Hogge analysis regarding material change of circumstances. The practical problems with regard to the Hogge analysis were articulated by District Court Judge Daniels in his concurring opinion in Moody v. Moody as follows:

> The problem with the procedure is this: the evidence supporting changed circumstances is almost always the same evidence that is used to establish the best interests of the child. Even when there is additional evidence which bears solely on the best interest question, that evidence is usually so entwined with the changed circumstances evidence that it is almost impossible to sort out. The trial judge is faced with an objection to almost every question. He or she must then try to figure out whether the answer would relate to changed circumstances, best interests or both. The witness frequently must be recalled to give further

> testimony in the second phase of the hearing, which causes inconvenience for the witness and expense for the parties.
>
> Admittedly, some trial judges do not follow this cumbersome procedure. Instead, we take all of the evidence and sort out mentally that which relates to changed circumstances and that which relates to best interests. We then make findings on both issues, taking into consideration the important policy of custodial stability, which requires a very high standard to establish a material change in circumstances. Id. at 511.

Consequently, the trial court did not err with regard to listening to the entire evidence in the matter prior to entering a ruling regarding whether or not there had been a change of circumstances sufficient to warrant reopening of the child custody issue. Indeed, the court was justified in hearing all of the evidence, including the child custody evaluation submitted by Bert Peterson, LCSW, in making this determination of whether or not there were changes in circumstances that justified reopening of the child custody issue.

In finding that there had been a material change of circumstances for purposes of reopening the custody issue, the court made its findings of fact, which includes some of the following: that at the time of the entry of the decree of divorce in this matter, plaintiff-appellant was working on a part-time basis and attending school from one to four hours per day; that said part-time work schedule of plaintiff-appellant enabled her to spend considerable time with the minor child; that in August of

1987, plaintiff-appellant began working full-time requiring the minor child to be placed full-time in a day care center; that subsequent to the decree of divorce defendant-respondent had the minor child visiting with him a significant period of time at the request of plaintiff-appellant. (R. 194,195) All of the above cited reasons were part of the basis for the court finding a material change in circumstances for purposes of reopening the custody issue. The court then articulated in its findings that it had based its decision on finding a material change of circumstances primarily because of two of the reasons above cited, to wit:

> a. The change in plaintiff's work schedule to full-time employment necessitating the placement of the minor child, Dagin, in a day care center also on a full-time basis.
>
> b. The remarriage of defendant and his creation thereby of a stable home environment where the child can be cared for by a stepmother who is a homemaker, not working outside the home, during those times when the father is working. (R. 195)

The complaint in the original divorce action was filed by plaintiff-appellant and her attorney. In the complaint for divorce, the plaintiff-appellant did not pray for custody of the minor child (R. 1,2). Defendant-respondent being unrepresented by counsel, entered into a stipulation with plaintiff-appellant and her attorney shortly after the divorce was filed (R.8). An amended Stipulation was subsequently entered into by the parties on February 13, 1985 in which neither party was awarded custody--

the only allusion being an award to plaintiff-appellant of $150 per month in child support. (R. 10-12) Wherefore, findings of fact, conclusions of law and a decree of divorce were duly entered granting to plaintiff-appellant custody of the minor child without any designation whatsoever or finding by the trial court that she was a fit and proper person to be awarded the permanent care, custody and control of the minor child. (R. 18 through 23) The only reference to plaintiff-appellant being a fit person to be awarded the permanent care, custody and control of the child was the original stipulation entered into between the parties, which could have arguably been superseded by the Amended Stipulation.

Since the trial court in the original divorce made no finding regarding whether either party was a fit person to be awarded the permanent care, custody and control of the minor child, defendant-respondent's testimony regarding his intent when executing the stipulations becomes relevant. Defendant-respondent's proffered testimony at the hearing regarding change of custody stated that when he had signed the stipulation he anticipated that the minor child would live with his mother, and defendant-respondent would have visitation. (R. 256 through 259) In addition, at the time of the decree of divorce, plaintiff-appellant had more time availability to care for the minor child since she was employed part-time and could care for the child personally for a great portion of the day. (R. 259, 260) The proffered testimony of

defendant-respondent was made part of the findings of fact of the court wherein it stated as follows:

