1997

Mark Citton v. Gina Warnick Citton : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS
STATE OF UTAH

MARK CITTON,	:	
Plaintiff and Appellant,	:	Case No. 970154-CA
	:	
vs.	:	Priority No. 4
GINA WARNICK (CITTON),	:	
Defendant and Appellee.	:	

BRIEF OF APPELLEE

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY,
JUDGE DAVID S. YOUNG

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MODIFICATIONS TO STATEMENT OF THE CASE

Judge David Young issued a MEMORANDUM DECISION denying Plaintiff's Petition to Modify Decree of Divorce on November 27, 1996. Judge Young concluded that custody of the parties' minor children should remain with Defendant.

Plaintiff has worded some of the facts in the STATEMENT OF THE CASE erroneously or with innuendo favoring his position. Also, two pertinent facts have been omitted. I have addressed the facts I consider inappropriately presented in the following statement. I have also added the facts that were omitted as #8A and #14A.

B. Statement of Facts

8A. During the summer of 1995, Plaintiff moved his family from Salt Lake City, Utah, to Boise, Idaho. His decision to move made it impossible for the father to continue to enjoy the interaction he previously had with his daughters.

14. The mother's status, a divorced, single mother with sole custody of the children, is the same now as it was at the time the parties divorced.

14A. Plaintiff's child support has been $100 per child from the time of the divorce until the case currently under appeal was decided.

15. The mother's moves were necessitated by financial need and by the need to be near proper schooling for Sandy. Three of the moves were to live with her parents because of inadequate income to maintain a separate residence.

19. The children have had two father figures, other than the Plaintiff, and one additional mother figure resulting from the Plaintiff's remarriage.

20. Brittany needs stability in relationships. She needs a home with intact, problem-solving, loving family relationships with her mother and the siblings she is accustomed to living with.

21. This statement is redundant and is an obvious attempt to bias the court against the Defendant. This observation by Dr. Stewart has already been stated in #17 and #18.

23. through 29. These statements, other than #25, have no relevance unless the court is rendering decisions on whether Defendant is complying with the tenets of her faith. #25 is an observation by Dr. Stewart which was a fact in dispute and was not proved during the hearing. #28 and #29 are responsible courses of treatment for chemical imbalance and emotional concerns. Neither is a basis for changing a child's custody status.

30. The majority of the mother's work has been at jobs which allow her to be at home when the children are at home. She has foregone opportunity for additional education and more challenging employment in order to properly care for her children.

32. This arrangement was ideal for both parties and for the children and was only discontinued when Plaintiff moved to Idaho.

33. The last two sentences should be rewritten as follows: "She has provided love, nurturing, and care for them at times when they have been in her home. Defendant instigated opportunities for Maryann to maintain her relationship

with the girls, and with Defendant, while Mark was in Desert Storm. Defendant and Defendant's parents invited Maryann to participate in their family activities during that four month period."

34. There was no evidence presented indicating that Maryann is better able to deal with Sandy now than she has ever been. There have been occasions when Maryann has called Gina to come and get the girls or has taken them to Gina's home because she was unable to cope with Sandy.

35. The custody and visitation arrangement, prior to Plaintiff's move to Idaho, made it possible for the girls to be in Plaintiff's home often. This was helpful when Defendant was experiencing emotional upset in her life and is evidence of her concerns for her children, even in an emotional setting.

36. In March, 1995, Defendant wrote a letter to Plaintiff stating she was having emotional problems because her husband had just left. She asked him to take the girls until she got control of her emotions, possibly even through the summer. After only six weeks, she called and stated she had things under control and was prepared to take the girls back. She assured him she would have no problem caring for the girls, so she took them back into her home.

40. If the Plaintiff gets custody of the children and moves them to Idaho, the relationship between the girls and their half-brother, Zachery (age 10) will be terminated. He visits his father in Oregon during the summer months when the girls would be with Defendant. Zachery and the girls are very close, they have lived together for all of Zachery's 10 years and have a loving relationship.

