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Randall Frank Mark v. Tamra Jean Hancock Mark, Janis Peck Hancock : Brief of Appellant

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

RANDALL FRANK MARK,
Plaintiff and Appellant,

vs.

TAMRA JEAN HANCOCK MARK,
and JANIS PECK HANCOCK,
Defendants and Respondents.

Case No.
13733

APPELLANT'S BRIEF

Appeal from the Judgment of the Third District Court for Salt Lake County, Honorable James S. Sawaya, Judge

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STATEMENT OF THE KIND OF CASE

This is an action between natural parents of a minor child to determine permanent custory of the child. The parties obtained a divorce in the State of Alabama where the Court temporarily deprived both parties of custody on the ground of immaturity and awarded temporary custody of the child to the Defendant's step-mother.

DISPOSITION IN LOWER COURT

The case was tried to the Court. From a judgment in favor of the Defendant, the Plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment and judgment in his favor as a matter of law, or that failing, a new trial.

STATEMENT OF FACTS

The parties were residents of the State of Utah and were married in this State. The parties moved to Alabama because of the Plaintiff's enlistment in the United States Air Force. While in Alabama, Defendant initiated proceedings for divorce and a Decree of Divorce was issued in favor of the Defendant. The minor child of the parties was temporarily placed in the custody of the Defendant's step-mother who resided in Salt Lake City, Utah, and visitation privileges were granted both the Plaintiff and the Defendant. The Alabama Court held that both parties were immature and directed that action for permanent custody be initiated in the State of Utah (R-37, 38).

Plaintiff initiated an action for permanent custody of the minor child on the 19th day of December, 1973. The named Defendants in that action were the Defendant, Tamra Mark, natural mother of the minor child, and Janis Peck Hancock step-mother of the Defendant Tamra Mark. Janis Peck Hancock defaulted in answering the Plaintiff's complaint and on the 25th day of January 1974, her default was entered (R-26).

The case was tried to the Honorable James S. Sawaya, District Judge, on the 29th day of April, 1974. Prior to the hearing, the Plaintiff moved the Court for

an order to compel a pre-hearing evaluation of both parties but the motion was contested by the Defendant and the Court denied the motion for the pre-hearing evaluation (R-11, 20).

The trial was tried on the 29th and 30th of April 1974 and on May 1, 1974 the Court entered its Memorandum Decision, holding that the Defendant and natural mother of the minor child was a "fit and proper person to be awarded permanent care, custody, and control of said minor child" (R-14).

ARGUMENT

POINT I.

THE COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR A PRE-HEARING CHILD CUSTODY EVALUATION OF THE PARTIES.

The Plaintiff, on April 2, 1974 moved the Court for an order directing the Plaintiff and Defendant to submit necessary information for a child custody evaluation to be conducted by the Salt Lake Mental Health Division. Although no written objections were filed by the Defendan,t, counsel for the Defendant appeared at the time of hearing and objected to the child custody evaluation on the grounds that such evaluation would be a violation of the Defendant's rights under the Fifth Amendment of the United States Constitution. Under Section 30-3-17 and 30-3-17.1 Utah Code Annotated 1953, as amended,

the Utah Legislature granted the District Courts authority to require either or both spouses to appear before counselors, physicians, psychologists, psychiatrists, social workers, or other specialists and granted such experts the right to submit written evaluations of the prospects or prognosis without devulging facts or revealing confidential disclosures. Certainly these statutory provisions indicate the Legislature was cognizant of the parties' constitutional rights and these provisions do not violate these rights in any way. The requested evaluation is hardly distinguishable from the present adoption evaluations required in adoption proceedings in the State of Utah.

The Defendant may argue that the consent of both parties *is* required for the evaluation to be conducted pursuant to Section 30-3-15.2 Utah Code Annotated 1953 as amended. However, that provision does not dictate a joint agreement between parties before an investigation can be ordered by the Court. The Section merely states that *a written report may be introduced in evidence* when both parties consent to it in writing. Obviously if a party objects to the written report being submitted as evidence, the Court is then empowered to proceed under Section 30-3-17.1 Utah Code Annotated, 1953 to receive a written evaluation of the *prospects and prognosis without receiving specific facts or without violating confidential disclosures.* (Emphasis added.)