> 4. That at the time of the entry of the decree of divorce in this matter, the plaintiff was working on a part-time basis and attending school from one to four hours per day.
>
> 5. That the part-time work schedule of the plaintiff enabled her to spend considerable time with the minor child.
>
> 6. That in August, 1987, the plaintiff has become gainfully employed on a full-time basis working at least eight hours per day, that during such time as she is working on a full-time basis, the child has been placed in a day care center.
>
> 7. That subsequent to the entry of the decree of divorce and for the period of time beginning in May of 1985 and continuing through the beginning of the summer of 1986, the defendant, at the request of plaintiff had the child visiting with him a significant period of time. From time to time when the mother needed assistance with the care of the child, she brought the child to the father. (R. 194 & 195)

The findings of fact as articulated by the Fourth Judicial District Court show that there are sufficient justifications for the court's decision that there had been a material change of circumstances upon which the previous award of custody had been based.

> II. THE COURT'S FINDING THAT PLAINTIFF-APPELLANT'S WORK SCHEDULE NECESSITATED THE PLACEMENT OF THE MINOR CHILD IN A DAY CARE CENTER WAS A SUFFICIENTLY SUBSTANTIAL AND MATERIAL CHANGE OF CIRCUMSTANCES TO JUSTIFY REOPENING THE ISSUE OF CUSTODY.

In the case of Marchant v. Marchant, 66 Utah Adv. Rpt. 45 (September 18, 1987), this court quoted Rule 52a of the Utah Rules

of Civil Procedure to state that findings of fact "shall not be set aside unless clearly eroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." Id. at 47. However, in the case of child custody awards this court articulated standards for findings of fact of a trial court in child custody cases, and stated that sufficient findings:

> 1. Are sufficiently detailed;
> 2. Including enough facts to disclose the process through which the ultimate conclusion is reached;
> 3. Indicate the process is logical and properly supported; and
> 4. Are not clearly eroneous. Id. at 47.

In setting the standard for what factors are properly considered by a trial court in determining an award of custody, the court in Marchant reiterated the factors that had been previously outlined in Pusey v. Pusey, 728 P.2d 117, 120 (Utah, 1986) and stated that child custody decisions should be based on findings regarding "function related factors" and articulated the following list to be considered by a trial court: 1) "The identity of the primary caretaker" Id. 47; 2) "The identity of the parent with a greater flexibility to provide personal care for the child" Id. at 47; 3) "The identity of the parent with whom the child has spent most of his or her time pending custody determination if that period has been lengthy" Id. at 47; 4) "The stability of the environment provided by each parent".

The Fourth Judicial District Court in its Findings of Fact regarding material change of circumstances stated as follows:

> 4. That at the time of the entry of the decree of divorce in this matter, the plaintiff was working on a part-time basis and attending school from time to time.
>
> 5. That the part-time work schedule of the plaintiff enabled her to spend considerable time with the minor child.
>
> 6. That the plaintiff has become gainfully employed on a full-time basis working at least 8 hours per day. That during such time as she is working on a full-time basis, the child has been placed in a day care center.
>
> 7. That subsequent to the entry of the decree of divorce and for that period of the time beginning in May of 1985 and continuing through the beginning of the summer of 1986, the defendant, at the request of the plaintiff had the child visiting with him a significant period of time. From time to time when the mother needed assistance with the care of the child, she brought the child to the father. (R. 194, 195)

The above stated findings are sufficiently detailed in order to satisfy the requirements set forth in Marchant. Indeed, the findings indicate that at the time of the divorce, plaintiff was working part-time and attending school from time to time, and thus she had a great deal more time to spend with the minor child than defendant who was working full-time at Wicatt. Subsequent to the decree of divorce, plaintiff-appellant began working full-time; and as a result, her time availability to spend with the minor child was substantially reduced. Indeed, because of plaintiff-appellant's busy working schedule, social schedule and vacation schedule, she did not have sufficient time to spend with the minor

child when he was ill, and would bring the minor child to be cared for by defendant-respondent on those occasions. (R. 256, 257) Because of plaintiff-appellant's schedule, the parties reversed roles, and defendant-respondent, became the primary caretaker of the minor child. (R. 257) It is based on these facts that the court articulated its findings as above stated. The findings are based on sufficient factual testimony and evidence and should not be set aside.

III. IN THE PRESENT FACT SITUATION, THE REMARRIAGE OF DEFENDANT-RESPONDENT TO A FULL-TIME HOMEMAKER CONSTITUTED A MATERIAL CHANGE OF CIRCUMSTANCES TO JUSTIFY REOPENING THE QUESTION OF CUSTODY.