41A. Defendant has been providing the services indicated in #41 for Sandy for 14 years. She is proficient as a caregiver. Her academic accomplishments are not comparable to Plaintiffs; however, she has 14 years of practical experience with an autistic child, from birth to age 14. During those years she has fed, dressed, cleaned, medicated, provided recreation, found appropriate schooling, provided transportation, dealt with the maturation process, and provided total care for her autistic daughter. She is eminently qualified to continue providing those services. She has also taken every opportunity to study how to properly care for autistic children but has not found time to write a paper or pursue a formal degree.

42. Plaintiff has always honored his child support obligations of $100 per month per child and Defendant has never petitioned the court for additional money as the $200 was agreed upon at the time of their divorce.

51. One of Brittany's teachers noted on a report card, "She's had difficulty in completing her work this term." She stated that Brittany was troubled because of the custody situation that was going on. (The custody situation became an issue when the Plaintiff moved from the state and was caused by the Plaintiff bringing suit).

57. As indicated in #51, the need for therapy was a direct result of the custody case brought by Plaintiff. Brittany had never required therapy before that time, nor has she required it since the decision under appeal was issued.

58. This observation by Dr. Stewart is inconsistent with her report. There are no negative reports about the care of the children from any of those interviewed. Dr. Stewart's concern seems to be that Defendant does not live Mormon standards.

60. There is no evidence that this is a true statement. In the past there have been numerous occasions when Sandy was unable to adjust even for a short period of time.

61. This is an inaccurate and unfair observation by Dr. Stewart. This question was asked of the Defendant as an afterthought in a telephone conversation about other matters. Defendant was very surprised by the question and had no opportunity to contemplate what she might do. No parent is required to make that kind of decision on the spur of the moment and without any forethought. In fact, all of Dr. Stewart's observations are made on the basis of a face to face discussion lasting less than one hour. She never visited the Defendant's home nor had any discussion with maternal grandparents or other extended family members who are currently involved in the girl's lives.

63. This is a questionable statement as Plaintiff, in a telephone conversation, told the Defendant's mother, "I will destroy Gina."

64. This recommendation is inconsistent with the findings as recorded in her report. She and all others interviewed have praised Defendant for her mothering, homemaking, relationship, and caregiving skills.

REPLY TO STATEMENT OF ISSUES ON APPEAL AND STANDARD OF REVIEW, AND RECOMMENDED DISPOSITION OF APPEAL

Plaintiff asks four questions in the statement of issues, "Did the trial court overlook relevant evidence, oversimplify the recommendations of the custody evaluator, show bias against the father, and make insufficient findings when denying the father's petition to modify?"

Even under the standard suggested in *Allred v. Allred,* 797 P.2d 1108,1111 (Utah App. 1990) (quoting *Stevens v. Stevens,* 754 P.2d 952, 958 (Utah App.1988), the answer to each of the four questions is an obvious NO.

Each of the questions asked is adequately covered in the MEMORANDUM DECISION, (Appendix B in the Appellant's Brief). The trial court's findings need not include a detailed, separate discussion of each issue raised by Plaintiff during trial. As long as the court's MEMORANDUM shows that all evidence was taken into consideration in rendering its decision, the decision meets the standards cited.

This appeal has no merit as an argument that the trial court failed to meet the standards set by the cases cited. It is an obvious attempt to reargue the facts and to hopefully find a judge who may be more receptive to the recommendation of the custody evaluator. As such, it is a frivolous case and should be dismissed without further hearing or oral argument.

Plaintiff has told Defendant's family that he plans to destroy her and he is attempting to do that financially. Defendant is a single mother with four children and is unable to continue paying attorneys to defend her rights as the custodial parent. Plaintiff has refused to pay the $3,000 he was ordered by the trial court to pay to

Defendant for attorney's fees. This refusal to respond to the order of the trial court has caused Defendant to lose the attorney who defended her throughout the trial court process. She does not have sufficient funds either to pay that attorney or to retain another one.

The trial court noted that this is the third attempt Plaintiff has made to modify the original decree. Of the first two, one was dropped and the other was resolved without a court hearing. It would have been resolved without any legal involvement if the Plaintiff had merely talked to Defendant. Adequate visitation has never been a problem and, in fact, Plaintiff has used the fact that he has the girls often as evidence that he should have custody.