Moreover, it seems inconsistent for the Defendant to object to an evaluation or to an investigation of at least the immediate environment in which the minor child

is proposed to be placed when she is then permitted to come to Court and testify to the adequacy or excellence of the environment in which she proposes to place the child. This situation in analogous to cases where a party in a civil action claims a privilege under the Fifth Amendment and attempts to frustrate the due process of the law. Argument on this point will be made under Point II of Plaintiff's Brief.

POINT II.

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE BEST INTEREST OF THE MINOR CHILD IS BETTER SERVED BY AWARDING CUSTODY OF THE MINOR CHILD TO THE DEFENDANT AND NATURAL MOTHER.

The Defendant throughout the entire trial contended that the Plaintiff's burden was to show that the Defendant, natural mother, was unfit, immoral, or incompetent before the presumption in favor of the mother was overcome. All of the recent cases decided by this Court consistently hold that the controlling consideration in cases such as this is the "best interests of the child". This position is most clearly illustrated in *Hyde* vs. *Hyde*, 22 U. 2d 429, 454 P. 2d 884 (1969). The Court, in affirming the lower Court's award of custody to the father, indicated that the welfare of the child was the paramount consideration under Section 30-3-5 Utah Code Annotated 1953.

The Court quoted *Steiger* vs. *Steiger*, 4 U. 2d 273, 293 P. 2d 418 (1956) and *stated*:

> "The divorced mother has no absolute right to custody but . . . the policy of our decisions has been to give weight to the view that all things being equal, preference should be given to the mother in awarding custody of a child of tender years . . ."

The Court further stated:

> "The Defendant has no absolute right to custody . . . because she is the mother. At best she is in an advantaged position when all things are equal. However, when things are not equal as regards the ability of the parties to care for and properly rear the child, then any advantage customarily given to the mother must be denied, and the award made so as to provide for the best interest and welfare for the child."

It is obvious that the decisions today look beyond the maternal presumption regardless of the tender years of the child. The proposed permanent home of the child, the child's physical, emotional, educational, psychological, and financial needs are to be considered all with the view towards determining what best serves the child and obviously differs from past decisions which refer to the rights of the parents as compared to the rights of the child in question. In *Stocks* vs. *Stocks*, 14 U. 2d 314, 383 P. 2d 923 (1963) the Court *stated*:

> "The rule which favors the mother is only one of many factors which must be considered and is applicable only if *all* things are equal . . ."
>
> "The instant case is a good example of the undesirable and impractical results that would emanate from adopting the view urged by Plaintiff that the Court must invariably, in all circumstances, award the custody of children under 10 to the mother unless she is found to be an immoral or incompetent person."

As indicated, the Defendant's position throughout the entire trial presumed that the Court must find that the Defendant was unfit or immoral or incompetent before the Plaintiff, the natural father, could prevail in the action. The Memorandum Decision also suggests that perhaps the natural mother would have to be shown to be unfit before the natural father could prevail. The precise wording of the Memorandum Decision *states*:

> "In this matter the Court finds that the Defendant as mother of the minor child is a fit and proper person to be awarded the permanent care, custody and control of said minor child" (R-14).

Plaintiff proceeded on the theory that the best interest of the child would better be served by the total circumstances which the Plaintiff could provide as compared to that which the Defendant could provide. The evidence at the trial showed that the Plaintiff was a veteran, having obtained an honorable, hardship discharge from the United States Air Force upon recommendation

of the Court in Selma, Alabama (R-37). The Plaintiff is presently enrolled at Weber State College majoring in Police Science with a minor in Psychology and is an A student. He presently resides with his parents in Salt Lake City and the parents have consented to providing him with the facilities with which to raise the minor child and to provide the necessary care and supervision for the child during Plaintiff's attendance at college or whenever he was unable to be with the minor child. The testimony further indicates that the child's room had been recently remodeled to accommodate the child and that the yard is completely fenced to insure the safety of the child (3P. thru 9P.). The neighborhood provides adequate playmates for the child. The medical needs of the child, since his arrival here in Salt Lake City has been provided primarily by the Plaintiff or the paternal grandparents of the minor child. The actual custody of the minor child has been primarily with the Plaintiff or the paternal grandparents of the minor child as indicated by the records kept by Plaintiff and the paternal grandparents (Exhibit 14P. and 15P.). The paternal grandmother is a housewife and is always available and willing and able to care for minor child in the absence of the Plaintiff.