Plaintiff-appellant relies on the case of Kramer v. Kramer, 738 P.2d 624 (Utah, 1987) for her proposition that the trial court erred in considering defendant-respondent's current marriage to a full-time homemaker to be a substantial and material change for purposes of reopening the custody issue. Plaintiff-appellant argues that the fact situation in the present case is identical to that in Kramer in which the trial court focused on the custodial parent only in determining whether there had been a material change of circumstances for purposes of reopening the custody issue. The trial court in that case held that the noncustodial parent in Kramer did not fall within the exception articulated in Hogge v. Hogge, wherein the court changed custody of the minor child to the noncustodial mother who had overcome emotional problems and could provide a stable home environment for her

children.

However, Kramer was not intended to overrule the Hogge decision but only to limit its application to a circumstance wherein the trial court felt that the original decree of divorce was based on circumstances regarding the noncustodial parent. The court indicated in Kramer that it was not overruling the Hogge decision but merely limiting its application:

> The narrow construction we place on Hogge is not an innovation or change in our case law. Rather it is consistent with the approach this court has implicitly taken in applying the first prong of Hogge's change of custody test. Kramer, Id. at 627.

Nevertheless, the trial court in Kramer, after hearing and weighing the evidence, ruled that the noncustodial parent had failed to carry the burden of material change in circumstances for purposes of reopening the custody issue. As such, the Kramer case can easily be distinguished from the present case now before this court in which the trial judge ruled that the noncustodial parent had indeed met his burden of proof in showing that there had been a material and substantial change of circumstances in relation to the issue of child custody since the time of the decree of divorce.

Indeed, the ccurt in Kramer indicated that it was the trial court, and not the appellate court, who should weigh the presented evidence in order to determine whether or not a material change in circumstances has been met:

> It is the trial court's prerogative to hear and weigh the conflicting evidence and to make findings of fact. We will not upset such findings when they are supported by substantiated record evidence. Kramer, Id. at 628.

In the present case, although plaintiff-appellant attempted to rebut the evidence presented by defendant-respondent, the ruling of Judge Park indicates that in weighing the relative evidence presented by the parties, that he was more persuaded by that presented by defendant-respondent. The court's findings acknowledge the fact that since the decree of divorce, plaintiff-appellant had spent substantially less time with the minor child than she had at the time of the decree. In fact, plaintiff-appellant herself had chosen defendant-respondent and his new wife to be the caretaker of the minor child when she went on Caribbean cruises, (R. 257), when the child was sick (R. 257), and when she was involved in career pursuits (R. 256, 257).

Indeed, since defendant-respondent's remarriage to a full-time homemaker, defendant-respondent and his new wife, Lynda, have had Dagin in their home for approximately three-fourths of the time between May of 1985 through the beginning of the summer of 1986. (R. 256, 257). Indeed, plaintiff-appellant herself chose to leave the minor child with his step-mother when he was sick with chicken pox so that he would receive the proper care and attention. (R. 257) Based on the evidence presented, it was in the trial court's discretion to determine that it was proper to enter a finding regarding defendant-respondent's remarriage to a

full-time homemaker since it was she who had in fact spent a great deal of time subsequent to the entry of the decree of divorce caring for the minor child of the parties to this action.

Of particular significance in the Kramer decision is the fact that three of the Supreme Court justices merely concurred in Judge Zimmerman's opinion, to wit: Justice Durham, Associate Chief Justice Stewart, and Justice Howe. The written concurring opinions of Justice Stewart and Justice Howe indicate that they held some reservations in regards to the court's strict adherence to a standard which allows the trial court to focus only on the custodial parent ir determining whether or not there has been a material and substantial circumstances for purposes of reopening the custody issue.

Associate Chief Justice Stewart stated:

> The nature of the parent-child relationship may never be discovered by the trial judge if he or she rigidly limits a hearing for a change in custody to determine whether there are changed circumstances, without any regard for how well the child is doing under the established custody relationship. Focusing only on alleged change of circumstances of one or the other of the parents may result in great harm to a child. Kramer, Id. at 628.

Justice Stewart felt that the court's "strong emphasis on stability is reaching a point where it has become inappropriately severed from the underlying reason that supports the very principle of stability itself, i.e. the need to insure that custody awards are in the best interests of the child involved."

Kramer, Id. at 629.

