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Anni Kristensen v. Poul Erik Kristensen : Brief of Appellant on Appeal

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

* * * * *

ANNI KRISTENSEN,)
)
 Respondent,)
)
)
vs.)
)
POUL ERIK KRISTENSEN,)
)
 Appellant.)

* * * * *

APPELLANT'S BRIEF ON APPEAL

* * * * *

CASE NO. 15531

* * * * *

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IN THE SUPREME COURT
OF THE STATE OF UTAH

* * * * *

ANNI KRISTENSEN,)	
)	
Respondent,)	BRIEF ON APPEAL
)	
vs.)	
)	
POUL ERIK KRISTENSEN,)	Case No. 15531
)	
Appellant.)	

* * * * *

NATURE OF THE CASE

This is an appeal from the refusal of the District Court to modify a Decree of Divorce in regard to the custody of the minor children of the parties.

DISPOSITION IN THE LOWER COURT

The parties were divorced after a trial before the Third Judicial District Court, the Honorable Jay E. Banks presiding, on the 24th day of May, 1977. (R. 58-61.) The Decree awarded care, custody and control of the four minor children of the parties to the plaintiff (respondent) even though the three oldest children had resided with the defendant (appellant) for the 14 months between the time the respondent left the home of the parties and the entry of the Decree. (R. 7, 9-10, 24, 26, 59; p. 2-3, Custody Evaluation.) In mid-June of 1977 the respondent moved herself and the children in with her boyfriend, Alphonse Mulder (Tr. 73-74), and on two occasions after the children

were placed in her custody, they went to the Juvenile Court for assistance regarding their placement with the plaintiff. (Protective Services Referral Report.) The defendant then filed a Motion to Modify the Decree of Divorce based on the change of circumstances and the best interests of the children. (R. 83-86.) The Petition for Modification of the Decree of Divorce was set for hearing before the Honorable David K. Winder, one of the Judges of the Third Judicial District Court, at 10:00 A.M. on August 3, 1977. At that time, pursuant to stipulation of the parties (R. 98-99), the Court ordered (R. 95-97, 100) that a custody evaluation be performed to determine proper placement of the children. The matter was then set for trial on the 25th day of August, 1977. (R. 101.) On the 25th day of August, 1977, the appellant appeared in person and by counsel before the Honorable Jay E. Banks, but counsel for the respondent was ill and could not attend the hearing. (R. 102, 112-113.) Judge Banks, after reviewing the custody evaluation, ruled that temporary care, custody and control of Anne Marie, Erik and Alan, the three oldest children of the parties, should be temporarily transferred from the respondent to the appellant. (R. 102, 112-113.) The Motion for Modification then came on for trial on the 20th day of September, 1977 before the Honorable James S. Sawaya who, by an Order entered on the 27th day of September, 1977, denied the defendant's Motion to Modify the Decree of Divorce. (R. 114, 115, 128.) The defendant then filed this appeal. (R. 131.)

NATURE OF RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Order of the District Court refusing to modify the Decree of Divorce and an Order from this Court awarding care, custody and control of the minor children of the parties to himself.

STATEMENT OF THE FACTS

On or about the 1st day of May, 1976, the respondent left the children, the appellant and the marital home of the parties and moved in with Mr. Alphonse Mulder. (R. 9-10.) She filed an action for divorce against the appellant on the 14th day of June, 1976. (R. 2-3.) At the time that she moved from her home, the respondent left all four of the minor children of the parties in the care, custody and control of the defendant. (R. 9-10.) Approximately one month thereafter, pursuant to agreement between the parties, the respondent was given physical custody of the youngest child of the parties, an infant, Alice. (Custody Evaluation pp. 2-3; R. 9-10, 15.) The three older children resided with the appellant and the youngest child resided with the respondent until June 7, 1977. (R. 70.) After the trial, prior to which there had been no custody evaluation performed by or on behalf of the Court, care, custody and control of the four minor children of the parties was awarded to the respondent. (R. 40, 59.) Actual custody of the three older children was transferred to the respondent on June 7, 1977. (R. 70.) The children initially refused to go with the respondent and the transfer was

effectuated by the Utah State Division of Family Services and the Second District Juvenile Court over a several day period. (Protective Services Referral Report; Custody Evaluation, p. 3.)

Within ten days from the time the children moved in with the respondent, she moved them and herself in with Alphonse Mulder. (Tr. of Hearing September 20, 1978, pp. 73-74.)¹ The children resided with the respondent and Alphonse Mulder for a period of approximately one month prior to coming back to the appellant for a one-month summer visitation. (Custody Evaluation, p. 3.) Based on the actions of the respondent and the children, what the children told him and the results of psychological tests administered to the children on July 9, 1977 and August 2, 1977 (Exhibits D-1 and D-2), the appellant filed a Motion to Modify the Decree of Divorce and requested a custody evaluation by the District Court. (R. 83.) This was stipulated to by the parties (R. 98-99) and ordered by the Court. (R. 95-97, 100.) A custody evaluation was made and filed with the Court. (R. 103, 104, Exhibits.)

