1978

Dianna Lynn Jorgenson (Ovard) v. James Scott Jorgenson : Respondent' S Brief on Appeal

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF

------0------

IANNA LYNN JORGENSON (OVARD),

Plaintiff and
Appellant,

-vs.-

MES SCOTT JORGENSON,

Defendant and
Respondent.

RESPONDENT'S

AN APPEAL FROM A JUDG
IN AND FOR THE COUNTY
HONORABLE

M. HARDING
West Main Street
O. Box 126
erican Fork, Utah 84003

orney for Plaintiff
ellant

IN THE SUPREME COURT OF THE STATE OF UTAH

------0------

DIANNA LYNN JORGENSON (OVARD),
Plaintiff and Appellant,

-vs.-

JAMES SCOTT JORGENSON,
Defendant and Respondent.

Supreme Court No. 15434

------0------

RESPONDENT'S BRIEF ON APPEAL

* * * * * * * * * *

AN APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH
HONORABLE DAVID K. WINDER

* * * * * * * * * *

RAY M. HARDING
59 West Main Street
P.O. Box 126
American Fork, Utah 84003

Attorney for Plaintiff - Appellant

STEVEN W. ALLRED
225 South Second East - Suite 200
Salt Lake City, Utah 84111

Attorney for Defendant - Respondent

TABLE OF CONTENTS

AUTHORITIES CITED

CASES

STATUTES

IN THE SUPREME COURT OF THE STATE OF UTAH

------0------

DIANNA LYNN JORGENSON (OVARD) Plaintiff and Appellant, -vs.- JAMES SCOTT JORGENSON, Defendant and Respondent.	:	Supreme Court No. 15434

------0------

RESPONDENT'S BRIEF ON APPEAL

------0------

NATURE OF THE CASE

This is an action based upon mutual Petitions for Modification filed by each party pursuant to a preceding divorce action. As pertinent to this appeal, appellant (mother) sought the imposition of more restrictive child visitation while respondent (father) sought a more definite statement of his rights of visitation.

DISPOSITION IN LOWER COURT

Upon a full hearing of the lower court, the Petition of appellant, as it pertains hereto, was denied while respondent's Petition, with modifications, was granted.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the lower court's ruling in its entirety.

STATEMENT OF FACTS

That parties hereto were divorced in 1972. The Decree therein granting custody of the parties' minor child to appellant with respondent being awarded reasonable rights of visitation. (R. pg. 17).

Subsequent to the divorce of the parties, defendant began to experience difficulty in exercising his visitation (T. 107-110). That difficulty resulted in defendant initiating three seperate court proceedings in order to enforce his visitation (R. 11, 24, 61-63). At the first hearing, the parties were ordered to avail themselves of counseling in order to facilitate visitation (R. 19). The second hearing resulted from plaintiff's failure to comply with the recommendations of the Court (R. 23). At the second hearing, the Court set forth temporary visitation with the direction that the parties endeavor to increase the extent of the visitation by defendant (R. 26). At the third hearing, again as a result of plaintiff's denial of reasonable visitation, the Court ordered extremely specific visitation to defendant and, in light of plaintiff's past performance, made visitation an integral requirement of child support obligations.(R. 67-70 The courts have unanimously upheld the visitation rights of the defendant and have, in fact, encouraged an increase of visitation (T. 12). This in spite of the fact that plaintiff presented a Dr. Bernell Christensen at the third hearing who

recommended that defendant be deprived of visitation for at least six more years. (T. 50)

Plaintiff, since the parties divorce, has consistently frustrated the rights of the defendant, and has maintained an attitude contrary to the best interest of the child (T. 13-15, T. 20, T. 22, T. 25, T. 27, T. 28, T. 29, T. 32, T. 42, T. 89, T. 107-110, and T. 152). Throughout the trial of this matter, no evidence was ever produced to show defendant was other than a normal father (T. 59, 63, 124) and the Court so found.

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING VISITATION OF THE MINOR CHILD TO DEFENDANT

It cannot be gainsaid that the best interest and welfare of the minor child constitutes the primary concern and guiding principle in the award of visitation of a child caught in the turbulance of divorce.

The legislature of this state has enunciated that policy in §30-3-5, Utah Code Annotated, 1953, which reads:

> "...Visitation rights of parents, grandparents and other relatives shall take into consideration the welfare of the child."

That doctrine has been followed by this Court in its decisions. See Sampsell v. Holt, 115 Utah 73, 202 P. 2d 550 (1949); Steiger v. Steiger, 4 Utah 2d 273, 293 P. 2d 418

(1956); Johnson v. Johnson, 7 Utah 2d 263, 323 P. 2d 16 (1958); Hyde v. Hyde, 22 Utah 2d 429, 454 P. 2d 884 (1969); Arends v. Arends, 30 Utah 2d 328, 517 P. 2d 1019 (1974); and Mecham v. Mecham, 544 P. 2d 479 (1975).