Justice Howe agreed with Justice Stewart and further stated his concern regarding a decree of divorce based on default in which the court had not entertained the evidence and entered a ruling on what would be in the best interests of the child:

> I have somewhat of the same concern in cases where divorce decree and custody of a child is obtained by default. In such instances there is no determination made by the court as to which parent would be superior in raising the child. Too rigid an application of the rule advocated by the majority would forever lock a child into the custody of one parent or the other where there has been no determination on the merits of parenting ability of either parent and custody has been awarded only because of the default of one parent in failing to oppose the complaint of the other. A child should not be subjected to spending the rest of his or her minority in a inferior environment because of the inaction of one parent at the time custody is awarded. Kramer, Id. at 629.

This is certainly the case in the present action wherein defendant-respondent, who was unrepresented by counsel, merely entered into a stipulation with plaintiff-appellant and her attorney in the original action for divorce. The court had made no determination with regard to who would be the best custodial parent, and in fact, the court did not enter a finding determining plaintiff-appellant to be a "fit and proper person". Since no determination was made, the actions and intents of the parties become relevant.

In the present case, defendant-respondent, in his proffered testimony, indicated that at the time of the decree of divorce he

anticipated plaintiff-appellant having a great deal more time to spend with the child, and acting as custodial parent. Since the decree of divorce, defendant-respondent had in fact had the child three-fourths of the time, which was unanticipated in the original decree of divorce, and had in fact become the custodial parent of the minor child, along with his new spouse, Lynda, who had cared for the child during the days when defendant-respondent was at work. Judge Park acknowledged the great amount of time that the minor child had spent with defendant-respondent and his current wife, as so articulated in Finding No. 7 of his Findings of Fact and Conclusions of Laws, which states:

> That subsequent to the entry of the decree of divorce and for that period of time beginning in May of 1985 and continuing through the beginning of the Summer of 1986, the defendant, at the request of plaintiff had the child visiting with him a significant period of time. From time to time when the mother needed assistance with the care of the child, she brought the child to the father. (R. 194, 195)

In this circumstance, the court in Finding 9b of its Findings of Fact and Conclusions of Law made a determination that:

> The remarriage of defendant and his creation thereby of a stable home environment where the child can be cared for by a stepmother who is a homemaker, not working outside the home, during those times when the father is working, (R. 195)

constituted a material change of circumstances for reopening the custody issue. Said determination of the court was based on the evidence and on the fact that defendant-respondent and his present

wife had in fact already had assumed much of the responsibility attendant to being a primary caretaker to the minor child, Dagin:

> The fact that the father had the child all of these days during that period of time in my opinion is not "knit picky". I think that was part of my consideration. If this had been a situation where the father had never had the child so that here we are putting the child over in a brand new environment something that would be strange to a child, at this point in time, that would been a futher consideration of mine. (R. 337)

IV. AFTER DETERMINING THAT THERE HAD BEEN A MATERIAL CHANGE IN CIRCUMSTANCES FOR PURPOSES OF CHANGING CUSTODY, THE TRIAL COURT WAS CORRECT IN REOPENING THE ISSUE OF CUSTODY AND DETERMINING WHAT WAS IN THE BEST INTERESTS OF THE CHILD.

Once the trial court has determined that there has been a substantial and material change in circumstances for purposes for modifying the decree of divorce regarding child custody, the court "must determine denovo which custody arrangement will serve the welfare or best interests of the child, and modify, or refuse to modify, the decree accordingly." Hogge, Id. at 54.

In Marchant v. Marchant, 66 Utah Adv. Rpt. 45 (September 18, 1987) this court adopted the standards to be considered by a trial court in child custody cases to be "function-related factors", and adopted the standards as earlier set forth in Pusey v. Pusey, 728 P.2d 117 (Utah, 1986) as follows:

> 1. The identity of the primary caretaker during the marriage.
> 2. The identity of the parent with greater flexibility to provide personal care for the child,
> 3. The identity of the parent with whom the child has spent most of his or her time pending custody

determination if that time has been lengthy, and
4. The stability of the environment provided by each parent. Marchant, Id. at 47.