The matter came on for trial before the Honorable Jay E. Banks on August 25, 1977. However, Earl S. Spafford, the attorney then representing the respondent, entered the hospital the day before the scheduled trial. On motion of his associate

1. All transcript references, exhibit references and custody evaluation and written supplement will pertain to the hearing held on September 20, 1977 before Judge Sawaya, unless otherwise noted.

the trial was continued to the 20th day of September, 1977. (R. 102, 112-113.) However, Judge Banks, after reviewing the custody evaluation performed for the Court, entered an Order temporarily transferring custody of the older three children from the respondent to the appellant. (R. 102, 112-113.)

The custody evaluation performed by Mr. Kim Peterson firmly recommended that care, custody and control of the three older children of the parties be transferred from the respondent to the appellant. He found that while both parents had emotional problems, the respondent was the least stable and least capable parent of the two. (Original Custody Evaluation, p. 9; Psychological Report of Dr. Cutler.) He found the three older children were psychologically much closer to their father, the appellant, than their mother, the respondent. (Original Custody Evaluation, p. 9; Psychological Report of Dr. Cutler.) The evaluation and conclusion of Mr. Peterson were concurred in by Drs. Malcolm and Barbara Liebroder who, after administering clinical psychological examinations to the children, determined that the three older children were strongly attached to their father (the appellant) and custody should be vested in him. (Exhibit D-2.) Drs. Malcolm and Barbara Liebroder also felt that custody of the youngest child, Alice, should be awarded to the defendant in order to allow her strong relationship with her siblings to continue. (Exhibit D-1.)

After Judge Banks entered his Order, Anne Marie, the oldest of the children, refused to leave her mother and go to her

father. She was then re-examined by both Dr. and Dr. Liebroder and Kim Peterson. Drs. Malcolm and Barbara Liebroder felt her action was based on her realization that her mother was a weaker parent than her father, and Anne Marie's belief that she had to protect her mother. (Exhibit D-3.) Kim Peterson, on the other hand, found that her feelings were evoked as a direct result of manipulation and pressure applied by both the respondent and Alphonse Mulder. (Written Supplement to Custody Evaluation; Exhibit.) Both Kim Peterson and the psychologists from the Utah Psychological Center reaffirmed, despite her actions, that Anne Marie should be placed in the custody of her father (the appellant). (Tr. 13, 40; Exhibit D-3; Handwritten Supplement to Custody Evaluation; Exhibits.)

On the 20th day of September, 1977, the matter came on for trial before the Honorable James S. Sawaya, one of the Judges of the Third Judicial District Court who, after hearing the testimony of Kim Peterson, Bryant Eastham, Dr. Malcolm Liebroder, Mr. Kent McDonald and the parties (Tr. pp. 2-87; R. 114), and considering both the original custody evaluation and the written supplement thereto (Exhibits), refused to modify the Decree of Divorce. (R. 115, 128.) This appeal of that Order was thereafter filed. (R. 131.)

CARE, CUSTODY AND CONTROL OF THE MINOR CHILDREN OF THE PARTIES SHOULD BE VESTED IN THE APPELLANT.

In the instant matter the evidence presented to the Trial Court clearly demonstrated that a change of circumstances

had occurred since the entry of the Decree of Divorce and that it was in the best interest of the minor children of the parties that the Decree be modified to place care, custody and control of them with the appellant. This Court has clearly stated the standards for a change of custody of children.

" . . . an award of custody of children in a divorce proceeding is not permanent. If circumstances change so that their welfare and best interests would be served thereby, the court has continuing jurisdiction and authority to make appropriate changes." Smith v. Smith, 564 P.2d 307 at 309 (Utah, 1977).

In the instant case the change of circumstances occurred within ten days of the time the children were taken from the appellant and placed with the respondent. The respondent moved herself and the children in with Alphonse Mulder, her boyfriend. (Tr. 73-74, Custody Evaluation; Exhibits.) The children responded by seeking to get out of the home. They told their father of their unhappiness and he had them tested by a psychologist who confirmed their poor emotional condition. (Exhibits D-1 and D-2.) Since either of these occurrences forms a sufficient basis to justify the Court again examining the situation to determine what is the best interest of the children, Judge Sawaya then was required by the evidence before him to follow the mandate of this Court that:

"The controlling factor being that which is in the best interest and welfare of the minor child." Rice v. Rice, 564 P.2d 305, 306 (Utah, 1977).

or, as this Court has previously declared:

"In addition to and quite beyond the rights of the parents, there is the important prin-

principle that the paramount consideration is the long-term welfare and adjustment of the children." Cox v. Cox, 532 P.2d 994 at 996 (Utah, 1975).

Kim Peterson, the social worker who performed the custody evaluation for the Court (Tr. 40; Custody Evaluation and Written Supplement in Exhibits), Doctors Barbara Liebroder and Malcolm Liebroder in their psychological evaluations of the children (Tr. 25; Exhibits D-1, D-2 and D-3), and Bryant Eastham a certified social worker with an M.S.W., employed by the Protective Services Section of the Utah State Division of Family Services (Tr. 46) recommended that the older three children of the parties should be placed with their father. Each of these recommendations were made after the children had been placed with their mother and she had moved them and herself into the home of her boyfriend, Alphonse Mulder. These recommendations were made after the respondent had had the children placed with her and they had been exposed to life with her and her boyfriend.