In contrast, the Defendant, the natural mother, resided in a two bedroom apartment without any special accommodations for the minor child (R-63 thru R-65). The Defendant shared the apartment with a roommate on the third floor of the apartment complex and the Defendant would utilize the living room couch as her sleeping quarters during the visitation by the minor child al-

though the Defendant characterizes the second bedroom as "his bedroom" (R-65). It is obvious that the accommodations which she provided for the minor child were physically inadequate and that in fact the minor child did not have "a separate bedroom of his own" but was compelled to share all of the living quarters with the other two occupants. In the absence of the Defendant the child is shuffled between the commercial nursery, a maternal great grandmother and the step-mother of the Defendant. The step-mother would obviously be more capable, physically to care for a minor child of two years except for the fact that she had six minor children of her own and had an infant less than one year old and could not accommodate still another. The maternal great grandmother Mrs. Hancock, was the principal baby sitter when the child was not in a commercial nursery. She testified that she was competent to care for a child two years old and had no apparent handicaps or nervous conditions which might tend to detract for her capacity as a baby sitter of two year old boy. Notwithstanding this fact, however, she admits that she has had constant headaches for years and that she has taken pain pills, tranquilizers, and barbiturates for her headaches and has taken pain killers for her headaches. She further confirms that her headaches have persisted for over 30 years and that she goes to a doctor all the time (R-69 thru R-71).

The Defendant admits to the use of narcotics some four years ago. The person whom the Defendant indicated she intended to marry also utilizes narcotics and the Defendant's roommate utilizes narcotics. Although

there is no testimony in the trial that the Defendant used narcotics or drugs after the incident to which she testified the testimony was clear that she permitted the use of narcotics by her roommate and by her fiance in the presence of the minor child.

The Defendant's total efforts in obtaining custody of the minor child was shrouded by deception and began as early as the hearing in Selma, Alabama where she convinced her step-mother that a letter was needed from the family Bishop to prevent the child from being placed in a foster home when in fact such was not the case. She accused the Plaintiff of psychiatric abnormalities in Alabama only to have the Plaintiff found normal by psychiatrists in Alabama. She again accused the Plaintiff of the same psychiatric abnormalities prior to and during the trial in Salt Lake City. Yet when Plaintiff attempted to obtain an evaluation of both parties and the environment in which the child was proposed to be raised, the Defendant objected to Plaintiff's motion for such an evaluation.

Although the factual circumstances are distinguishable, it is analogous to *Gerard* vs. *Young*, 20 U. 2d 30, 432 P. 2d 343, where the Utah Supreme Court ruled that a person may not rely on the Fifth Amendment in *civil* cases to frustrate an action and prevent the other due process of the law. In so holding, the Court, citing Wigmore and Am. Jur. *stated*:

> "The constitutional provision may not be set aside, but the only purpose was to make the State convict an accused person by evidence other than

admissions of the Defendant himself. *It was not intended to allow a party in a civil action to escape civil liability by claiming the privilege.* He need not incriminate himself, but he has no constitutional assurance that the jury must seal up their minds to the only reasonable inference which could be drawn from his failure to give evidence that would throw light upon the matter before the court." (Emphasis added.)

Citing McCormick on Evidence, page 163, section 80, the court *states*:

"Under familiar principles an unfavorable inference may be made against a party not only for destroying evidence, but for the mere failure to produce witnesses or documents within his control. No showing of wrong or fraud seems to be required as a foundation for the inference that the evidence if produced would have been unfavorable. Why should not this same conclusion be drawn from the party's active interposing of a privilege to keep evidence out?"

The Court also cites *Phillips* vs. *Case*, 201 Mass. 444, 87 N. E. 755:

"It is a rule of law that the objection of a party to evidence as incompetent and immaterial, and insistent upon his right have his case tried according to law, cannot be made a subject of comment in the argument. On the other hand, if evidence is material and competent except for a personal privilege of one of the parties to have it excluded under the law, his claim of the privilege may be referred to in argument and considered by the jury, as indicating his opinion

that the evidence, if received, would be prejudicial to him . . . ".

As earlier stated, the facts on all of the above citations differ from the facts of the case at bar. However, all of the circumstances are analogous, namely; a party in civil action cannot frustrate due process of law by claiming the privilege of the Fifth Amendment. At least, the evidence withheld under such claim is to be presumed unfavorable.