In the present case, the Fourth Judicial District Court, after first determining that a material change of circumstances had taken place regarding custody, entertained all of the appropriate factors as enunciated in Pusey v. Pusey and Marchant v. Marchant and articulated in Finding No. 18 of its Findings of Fact and Conclusions of Law as follows:

> The court having determined that there exists a material change in circumstance, finds it necessary to determine what is in the best interests of the minor child. Therefore, the court takes into consideration the following:
>
> a. Primary Caretaker. Although the plaintiff has technically been the primary custodian of Dagin, it is not easy to determine whether or not she has been the constant primary caretaker. The court notes Exhibit "1" of plainitff (sic) delineating actual custody time periods.
>
> b. Time Available. The court finds that there has been a material change in the time available for the plaintiff to spend with the minor child, both parents now working full-time as opposed to the earlier situation.
>
> c. Stability of the Environment. The court finds significant changes in environment and goals of the plaintiff and further notes a considerable degree of stability of environment in the defendant.
>
> d. Relationship to stepparent and step-sibling. The court finds that the day care center in which the child is presently enrolled appears to be an excellent facility, well staffed with state of the art technology. The court further finds that the stepmother, Lynda Fullmer, has developed an excellent loving relationship with the minor child and will be available as a homemaker in the home at times needed by the child. The

> court further finds that the minor child has seemed to develop an excellent appropriate relationship with his stepsister, Christa. (R. 198, 199)

The trial court also placed a considerable amount of weight on the child custody evaluation conducted by Bert Petersen, LCSW of Child Custody Evaluation Services which recommended that custody of Dagin be given to defendant-respondent. The court noted in Finding No. 20 of its Findings of Fact and Conclusions of Law, "the court finds that it is in agreement with the conclusion of Mr. Petersen as contained in his report." (R. 200)

In his report, Mr. Peterson looked at ten factors in determining what would be in the best interests of the minor child, to wit: primary caretaker, time available, integration into the family, stability of the environment, religious training, interference with visitation, frequent changes of residence, move out of state, relationship to stepparent and step-sibling, and support system. In particular, Mr. Peterson noted that within a ten month period, plaintiff-appellant had moved four times within a ten month period. In addition, she had had frequent changes of jobs and had placed the minor child in two different day care centers. (R. 58)

On the other hand, the evaluator noted that defendant-respondent had not had any changes of employment or residence and stated that the child's pediatrician had noted "a much calmer Dagin at a checkup towards the end of summer. The doctor would

not draw scientific conclusions from what he had observed but suggested that perhaps the child was feeling secure where he was living at the time. At that time he was living with his father." (R. 58) The evaluator also noted "although Laura has technically been the primary custodian of Dagin, it is not easy to determine if she has been the constant primary caretaker." (R.58)

The evaluator then inquired into whether Dagin, the minor child, was better off in a day care center or with his stepmother. To that end, the evaluator noted the following:

> At the day care center this evaluator asked if Dagin's teacher had ever asked the class to draw a picture of a family. They reported that they had and sent the pictures home with their parents. At Laura's home the picture was found, and she gave permission to this evaluator to keep the picture for reference. The drawing includes four figures on one side of the paper and a single figure on the other side of the paper. Dagin identified a mom with four figures and a mom as a single figure on the other side. He identified himself in the figure of four. Although we cannot draw conclusions as to who he wants to live with from the drawing, we can get a suggestion that Dagin has a concept of family that includes four people. Included in the picture were definitely a dad, a mom and Dagin and one other figure. (R. 58)

The decision of the trial court awarding custody of the minor child to defendant-respondent was supported by the evidence and testimony on the record, and it was "the trial court's prerogative to hear and weigh the conflicting evidence and to make findings of fact. We will not upset such findings when they are supported by substantial record evidence." Kramer at 628.

Contrary to the arguments of plaintiff-appellant, the trial

court did not make an award of custody to the stepmother. Indeed, a decision in the opposite result, if that analysis were followed, would lead to the conclusion that an award of custody to plaintiff-appellant would in fact be awarding custody of the minor child to a child care institution since plaintiff-appellant works full-time. Indeed, it is not plaintiff-appellant who will be taking care of the child during the day, but the day care center. Plaintiff-appellant's argument ignores the fact that the basis upon which she claims discrimination is the exact basis upon which she claims defendant-respondent should not be given custody of the minor child, that being full-time employment.

Although the issue of employment was raised in regards to time availability of each of the parties to spend with the minor child, the court based its decision on award of custody on the relative stability of the parties as articulated in Finding No. 12 of the Findings of Fact and Conclusions of Law as follows:

> The court finds that the child should dwell in a stable environment and that the defendant, petitioner herein, can provide better stability and is in a better position to take care of the minor child at the present time. (R. 196)

The court, having reviewed the child custody evaluation in which it was noted that stability of environment is important for the overall development of a minor child (R. 58), the testimony and evidence regarding plaintiff-appellant's frequent moves and job changes and the remarriage of defendant-respondent to a full-

time homemaker, the court could properly find that defendant-respondent had a greater stability in environment for raising the minor child, and therefore it was in the best interests of the minor child for custody to be awarded to defendant-respondent.

