1978

Anni Kristensen v. Poul Erik Kristensen : Brief on Appeal

Utah Supreme Court

David S. Dolowitz; Attorneys for Appellant;
Jonathan King; Attorneys for Respondent;

IN THE SUPREME COURT

OF THE STATE OF UTAH

ANNI KRISTENSEN, :

Respondent, :

vs. :

POUL ERIK KRISTENSEN, :

Appellant. :

BRIEF ON APPEAL

Case No. 15531

NATURE OF THE CASE

This is an Appeal by the Defendant/Appellant from an Order of the District Court wherein said Court refused to modify a Decree of Divorce with regard to the custody of the parties minor children.

DISPOSITION IN THE LOWER COURT

Following a two day trial, the lower court, by the Honorable Jay E. Banks, awarded care, custody and control of the parties' four minor children to the plaintiff. Approximately six weeks following the entry of the aforesaid Decree of Divorce, the Defendant filed his Motion for Modification of said Decree, seeking custody of the minor children. Again following a two day hearing on Defendant's Motion, Judge James S. Sawaya, failing to find change of circumstances, or good cause warranted by the best interest of the children, denied the Defendant's Motion, said denial being the subject matter of this Appeal.

NATURE OF RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the Order of the District Co denying the Appellant's Motion to Modify the Decree of Divorce pertain to the care, custody, and control of the minor children of the parties which by said Decree had been reposed with the Respondent.

STATEMENT OF THE FACTS

Following several months of extremely cruel treatment which forced the Plaintiff to leave her home in fear for her personal safety (R. 50) she filed a Complaint seeking a Divorce. (R. 2-3) An inordinately long delay ensued wherein the parties sought relief pertaining t custody of the parties' four minor children culminating in a trial, th Honorable Jay E. Banks presiding, on the 7th and 8th days of April, 19 (R. 38-39) The issue of custody of the parties' children was pursued i great detail as evidenced by the witnesses called by the parties to tes tify regarding said issue. On April 12, 1977, Judge Banks ordered:

> "Custody of the children is awarded to the mother with very liberal visitation to the Defendant to include the Defendant have the children for one month during the summer (no support to be paid during that time)." (R. 40)

Findings of Fact and Conclusions of Law and a Decree of Divorce in conformity with Judge Bank's decision were entered on the 24th day of May, 1977. (R. 50-61)

> "The Court expressly finds that because of the age of circumstance of the (sic) and of the parties, the best interests of the children will be served by their being in the physical custody, care and control of plaintiff." (Emphasis added. R. 51 and R. 59)

Owing to the apparent efforts of the parties to "poison the well" the Court found it necessary to enter the following finding:

> "The Court feels it reasonable and finds that the best interest of the parties and of their children will be served by an affirmative order requiring co-operation with one another as to matters of visitation and an order restraining the parties from discussing with the children or with third persons other than their attorneys or professional counselors, the difficulties existing between the parties and the circumstances giving rise to the divorce or the frustrations or inadequacies which either of the parties may feel as a result thereof. (R. 53 & R. 61)

Between the time when the Plaintiff was forced from the marital abode and the entry of the Decree of Divorce, the Defendant refused to permit the Plaintiff to have reasonable visitation with the parties' three oldest children (the youngest child then residing with the Plaintiff), and notwithstanding efforts by the Plaintiff to obtain custody of the three oldest children, the Court, by Judge Dean E. Conder, ordered that the Defendant should have custody of the three oldest children during the pendancy of the divorce action. (R. 26-27)

In total disregard for the Court's Order as contained in the Decree of Divorce, the Defendant refused to tender custody of the children to the Plaintiff, thus precipitating a Motion for an Order to Show Cause being brought before Judge Banks on the 7th day of June, 1977, together with a Motion to Amend or Alter the Decree of Divorce (R. 43-47) Judge Banks on said occasion made the following statement:

