

1987

Kirk Randall Erwin v. Valerie Ann Erwin : Reply Brief

Utah Court of Appeals

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BRIEF

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DOCKET NO. 870576 CA

IN THE COURT OF APPEALS OF THE STATE OF UTAH

KIRK RANDALL ERWIN,

:

Plaintiff-Respondent,

:

vs.

:

VALERIE ANN ERWIN,

:

APPEAL NO. 870570-CA

Defendant-Appellant.

:

:

* * * *

REPLY BRIEF OF APPELLANT

* * * *

Appeal from the Judgment from the Seventh Judicial District Court
of Emery County, State of Utah, Honorable Boyd Bunnell,
presiding. Argument priority 7.

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

KIRK RANDALL ERWIN,	:	
Plaintiff-Respondent,	:	
vs.	:	
VALERIE ANN ERWIN,	:	APPEAL NO. 870570-CA
Defendant-Appellant.	:	
_____	:	

* * * *

REPLY BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

The Appellant in this matter has always taken the position that the clearly erroneous standard applied in this case. Respondent attempts to create an issue where none exists. A careful review of both the reply brief and Appellant's initial brief shows that the position taken by Appellant is correct. This Court must review the written findings of fact and conclusions of law to determine that the factors that should have been taken into account of the Trial Court were taken into account and that they were properly applied by the Trial Court Judge. Appellant's contention is that they were not.

The amendment to Rule 52(a) of the Utah Rules of Civil Procedure does not obviate the need for adequate findings of fact in a custody situation. In this case, the Court simply did not bridge the gap between testimony and findings. The Court gives no indication as to what facts it took into account in making its determination. In fact, in Appellant's situation, the Court specifically failed to take into account factors subsequent to Appellant's return to the State of Arizona where such factors were taken into account as to Respondent. Ultimately, of course, the Trial Court has the obligation in its findings to show not only its ultimate conclusion, but also to show that the conclusion is justified. The Trial Court simply failed to make such a determination and Appellant has clearly addressed that in her initial Brief and in this Reply Brief.

ARGUMENT

I

THE CLEARLY ERRONEOUS STANDARD OF RULE 52(a) IS
AND HAS BEEN THE STANDARD OF REVIEW IN DOMESTIC CASES.

Clearly the Trial Court is the place to adjudicate domestic matters. This is "because the proper adjudication of custody matters 'is highly dependent upon personal equations which the Trial Court is an advantaged position to appraise'", Smith v. Smith, 726 P.2d 423,425 (Utah 1986) citing Johnson v. Johnson, 323 P.2d 16, 19 (Utah 1958). The Utah Supreme Court and Appellate Courts have indicated that they will not overturn a Trial Court's determinations in a custody matter or in any other domestic matter unless the appellant can show a misapplication of the facts of that the Trial Court misapplied principals of law, Smith, 1986 supra and Rule 52(a), Utah Rules of Civil Procedure.

The Appellate Court must determine not only that the Findings support the Conclusion, but also demonstrate why and how that conclusion was reached, Smith, supra, see also Ebbert v. Ebbert, 744 P.2d 1019 (Utah App. 1987) (regarding findings of fact, conclusions of law and visitation issues) and Smith v. Smith, 751 P.2d 1149 (Utah App. 1988) (the application of findings of fact and conclusions of law and the distribution of property) both decided after amended Rule 52(a) went into effect.

The Court must review the written Findings of Fact and Conclusions of Law to determine that the factors that should be taken into account by the Trial Court Judge were (1) in fact

taken into account by the Judge and (2) properly applied by the Trial Court Judge.

Unless it is clearly erroneous the Trial Court's interpretation of the facts must be allowed, Berger v. Berger, 713 P.2d 695 (Utah 1985). However, this Court still must examine the Findings of Fact and Conclusions of Law to determine if they logically follow from the Court's determination of the facts, see also Ruhsam v. Ruhsam, 742 P.2d 123 (Utah App. 1987), Gardner v. Gardner, 748 P.2d 1076 (Utah 1988) and Davis v. Davis, 749 P.2d 647 (Utah 1988).

II

THE TRIAL COURT'S FAILURE TO MAKE ADEQUATE FINDINGS OF FACT IS NOT OBVIATED BY AMENDED RULE 52(a).