It is no less well settled that the trial court's decision as to children will not be disturbed unless it is clear that a breach of discretion occurred at the lower level. Graziano v. Graziano, 7 Utah 2d 187, 321 P. 2d 931 (1958); Sartain v. Sartain, 15 Utah 2d 198, 389 P. 2d 1023 (1964). The reason for the "infallibility" rule is that the trial court is in an advantaged position to observe the demeanor of the witnesses and form opinions. As stated in Sampsell supra, at 115 Utah 80:

> "The trial judge had the opportunity, as we do not, of seeing the parties and the witnesses, of observing their demeanor, and of forming opinions."

And in Hyde supra, the court reiterated that concept wherein it states at 454 P. 2d 885:

> "The trial lasted several days, and since both parties testified in open court and were present during the taking of the testimony of other witnesses, the trial judge was in a much better position to determine the question of fitness of the parties to have custody than are we who are limited to the reading of the record. He had the advantage of observing the behavior of the parties and could, therefore, better judge the emotional stability of each, than we can."

In addition, appellant would apparently have matters of this nature determined by psychiatrists and not in the traditional manner (T. 137A-139). However, the Mecham case, supra, at 544 P. 2d 481, appears to shed light on not only the "infallibility" rule but on the roles of psychiatrists vis-a-vis the judiciary in making this type of determination. In that matter, it was held:

> "The court had the benefit of testimony of psychiatrists, who gave their expert opinions, based on the appraisals they were able to make of the parties, the minor child, and the situation in which they were involved. Their opinions are worthy of careful consideration by the court, but are advisory only, and in no sense controlling. The parties appeared and testified. The court had the opportunity to observe their appearance and demeanor and to evaluate to a limited degree their personalities, attitudes and emotional stability, and to make a judgment in reliance on all the evidence produced at the trial as to what appeared to be in the best interest of the minor child. The ultimate decision was for the trial judge, who was in a more favorable position than we are to weigh the evidence as it came from the mouths of the witnesses before him, and to make a proper determination of the issues presented.

It is abundantly clear from the record that the trial court did carefully weigh and consider the testimony

of plaintiff's expert (T. 147 and 152). However, in his position, he was able to weigh that testimony in relationship to the testimony of the parties and their demeanor. Such consideration should not be disregarded without a substantial showing of abuse on the part of the trial court. In making its order, the Court was obviously concerned about the need for respondent to visit with the child and with appellent's continually flaunting of the Court's previous orders. (T. 22, 42, 146, 149, 150, 151, 152, 153). As a result of that concern, the Court properly exercised its considerable equitable powers. This court has affirmed the trial court's powers in Stanton v. Stanton, 517 P. 2d 1010 (1974) at 1014:

> "...In matters concerning custody and support of children, because of their highly equitable nature, it is appropriate for the trial court to take into consideration the entire circumstances in making any order of enforcement of the decree, by contempt or otherwise, having in mind equitable powers, to make any adjustment he may think fair and justified."

The Court was concerned that, because of the history of this matter, its method of enforcement was proper. (T. and 150). Such an order is not without precedence. In Peterson v. Peterson, 530 P. 2d 821 (1974), the trial court suspended support payments for lack of visitation. In affirming that order, the court said at 822:

> "That requirement was a condition precedent to obtaining support money, i.e. - the exercise of Mr. Peterson's right to see his children. Mrs. Peterson had not permitted this, which became the basis for her contempt. In short, she had not done and in not doing equity the while she insists on it, by now seeking, without any displayed penitence, remorse or strings attached, to invoke the very jurisdiction of the same court that she flouted before."

The facts herein are so similar as to obviate the further need for comparison. When the Court is convinced, as it is here, that customary methods of enforcement are useless, it may impose its considerable discretion to impose a method of enforcement that will ensure compliance.

CONCLUSION

Plaintiff has intentionally and consistently disregarded the orders of the court allowing defendant child visitation. Plaintiff has additionally failed at every step of these proceedings to show that defendant is anything but a normal father in a similar situation. At each proceeding the Court has determined that defendant is entitled to visitation and the hearing precipitating this appeal is no exception. The Court, in attempting to deal with a difficult situation has exercised its equitable powers in order to enforce its decision as it relates to the best interest and welfare of the child, that is, the fostering of a father-son

relationship.

RESPECTFULLY SUBMITTED this 6th day of March, 1978.

/s/
STEVEN W. ALLRED
Attorney for Defendant - Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the foregoing Brief of Respondent upon Ray M. Harding, attorney for Plaintiff and Appellant, at 59 West Main Street, P.O. Box 126, American Fork, Utah 84003, by United States Mail, postage prepaid, this 6th day of March, 1978.

/s/