Each modification effort has been to harass Defendant in an attempt to get her to voluntarily relinquish custody of the children. This history raises some question about the stability and emotional state of Plaintiff. Plaintiff has also participated in extended private negotiations with the girl's maternal grandfather in an attempt to resolve differences out of court. On two occasions a compromise was reached and in each instance the Plaintiff later backed out.

REPLY TO ARGUMENTS

Plaintiff has raised just two procedural issues, even though he felt it necessary to state them as three. Simply stated his issues are:

1. **The trial court did not use sufficient verbiage or proper form in the preparation of its MEMORANDUM DECISION.**
2. **The trial court decision was not supported by the evidence.**

I will address these two issues as one.

The first issue is a smoke screen. Rule 52(a) Utah Rules of Civil Procedure, *Hutchison v. Hutchison*, 649 P.2d 38, 42 (Utah 1982), indicates a custody decision must be supported by written findings and conclusions. In the instant case the trial court wrote eight full pages beginning with a factual background and then stating the reasoning followed in rendering the decision in favor of the Defendant. The first three pages of the written decision discuss the facts of the case and pages four through seven address the reasoning process the court used in arriving at a decision. In these pages the court specifically discusses the past, current, and future needs of the two children.

All of the requirements of the rules and case previously cited are met in those pages. The court also met the so-called *Marchant* standard in that it does specifically delineate what its reasoning process was. Plaintiff apparently has a problem with the way Judge Young writes. That issue, whether valid or not, is not an issue upon which the Appeals Court should rule unless he has obviously not reasoned in a logical manner. That is not the case.

The Plaintiff's discussion of what he calls the fourth prong in *Marchant* is merely suggesting that the court interpreted the facts of the case differently than the Plaintiff did. Plaintiff's entire case is based on the recommendation of the custody evaluation. A careful reading of that evaluation shows that the conclusion reached by Dr. Stewart is not supported by the rest of the report. Dr. Stewart praised the Defendant's mothering and caregiver skills based on interviews with school teachers, physicians, etc. She then recommended that the children be given to the Plaintiff. That recommendation was based on unfounded assumptions.

Dr. Stewart spent less than an hour with the Defendant. Based on that brief discussion, one follow-up phone call, and numerous discussions with the Plaintiff and his wife, she determined that Defendant was less emotionally stable and that she had used some alcohol and drugs in the past. She extrapolated that information to suggest that Defendant is impulsive, less insightful, and less able to correct lifestyle problems; and that the Defendant has a history of alcohol and over-the-counter substance abuse. The leap from social drinking and use of over-the-counter drugs to alcohol and substance abuse was one the trial court was able to see through and recognize that the recommendation was inconsistent with the findings.

Dr. Strewar also suggested that the children would likely receive surrogate care if they remained with Defendant. Her reasoning was that the Defendant may have to enter a vocational rehabilitation program that would take her out of the home, whereas with the Plaintiff the stepmother would be at home all day. Care by a stepmother is surrogate care. The Defendant has a fourteen year history of caring for

the children herself and has adjusted her work schedule to avoid the need for surrogate care.

The court did not agree with the evidence presented by the Plaintiff and specifically with the recommendation of Dr. Stewart. The fact that the court disagreed does not automatically mean the court decision was erroneous. The court was able to weigh all of the evidence, including that presented by school teachers, physicians, Defendant's therapist, and Dr. Stewart, and render its decision.

COURTS COMMENTS FROM THE BENCH

The court's comments relative to the Plaintiff's motives were somewhat surprising However, the judge apparently saw and heard things which raised some suspicion in his mind relative to the reason the Plaintiff was pursuing this case

If the remarks were inappropriate, they should be referred to the Judicial Conduct Commission for consideration They are not grounds for overturning and prolonging a case that is disrupting the lives of two young ladies who are perfectly content and well cared for in their current custody/visitation arrangement

REPLY CONCLUSION

There is no evidence that the court abused its discretion or that it used faulty reasoning in arriving at its decision The trial court should be upheld and this case dismissed without oral argument

DATED this 20 day of April, 1998

GINA M WARNICK

Gina M Warnick

Defendant/Appelee

CERTIFICATE OF HAND DELIVERY

I hereby certify that a true and correct copy of the foregoing Brief of Appellee, was hand delivered, this 20 day of April, 1998, to the following.

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