In its initial brief, the Appellant sets forth the facts considered in the Court's weighing of the actions and testimony. To sum up, the Court found numerous items in its review of custody factors subsequent to the couple's return to Arizona. However, the Court failed to make any findings regarding the ability or inability of the Appellant to meet the same test applied to the Respondent. The Court simply failed to make any findings in this regard after Appellant's return to Utah and subsequent to the Court's award of temporary custody.

Respondent states that the Court entered into a detailed analysis of all factors to be determined in an award of custody. While the Court did in fact walk through those factors as to the Respondent subsequent to his return to Arizona, it did not do the same as to the Appellant. The Court did make a detailed analysis of Appellant's conduct in Arizona but made no findings as to her conduct after she returned to the State of Utah. This is even subsequent to the Court's award of the temporary custody of two of the minor children to the Appellant.

The Respondent goes through a detailed analysis of what evidence the Court could have used and might have used in arriving at some of the conclusions. The missing ingredient here, however, is that the Court noting the findings that the

Respondent claims could be drawn from the testimony he outlines in his brief. It is unfortunate that the Court did not make as detailed an analysis of the evidence presented by the Respondent as the Respondent does in his Brief. The Respondent also gives a detailed review of the findings of the custody evaluator. This is quite interesting in light of the fact that the Court makes no mention of the custody evaluation in its findings of fact. The Court simply ignored the custody evaluation. In even further error, the Respondent refers to the testimony of Rebecca Semken in giving an opinion of the custody evaluation as borne out on page 178 of the Trial Transcript (RA 278).

"Q: All right, did you formulate an opinion with respect to the minor child Lance as to the opinion of Mrs. Scartezini as outlined in the home study."

"A: I basically agreed."

Whereupon Appellant's attorney objected to the testimony in that Mrs. Semken had failed to speak with all parties involved and the Trial Court overruled the objection. The legal issues concerning this decision are more clearly set forth in Section II of Appellant's original Brief on page 15.

The Respondent goes through this testimony of Rebecca Semken and calls the Court's conclusions findings of fact; however, there are no such conclusions included in the Court's findings of fact. What is missing is the bridge between the testimony and the conclusions. The Findings of Fact are suppose to create that bridge; however, the Court's findings do not indicate what evidence was relied upon.

The Respondent in his Brief takes us through the factors that the Court supposedly addressed in making a determination of custody. Respondent also takes us through all of the evidence that supposedly supports the Court's conclusions; however, the only findings of fact that were made in this case are the findings and conclusions that are set forth by the Respondent in his Brief. There is absolutely no connection between the testimony and the Court's findings. Even a cursory review the Court's findings would reveal this.

The Appellant doesn't really dispute the factors that were set forth by Respondent in his Brief; however, the findings of fact issued by the Court in any of its statements are simply not supportive of the factors Respondent uses.

It is also somewhat ironic that Respondent relies heavily upon the custody evaluation performed by Mrs. Scartezini and the evaluation of the evaluation by Ms. Semken, but nowhere does the Court refer to the custody evaluation in its findings.

Appellant asserts that the failure of the Trial Court to take into account the care received by the two children in her custody and her ability to care for them during the time period in question is a clear abuse of discretion. Obviously, if the Trial Court had determined that the children were not properly cared for, well adjusted or for some other reason were not appropriately cared for by the Appellant during this time period, it would be within the Trial Court's discretion to make said determination based upon suitable Findings of Fact and

Conclusions of Law. However, the Court simply ignored this and made no mention of these two children, either in its Memorandum Decision or its Findings of Fact. To fail to make a decision and then simply transfer custody based on the care received by the other two children is an abuse of discretion and shows no reliance upon the evidence presented.

In its Findings, in paragraphs 4 and 6, the Court apparently relies on certain factors to make a determination of custody. The Court reiterated Respondent's testimony regarding the Appellant's activities in Arizona. However, there was no showing that the instability the Court was concerned about continued after December of 1986 when the Appellant was awarded temporary custody of the two younger children. There was no testimony presented regarding lack of supervision or limited supervision of these two children. Rather, the Court sets forth the activities in Arizona as an example of the Appellant's previous poor judgment, but sets forth no Findings as to any continued poor judgment or lack of care of the minor children. The Court does indicate that the Appellant "moved in with and began to live with another man and that she continues to this time to live with him with said two children and does so openly." (Findings of Fact, paragraph 4).