> "You turn those children over. You (Mr. Kristensen) turn those children over to the mother. There is no doubt in the Court's mind that you have been influencing the children, because I know the youngest boy does not have the capacity to make the decisions that he

did, and there's no doubt in my mind that you are the one that caused the children to be placed in protective custody. There's absolutely no question that she is going to have those children, and if either of you use those children to get back at the other the Court will put the offending party in jail. And I'll make it mighty difficult on you and I want you to know that." (R. 162-163)

At the conclusion of the aforesaid Hearing, Judge Banks ordered the Defendant ao immediately comply with the Decree of Divorce. (R. 70-71)

Thereafter, on or about the 7th day of June, 1977, the Plaintiff finally obtained, pursuant to an Order of the Court, physical custody of the children. Within one month thereof the Defendant in his ongoing effort to continue the vexatious nature of the divorce proceedings filed his "Motion in re Contempt and to Order Visitation" (R. 75-81) Prior to hearing on said Motion the Plaintiff tendered custody of the children to the Defendant for the purpose of the one month summer visitation as contemplated under the Decree of Divorce. While the children were in the custody of the Defendant, the Defendant caused to be filed his "Motion to Modify Decree of Divorce" on the 20th day of July, 1977. (R. 83-84) And thereafter refused to tender the children back to the custodial parent, the Respondent herein.

On August 25, 1977, the matter again came before Judge Banks wherein the Court ordered that temporary custody of the three older children should be remanded to the Defendant and the custody of the younger child be reposed in the Plaintiff. The matter was then set for trial on the 20th day of September, 1977, and Judge Banks concluded his Order by the following edict:

> "This temporary order is not to influence the Court which hears the matter. It will be without prejudice or advantage to either party." (R. 102)

A Custody Evaluation was filed with the above entitled Court on August 26, 1977, and the Order to Show Cause in re Modification was then heard by the Honorable James S. Sawaya on the 20th day of September, 1977 (less than six months after the two day trial of the Divorce) again several witnesses were elicited by the Defendant both with regard to the custody evaluation and in support of Defendant's position regarding Modification of the Decree of Divorce. On the 27th day of September, 1977, Judge Sawaya ordered that the Motion to Modify the Decree of Divorce as to custody of the minor children be denied. Said Order being entered by Judge Sawaya on the 10th day of November, 1977, together with an Order denying the Defendant's Motion to Amend Findings of Fact and Conclusions of Law (R. 128).

The Defendant then filed his Notice of Appeal on the 21st day of November, 1977. The Defendant (R. 131) filed a Motion to Stay Judge Sawaya's Order during the pendancy of the Appeal which Motion was denied by Judge Sawaya on the 12th day of December, 1977. (R. 139-141) The aforesaid Order provided in part:

> "It is hereby Ordered as follows: (1) The defendant's Motion for Stay pending appeal is denied. (2) That the temporary order of district Judge Banks shifting custody of some of minor children of the parties to the defendant is dissolved. (3) That pursuant to the Decree of Divorce plaintiff is to be restored custody of all four (4) of the minor children of the parties." (R. 140)

Notwithstanding this Order, the Defendant failed and refused to tender custody of the parties' boys over to the Plaintiff, and at the present

the two boys remain in the physical custody of the Defendant.

ARGUMENT

THE CARE, CUSTODY AND CONTROL OF THE PARTIES MINOR CHILDREN SHOULD CONTINUE TO BE VESTED IN THE RESPONDENT.

Probably one of the most important and salient factors and yet possibly overlooked within the context of this most unfortunate and endless litigation is found in the Defendant's "Motion for Stay Pending Appeal" (R. 117-118). The statement has questionable materiality to that particular motion but sets forth succinctly the Defendant's contempt for the Courts. In referring to the custody of boys Erik and Alan the following statement appears:

> " . . . and allow the Order insofar as it places custody of Erik and Alan to remain in effect and to allow those children to remain with the Defendant on the grounds that the said children, Erik and Alan Kristensen, have expressed their desire to live with the Defendant, that they resided with the Defendant for 17 of the last 18 months . . ." (Emphasis Added)

That statement was made on the 29th day of September, 1977. Today a proper accounting would show that notwithstanding Court Decrees and Orders to the contrary the Defendant has retained custody of the boys for 24 of the last 25 months.