If we can safely assume that a pre-hearing evaluation would have provided information regarding accommodations made by Defendant for the minor child, information on Defendant's mental and emotional qualifications to care for a minor son, information regarding the use of narcotics or drugs, information regarding Defendant's fiance, roommate, grandmother, step-mother and all other pertinent information, we should be able to assume from Defendant's claim of privilege from consenting to the evaluation that the evidence would have been unfavorable or at least a substantial and material portion of the evidence would have been unfavorable.

A comprehensive article on custody matters was printed in the Marquette Law Review, Vol. 56, Fall 1972, page 51, No. 1. The article cites the proposed Uniform Marriage and Divorce Act, which was drafted by the National Conference of Commissioners on Uniform State Laws, August, 1970.

The article points out the various factors which the

courts have based custody decisions on and *Lewis* vs. *Lewis*, 252 Wis. 576, 32 N. W. 2d 227 (1948) is particularly in point. The authors of the article, members of the Wisconsin Bar Association and the Wisconsin Judiciary *state*:

> "In *Lewis* vs. *Lewis*, the court approved finding that the wife was unfit because of illicit relationship, which started while her husband was in the Armed Forces and continued after his return, showed so great a disregard or proprieties as to warrant awarding custody to the husband. The wife's unwillingness to give up her improper association and consider conventionalities required awarding custody to the husband." (Pg. 64.)

In the case at bar, the record is practically devoid of any material evidence which could reasonably lead the court to hold that the Defendant has met the test of showing that her conduct, her emotional and physical qualifications, her financial circumstances and the environment in which she proposes to place the minor child in question, are all in the best interest of the child.

There is ample evidence, on the other hand, to prove that the best interest of the child is served by awarding the custody of the minor son to the Plaintiff. In addition to the benefits earlier referred to, the testimony of the psychiatrist indicates that, although brief, the one visit of the Plaintiff and his minor son gave the psychiatrist a stress situation where the psychiatrist could observe the interaction between father and son. The doctor's tes-

timony, probably the most important of all the testimony before the court, is quoted in part below:

> "Well, my evaluation of both father and child was to include a normal . . . include a mental status examination, see how they functioned in terms of their emotional status describing their behavior, attitude, thinking and feelings, how they responded intellectually to questions and so forth and I did perceive them both on that basis" (R-146, 147).
>
> ". . . Mr. Mark is an above average young man who is a very physical individual who has in spite of a rather strong physical interest begun to explore the intellectual foundation for child rearing and has begun to derive a philosophy as to how he might best interact with the child that he is able to use the resources about him in terms of influencing him for appropriate child rearing and as in the illustration that I gave, he was able to deal with an appropriate behavior" (R-147, 148).
>
> "He was able to deal with negative feelings. He was consistent. He was compassionate. He was firm I would have to say in dealing with the child's distress. In setting limits he did quite well and that he had good judgment and he is an intelligent young man" (R-148).
>
> "As the child became distressed and upset this would be an opportunity to see how a parent deals with an upset child and Mr. Mark was compassionate, was understanding of his situation, described what was going on to me, how he felt about it, what he perceived the child to be, what his distresses were and he dealt with him firmly but quite fairly and appropriately and did not

become unduly distressed even though it would be impossible . . . it would be possible to distress a person" (R-145, 146).

The evidence before the Court does not justify finding that the best interest of the minor child is served by awarding his custody to the Defendant mother and does support a judgment in favor of the Plaintiff.

POINT III.

THE TRIAL COURT ERRED IN REFUSING TO GRANT A NEW TRIAL ON THE EVIDENCE PROFFERED.

On May 3, 1974 the Plaintiff moved the Court for a rehearing based on newly discovered evidence which the Plaintiff could not have discovered on the date of the trial. The motion for rehearing was heard on the 10th day of May 1974 and attorney for the Plaintiff and attorney for the Defendant appeared before the Court. The Court was without a reporter.

The Plaintiff proffered evidence to the Court regarding the arrest of the Defendant Tamra Mark, on the 28th day of April 1974 at 7:00 A.M. for unlawful possession of a controlled substance and indicated that the counsel for the Plaintiff had in his possession a copy of the booking sheet regarding the arrest. Counsel for Plaintiff further proffered evidence which would tend to show that Defendant's fiance Michael Nuzzolo, Defendant's roommate and Defendant's roommate's boy friend were also arrested together with the Defendant on the west side of South Salt Lake.