It would seem that, even though the Court does not set forth the reasons in its Findings, that Appellant's relationship with this individual is a substantial basis for the Court's failure to continue the existing custodial relationship. The Respondent

also challenges the Appellant's position that the Court improperly took into account the sexual relationship between the Appellant and her now husband, Mr. Michael Stice. The Courts have been clear that whether its a change of custody or an award of custody, the best interests of the children are to be taken into account. See Hogge v. Hogge, 649 P.2d 52 (Utah 1982). The only distinction between the two is that for a change of custody, the Hogge rule requires a substantial change in circumstances. The best interest test remains the same. In Sanderson v. Tyron, 739 P.2d 623, 625 (Utah 1987), the Utah Supreme Court determined that "an extra marital sexual relationship is insufficient to justify a change in custody." In this case, the Court goes so far as to rule that a polygamist relationship alone is not a sufficient basis to take custody from the individual living in the polygamist relationship. The Court determined that an individual sexual relationship, absent some showing of adverse effect upon the children, was not sufficient as a factor for an award of custody. This position is further supported in case law in Fontenot v. Fontenot, 714 P.2d 1131 (Utah 1986); Shioji v. Shioji, 712 P.2d 197 (Utah 1985) and Stuber v. Stuber, 244 P.2d 650 (Utah 1952).

The Courts have determined that, in this day and age of pre-marital relationships, unless an adverse effect can be shown upon the children, the Court will not take the mere fact of a relationship outside the bounds of marriage as grounds for an award of custody. In that the Trial Court found no adverse

impact, it improperly considered the existence of a relationship between Mrs. Erwin and Mr. Stice.

The Trial Court has the obligation in its findings not only to indicate its ultimate conclusion, but also must "show why the ultimate conclusion it reaches is justified", Smith (1986), supra, citing Milne Truck Lines v. Public Service Commission, 636 P.2d 1047 (Utah 1981); Elwel v. Board of Education, 626 P.2d 460 (Utah 1981). In custody determinations, these findings are critical in that "proper findings of fact ensure that the ultimate custody award follows logically from and is supported by the evidence and the controlling legal principals," Painter v. Painter, 80 UAR 14 at 15 (Utah App. 1988) citing Smith v. Smith, 726 P.2d 423, 426 (Utah 1986). Therefore, it is not necessary, or it should not be necessary, for an Appellate Court to try and guess the basis for the Trial Court's Findings of Fact. In this situation, there are no Findings of Fact in regard to the ability or lack thereof of the Appellant to care for the children. In making such a determination, the Court should look to "the particular needs of the child and the ability of each parent to meet those needs," Martinez v. Martinez, 728 P.2d 996 (Utah 1986), citing Smith, supra and Hutchinson v. Hutchinson, 649 P.2d 38 (Utah 1983) and that was not done in this case.

III


CONCLUSION

The Appellant seeks relief from the Trial Court's decision in this matter. In all issues presented, the Appellant seeks reversal of the Trial Court's decision with remand for further hearing with instructions from the Appellate Court regarding the issues presented.

Regarding custody, the Trial Court gave no indication in its Findings of Fact as to how its Conclusions were reached. It appears that substantial testimony was not discounted or found to be not credible, but rather was plainly ignored. This constitutes an abuse of discretion in the decision made by the Trial Court. In addition, this case requires remand for the Court to issue proper Findings of Fact in regard to the custody determination.

As can be seen, there are numerous issues in this case that need to be resolved. The Appellant requests that the Appellate Court reverse the issues presented and remand the case back to the Trial Court with specific instructions regarding the necessary Findings for custody.

Respectfully Submitted this 1 day of November,
1988.


P. Gary Ferrero

MAILING CERTIFICATE

I hereby certify that I mailed four (4) true and correct copies of the foregoing Reply Brief of Appellant to Joane P. White, Attorney for Respondent, 5th Street Plaza, 475 East Main, Suite 1, Price, Utah 84501, postage prepaid, this 2nd day of November, 1988.

Ramie Seger