The emotional ties of these children to their father are very strong and their hostility toward their mother is very great. (Exhibits D-1, D-2 and D-3; Custody Evaluation and Written Supplement.) They felt they could rely on their father they could not rely on their mother. (Exhibit D-2.) Each of the mental health professionals who examined the children described their state of emotional turmoil; Drs. Malcolm and Barbara Liebroder (Exhibits D-1, D-2 and D-3), Kim Peterson (Custody Evaluation and Written Supplement), Bryant Eastham (Tr. 46-47), Kent

McDonald (R. 65). All of these witnesses except Mr. McDonald declared their belief that this could best be ended by placing the children with their father.

While counsel representing the respondent attempted on cross-examination to show that the children were being manipulated and expressed a desire to live with the parent with whom they had most recently resided, this was specifically rejected by Dr. Liebroder (Tr. 34), by Kim Peterson (Tr. 41, 42) and by Bryant Eastham (Tr. 46, 48). In fact, the respondent's witness, Mr. McDonald, stated that Erik had never, at any time, varied in his desire, declared both in the presence and absence of the respondent that he wished to live with his father. (Tr. 64, 65.)

The only overt evidence of any manipulation was that of the respondent. Kim Peterson described the manipulation in which the respondent engaged. The respondent and her boyfriend repeatedly applied pressure to Anne Marie not to go with her father and Kim Peterson felt Anne Marie's change of mind was the result of this pressure. (Written Supplement to Custody Evaluation; Exhibits.)

Kent McDonald seemed to feel the reverse was true. (Tr. 64.) However, in evaluating the testimony of Mr. McDonald it must be noted that he has only a master's degree in psychology (R. 57), administered no clinical or psychological tests to the children (Tr. 61, 65), and possesses neither the background, training or experience possessed by Dr. Malcolm Liebroder (R. 8,

9), who has a Ph.D. in psychology, extensive testing and therapy background, and serves as a consultant for a number of State and Federal agencies. (Tr. 8, 9.) Dr. Barbara Liebroder also has a Ph.D. in Psychology. (Exhibits D-1, D-2 and D-3.)

Examination of the experience and background of the other expert witnesses to determine the appropriate weight to be given to their testimony demonstrates that Kim Peterson holds a degree of Master of Social Work and is employed as a psychiatric social worker at the Primary Children's Medical Center. (Tr. 38.) Bryant Eastham holds a Degree of Master of Social Work and is employed as a protective service caseworker for the Utah State Division of Family Services. (Tr. 44-45.)

In addition to evaluation of the difference in the quality of the differing experts, the contact of each with the case requires further qualification of the testimony of Mr. McDonald. While Dr. Malcolm Liebroder, Kim Peterson and Bryant Eastham testified after contact with the children and both parents that the appellant was the proper parent to have custody of the three older children of the parties, Kent McDonald, the sole expert witness offered on behalf of the respondent, testified merely that the respondent was a suitable parent to have custody of the children (Tr. 62), he had no direct knowledge of the appellant (Tr. 66) and had never administered clinical or psychological tests to the children themselves. (Tr. 61, 65.) Dr. Malcolm Liebroder, testifying on behalf of himself and his co-

tester, Dr. Barbara Liebroder, completed extensive clinical testing and interviewing of the children before testifying. (Tr. 7-25, Exhibits D-1, D-2 and D-3.)

The only disagreement between the experts called by the appellant (Dr. Malcolm Liebroder and Bryant Eastham) or the Court (Kim Peterson) was in regard to custody of Alice, the youngest child of the parties. Drs. Malcolm and Barbara Liebroder felt that Alice had strong ties with her siblings and thus should be placed with them with their father. (Exhibit D-1.) Kim Peterson, who did the evaluation for and on behalf of the Court, felt that Alice had strong emotional ties with her mother and should remain with her. (Custody Evaluation; Exhibits.) This was also the opinion of Bryant Eastham. (Tr. 46.)

The evidence presented to Judge Sawaya was overwhelming in its weight and sufficiency that there had occurred a change of circumstances since the entry of the Decree of Divorce and the best interests of the children required the modification of the Decree of Divorce to place their care, custody and control with the appellant. He erred in his failure to follow the rules enunciated by this Court and do so.

CONCLUSION

This Court, on the record before it, should reverse the Trial Court, modify the Decree of Divorce, and award care, custody and control of the four minor children of the parties to the appellant.

RESPECTFULLY SUBMITTED this 2nd day of March, 1978



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CERTIFICATE OF MAILING

I hereby declare that I caused to be mailed two true and correct copies of the foregoing Appellant's Brief on Appeal in Case No. 15531, postage prepaid, this 2nd day of March, 1978, to Jonathan King, Attorney for Respondent, at 352 Denver Street, Salt Lake City, Utah, 84111, and to Anni Kristensen, Respondent, c/o Alphonse Mulder, 5048 Lambeth, Taylorsville, Utah, 84118.


DAVID S. DOLOWITZ