The above circumstances find a striking similarity in the ca of Watts v. Watts, 445 P.2d 141, 21 Ut.2d 306 (1968). In that case th non-custodial parent filed a petition for modification of a divorce de cree that had been entered but a couple of months previous seeking a change of custody of the parties' minor child. The court found that

not only had the non-custodial parent failed to show any substantial change in circumstances justifying modification but that the said non-custodial parent had in several respects ignored the provisions of said decree. In so finding the court stated:

> "— it is rather unconscionable to conclude that such unilateral change in circumstances could inure to the benefit of a conceited defaulter."

In the present case the defendant not only refused the plaintiff access to her children prior to the entry of the Decree of Divorce but upon the entry of the same Defendant continued to deprive Plaintiff of custody of the children forcing the Plaintiff to seek court sanctions to obtain physical custody of the children.

The court in Watts v. Watts, supra, continued its findings which again have direct relation to the facts in the present action:

> "Many children are unhappy at home, as were Tom and Huck, which is a good reason only to say they are unhappy at home. Discipline is something else, which a trial court must learn to spell without necessarily equating the term with 'unhappy'. We think the trial court did a pretty good job of equating — especially since the facts reflect at least a possible surmize that the Pied Piper was lurking in the shadows — not with a whistle, perhaps, but mayhap with tempting ice cream cones or toy space ship."

Again, the similarity is striking to the present case wherein the plaintiff had only had the custody of the children for one month prior to turning the children over to the defendant for their summer visitation, whereupon defendant again refused to turn the children over to the plaintiff and instituted his motion for modification of decree. As Judge Banks stated, there is considerable evidence that the defendant had engaged in similar "Pied Piper" activities.

It is a well settled legal premise within the jurisdiction o the State of Utah that a petition or motion for modification of a divo decree is, and especially with reference to custody of minor children, is an equitable proceeding. It is also well settled that the petitio is required to show substantial or material "changed circumstances" fr those that existed at the time the court entered its prior order or de cree. Without such a prerequisite, the bitter and emotional contest e tered into between two litigants in a divorce action could drag on in- definately. The case of Crofts v. Crofts, 445 P.2d 701, 21 Ut.2d 332, established the need for "Finalization" within the scope of the contin ing jurisdiction of the domestic relation courts of the State of Utah. In referring to the finality of a judgment regarding the disposal of children or the distribution of property, the court describes subseque changes as follows:

> "This, however requires some good cause based upon a change of circumstances for modifying the decree and cannot be done by interpreting the language thereof. Litigation must be put to an end, and it is the function of a final judgment to do just that. A judgment is the final consideration in determination of a court on matters submitted to it in an action or proceeding. (49 C.J.S. Judgments §1)"

As stated above "Judgment" in the present action was entered by the ab entitled court following a two day trial on the 24th day of May, 1977. Less than two months subsequent, the defendant filed his Motion to Mod the Decree (July 15, 1977), requesting change of custody of the childr from the plaintiff to himself. (R. 83) Notwithstanding the defendant failure to set forth the change of circumstances and in particular the "good cause" upon which he based his motion, the lower court provided

the defendant with a second opportunity within a six month time span to again present evidence in substantiation of his recuring claim. Again the court found in favor of the plaintiff and against the defendant as to the issue of custody of the parties' minor children. It is therefore apparent that the "Common Sense Finality" rule espoused by the court in Crofts v. Crofts, supra, demands application to the present case.

Another generally accepted legal premise espoused by the Supreme Court of the State of Utah deals with the discretion and latitude granted to the trial court in assessing the many factors pertinent to an award of custody in divorce litigation. Although this discretion is not unimpeachable, it is nevertheless, one that by the very nature of the issues confronted must be and is employed by the Supreme Court of this State. In Robinson v. Robinson, 391 P.2d 434, 15 Ut.2d 293 (1964), the Court found as follows:

> "As we have often observed, on appeal, it is advisable to allow considerable latitude of discretion to the trial court in such matters because of his advantage position to judge the personalities and characters of those involved."