V. THE TRIAL COURT ERRED WHEN IT DID NOT SET AN APPROPRIATE AMOUNT FOR PLAINTIFF-APPELLANT TO PAY TO DEFENDANT-RESPONDENT AS CHILD SUPPORT.

Once the trial court had determined that defendant-respondent should be entitled to custody of the minor child, it should have set an appropriate amount in child support to be payable to defendant-respondent from plaintiff-appellant based on her earning capacity. Indeed, it was an abuse of discretion of the trial court not to do so.

Not only did the trial court fail to award defendant-respondent an appropriate amount in child support from plaintiff-appellant, the court ordered defendant-respondent to pay to plaintiff-appellant $250 a month for the three summer months that she had visitation with the minor child. In doing so, the court failed to take into consideration that there would be nine months out of the year in which plaintiff-appellant would have little or no financial obligation for the minor child, since the entire expense for the minor child would be born by defendant-respondent during the nine months in which he would have custody. Certainly, plaintiff-appellant, since she was not ordered to pay child support, could save the amounts that she should have been paying

in child support in order to support herself and the minor child during the three summer months visitation period.

VI. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO TERMINATE THE PREVIOUS AWARD OF ALIMONY.

Although the trial court found that at the time of the decree of divorce, plaintiff-appellant was only working part-time, and that at the present time, plaintiff-appellant had acquired a full-time position and was making twice the amount of money that she did at the time of the decree of divorce, it failed to terminate the alimony award given in the original decree of divorce of $200 a month.

In paragraph 11 of the court's Findings of Fact and Conclusions of Law, it indicated that it was of the "opinion that alimony in this matter should not continue forever." As such, the court took a position that the award of alimony was merely "to provide a cushion to defendant to return to a self-sustaining status." Claus v. Claus, 727 P.2d 184 (Utah, 1986).

Since plaintiff-appellant was now working full-time as a receptionist for a law firm, she was no longer in need of defendant-respondent's assistance and alimony should have been terminated immediately. Indeed, it was an abuse of discretion for the court's failure to do so.

VII. THE TRIAL COURT PROPERLY AWARDED THE 1987 AND 1988 FEDERAL AND STATE INCOME TAX EXEMPTION FOR THE MINOR CHILD TO DEFENDANT-RESPONDENT.

In entering its decision that defendant-respondent would be

entitled to the 1987 and 1988 income tax exemptions for the minor child, the court articulated that "he will be in primary custody at the end of 1987 for the bulk for 1988." (R. 321)

When further questioned by plaintiff-appellant's attorney regarding his decision, Judge Park indicated:

> ...and so there is going to be a tax saving and I sort of took that into consideration when I raised his child support to $250 instead $150. If we can create a greater stream of income for that purpose, I think that is what we ought to do. That is one of the reasons I raised the child support for those three months or whatever she elects to take during the summer. (R. 324)

Of particular note is the fact that the trial court awarded the payment of $250 per month in child support for the three summer months in which plaintiff-appellant would have visitation with the minor child. Subsequently, on the 9th day of February, 1988, this court ordered defendant-respondent to pay $250 a month in support from November, 1987 until final disposition of this appeal.

Based on the fact that Judge Park increased child support from defendant-respondent to appellant-plaintiff by virtue of the fact that he had awarded to defendant-respondent the income tax exemptions for 1987 and 1988 for the minor child of the parties, Judge Park's decision in that regard should be upheld.

CONCLUSION

Plaintiff-appellant has failed to show that the Fourth Judicial District Court abused its discretion when it awarded

custody of the minor child to defendant-respondent. In the absence of such a showing, this court should affirm and uphold Judge Park's prior rulings. In the event this court feels that the lower court decision is not substantiated by sufficient findings, then defendant-respondent requests this court remand all issues for further hearing.

DATED this 16 day of March, 1988.

WAYNE B. WATSON, P.C.
Attorney for Defendant-Respondent

CERTIFICATE OF MAILING

I hereby certify that I have mailed ten true and correct copies of the above Respondent's Brief to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, UT 84102 and two true and correct copies to Claudia Laycock, Attorney for Plaintiff-Appellant, postage prepaid, at P.O. Box "L", Provo, UT 84603 this 16 day of March, 1988.

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