The Court indicated that even if the Plaintiff were able to prove the proffered evidence the Court would not be inclined to change its ruling regarding the custody of the minor child in question and therefore denied Plaintiff's motion for rehearing.

The Plaintiff concedes that generally, motions for new trials are viewed with disfavor and a ruling of a trial court will not be overturned unless there is a showing of an abuse of the discretion of the trial court. *Jones Mfg. Co.* vs. *Wilson,* 15 U. 2d 210, 390 P. 2d 127. The cases generally held that a motion for new trial would be granted if the party moving for the new trial shows that the evidence was discovered since the trial, that the evidence could not be discovered before trial with due diligence, that the evidence is material, that the evidence is not merely cumulative or impeaching and that the admission of such evidence in a new trial would probably bring about a different result. *Universal Inv. Co.* vs. *Carpets,* 16 U. 2d 336, 400 P. 2d 564. *VanDyke* vs. *Ogden Savings Bank,* 48 U. 606, 161 P. 50, the Court, referring to 3 Graham and Waterman on New Trials the Court *stated*:

> "The rule that newly discovered evidence must not be cumulative, though well settled, has an occasional exception. Where, by admitting it, what was before mysterious and doubtful becomes plain and certain, so that if received, the most obvious justice, and, if rejected, the most palpable injustice will be done, courts do not hesitate to adopt the former alternative."

In the case at bar the Defendant's character, emotional and mental stability and propriety as well as the Plaintiff's is of great concern to the Court because of the welfare of the minor child in question. At trial some evidence was introduced which tended to show that the Defendant, natural mother of the minor child, used narcotics in the past and permitted the use of narcotics in the presence of the minor child. This testimony, however, was denied for the most part by the Defendant or by her fiance who testified at trial. The newly discovered evidence goes to the heart of the Defendant's qualification as a mother and as a person having legal custody of the minor child, especially in view of the fact that the child shared living facilities with the persons who, according to the Plaintiff's proffered evidence, were arrested for illegal possession of a controlled substance.

The proffered evidence, if proved, impeaches the Defendant and her fiance since the Defendant testified that except for some four years past she had not used any drugs or narcotics and the Defendant's fiance testified that he had never seen the Defendant use any narcotics or drugs. The proffered evidence, if proved, would also shed light on the Defendant's moral character since it would show that the Defendant and her companions were booked at 7:00 A.M. the morning before the trial at an address other than at her residence. If the Defendant was in fact booked at the early hour of 7:00 A.M. it could be reasonably assumed that the actual time of arrest would be at least an hour prior to the actual book-

ing which could reasonably lead to the presumption that the Defendant and her fiance and the Defendant's roommate and her roommate's boy friend spent the night together at the address where the Defendant was arrested in South Salt Lake.

The proffered evidence, if proved, would make absolutely clear the Defendant's disregard for the welfare of the minor child and for the oath which she took in court prior to her testimony.

The newly discovered evidence which was proffered by the Plaintiff together with the evidence before the Court would clearly show that the best interest of the child would not be served by awarding his custody to the Defendant mother but rather to the Plaintiff father and and the Court erred in refusing to grant Plaintiff's motion for new trial.

CONCLUSION

Plaintiff submits that the judgment of the lower Court should be reversed and judgment entered in favor of the Plaintiff or in the alternative a new trial should be granted on the following basis:

1. The Court erred in refusing to grant the Plaintiff's motion to compel the Defendant to submit to a child custody evaluation notwithstanding the fact that written report could not have been introduced into evidence since the Court had authority to order such an evaluation and to receive a written evaluation of the *prospects and prog-*

nosis without receiving specific facts or without violating confidential disclosures. (Emphasis added.)

2. The Court erred in granting judgment for the Defendant since the only affirmative evidence before the Court is evidence in favor of the Plaintiff and the Defendant submitted no independent affirmative evidence to show that the best interest of the child would be better served by awarding the custody of said child to the Defendant and because the Court appeared to have proceeded on the theory that the Plaintiff had the burden of proving Defendant unfit, immoral, or incompetent before the presumption in favor of the mother could be overturned.

3. The Court erred in refusing to grant Plaintiff's motion for rehearing because the proffered evidence, if proved, would clearly indicate that the Defendant and her fiance utilized narcotics and drugs and that the child would be placed in a surrounding where such activities were permitted in his presence and would have rebutted any inference that the child's best interest and welfare would be served by placing the child in the custody of the Defendant mother.

Respectfully submitted,

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