See also Cox v. Cox, 532 P.2d 993 (1975), and Hyde v. Hyde, 454 P.2d 884, 22 Ut. 2d 429 (1969). In the case of Weiss v. Weiss, 469 P.2d 504, 24 Ut.2d 236 (1970), Justice Henroid in dissenting opinion thereto took umbrage with the majority opinions position relative to the trial court's discretion by stating as follows:

> "They (referring to the main opinion's reference to the discretion granted the lower court) are platitudes that unrealistically are not supportive of the prepon-

> derance of the evidence, and in rendering lip service thereto, it seems to me, is a myoptic appraisal of the findings of fact of not only one but two district court judges and they do not take into account what the main opinion claims we should do, — give due 'allowance for the advantaged position of the trial judge'."

Again, in the present case, two district court judges within the time span of less than six months heard the best evidence that the Defendant could produce in an effort to sustain his position regarding custody and the best evidence that the plaintiff could produce to sustain her position with regard to the custody of the parties' minor children and both concluded alike that the "plaintiff" as the mother of said children as a fit and proper person to have the care, custody and control of said children awarded to her subject to the right of the defendant to visit said children at reasonable times and places and further stated:

> " . . . the best interest of the children will be served by their being in the physical custody and care and control of the plaintiff." (R. 50-51)

Again referring to the discretion of the trial judge, this court in the case of Henderson v. Henderson, Supreme Court of the State of Utah, March 1978, stated in referring to the trial judge:

> "He is necessarily clothed with great discretion in matters of this kind, and we cannot conclude that he erred."

Notwithstanding the irrelevancy of the inuendos regarding the relationship between the respondent and Warren Alphonse Mulder, as described in the Appellant's Brief, there does not appear in the record any evidence whatsoever that the relationship between the Respondent and Mr. Mulder in any way inhibits the Respondent from performing the

maternal needs of the parties' minor children. In fact, insomuch as the Respondent and Mr. Mulder are now wife and husband, and insofar as Mr. Mulder is in a position to support and maintain both the Plaintiff and the minor children, the Plaintiff is in a far superior position to provide for the best interests and needs of the children, whereas the Appellant must look to external care for the children while he is pursuing his livelihood.

It is also interesting to note how much reliance the Appellant places on the Custody Evaluation as filed with the lower court. It is obvious that such an evaluation conducted after three of the four minor children have been in the physical custody of the Appellant for 17 of the preceeding 18 months, could have any validity whatsoever in light of Judge Banks' finding that the Defendant had engaged in substantial efforts to "poison the well". To understand the minor children's attitude toward Mr. Mulder as expressed in their interviews in the Custody Evaluation (R. 104) one must also investigate the malice and harrassment exercised by the Defendant in bringing a lawsuit against Mr. Mulder and furthermore which lead the defendant to have his own children picked up and placed in protective custody during the one month in the last twenty five months that the plaintiff has actually had physical custody of all of the minor children (R. 163).

CONCLUSION

This Court should affirm the trial court decisions of both Judge Banks and Judge Sawaya by affirming Judge Sawaya's Order denying

defendant's Motion to Modify Decree of Divorce, said Order being in the best interests of the four minor children of the parties hereto. Furtheremore, this Court should award to the Plaintiff her reasonable cost incurred on this Appeal.

RESPECTFULLY SUBMITTED this 17th day of April, 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 Respondent's Brief on Appeal in Case No. 15531, first class postage prepaid to David S. Dolowitz of the law firm of Parsons, Behle & Latimer, 79 South State Street, P.O. Box 11898, Salt Lake City, Utah 84147, attorney for Appellant, Poul Erik Kristensen.

DATED this 17th day of April, 1978.

Gary R. Howe
ATTORNEY