1977

Ruth Guenther Jorgensen v. Ray Lynn Jorgensen : Brief of Respondent

Utah Supreme Court

GARY L. GALE
Attorney for Plaintiff and
Appellant
Suite 205, The Legal Arts Building
2568 Washington Boulevard
Ogden, Utah 84401

TABLE OF CONTENTS

AUTHORITIES CITED

CASES

STATUTES

IN THE SUPREME COURT OF THE STATE OF UTAH

RUTH GUENTHER JORGENSEN,	:	
	:	
Plaintiff and Appellant,	:	Case No. 16193
	:	
vs.	:	
	:	
RAY LYNN JORGENSEN,	:	
	:	
Defendant and Respondent.	:	

- - - - - - - - - - -

BRIEF OF RESPONDENT

- - - - - - - - - - -

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the Fourth Judicial District Court wherein the Honorable J. Robert Bullock, District Judge, heard a contested divorce on a complaint and counterclaim involving paternity and custody of children, and the acquisition and division of real and personal property. The court awarded real property acquired after the separation of the parties to respondent and divided the personal property, including the balance of the savings.

DISPOSITION IN LOWER COURT

Respondent was granted a divorce on his counterclaim and awarded custody of the oldest of his two minor

children, age 3, the real property, and one-half of the personal property.

RELIEF SOUGHT ON APPEAL

The decision of the trial court should be affirmed by this court.

STATEMENT OF FACTS

The parties were married to each other at Salt Lake City, Utah, on the 17th day of August, 1972, and thereafter, respondent tolerated an unfaithful wife who dated other men and had at least two affairs during the period of the marriage (Find. No. 7, R-P.25). The second child was born May 25, 1978, approximately one month prior to the separation of the parties at a time when appellant was having an affair with another man and under circumstances where nobody knew for sure who the father of the child was.

Though appellant alleged in her complaint that respondent was the father, she privately advised respondent he was not the father of Stacy Lynn Jorgensen and would not have to pay child support for her. Because of recent decisions relating to res judicata and collateral estoppel, respondent chose to call in question the paternity of Stacy Lynn Jorgensen for the purpose of

obtaining blood tests and to pursue the legal rationale of Miller v. Marticorena (Utah), 531 P.2d 487 (1975). As stated in the Findings of Fact No. 3 (R-P.24), the trial judge invited counsel to the bench to advise the court on the scope of the paternity issue, at which time counsel for both parties advised the court that there was no issue as to the paternity of either child, respondent being not only satisfied, but extremely pleased with the results of the blood test, later admitted in evidence (R-P.88,114). The issue of paternity of Stacy Lynn Jorgensen was therefore not a result of the counterclaim of respondent, but rather, appellant's insistence that she not be saddled with respondent as the father of her youngest child, regardless of the blood test. It was appellant's position at the trial that her live-in boy friend (with whom she was having an affair during the marriage) is in fact the father of Stacy Lynn (R-P.67).

There was a conflict in the evidence as to whether or not there was $4,200.00 in the bank at the time the parties separated, or $4,853.73 (R-P.67). Based upon the testimony of the parties and the evidence of bills paid by respondent from that account, the court concluded that the account had $4,200.00 when the parties separated

and approximately $600.00 when the parties stipulated on an order to show cause that no further funds would be withdrawn from the account after payment of the repair bills due on appellant's car (R-P.55, L.7-15, P.110, L.4).

After the parties separated and after respondent paid the bills incurred during the marriage (and prior to the divorce hearing), respondent elected to purchase real estate in accordance with preliminary arrangements made prior to the separation of the parties, and respondent's parents were substituted in place of appellant by requirement of the financing institution and to secure their loan of the down payment to respondent (R-P.52, L.16). Appellant's statement that "the court awarded the house, together with the $6,000.00 equity thereunder, to defendant-respondent" has no evidenciary support except as an inference from facts found otherwise by the court.

ARGUMENT

POINT I

THE DECISION OF THE TRIAL COURT TO PLACE BRAD RAY JORGENSEN WITH RESPONDENT IS FULLY JUSTIFIED BY THE EVIDENCE PRESENTED AT TRIAL AND THE LAW OF THIS STATE.

This court has on several occasions taken pains to point out to the Bar that U.C.A. 30-3-10 does not apply

to divorce cases but is only applicable in cases of separation, and that the controlling statute is U.C.A. 30-3-5. Sampsell v. Holt, 15 Utah 73, 202 P.2d 550 (1949); Johnson v. Johnson, 7 Utah 2d 263, 323 P.2d 16 (1958). U.C.A. 30-3-5 provides:

> When a decree of divorce is made, the court may make such orders in relation to the children, property and parties, and the maintenance of the parties and the children, as may be equitable. The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, and custody of the children and their support and maintenance, or the distribution of the property as shall be reasonable and necessary...

Further, our statutes and case law allow the trial court "considerable discretion" in child custody matters. Rice v. Rice (Utah 1977), 564 P.2d 305.

The record shows that after the birth of Brad Ray Jorgensen, respondent provided personal care and attention for said child equal to that of the mother (R-P.79); that respondent had made a special effort to take his son with him and to spend his spare time with his son, and that a close relationship existed between the father and the son (R-P.101); that respondent spent evenings at home with his son while appellant was out of the home on a pretext, but in fact having an affair with another

man (R-P.64); that the respondent took the responsibility for bathing, clothing, feeding, caring for and giving security to said child when the appellant chose to be elsewhere (R-P.78).

On the other hand, the record shows that appellant spent evenings cooking in other men's apartments (R-P.71); dated other men (R-P.50); had an affair with another man in Idaho Falls, Idaho (R-P.69); and had another affair with a man for about a year prior to her separation from respondent (R-P.64), who at the time of the divorce hearing, was a live-in boy friend who she claimed to be the father of her youngest child (R-P.67, L.1); that she was considering moving to Washington and taking the children with her (R-P.73, L.9); that like respondent, appellant was working and was taking the children to a baby-sitter during her regular hours of employment (R-P.60, L.15). The court was acting in the best interest of the child in concluding that the environment and lifestyle provided by appellant was not equal to that offered by respondent, but that appellant could qualify to be a fit and proper person for custody of Stacy Lynn.

The Supreme Court's interpretation of the statute, and the oft-announced rule that "all things being equal,

custody of children of tender years should be placed with the mother" is hopefully designed to avoid habitual placement at the lowest acceptable standard of welfare services, rather than overlook the shortcomings of a mother just because she is the mother. Appellant alleges that because the trial court did not find her "unfit", she is therefore entitled to a custody preference. But a finding of "unfitness" is the standard by which any court can take children away from any parent. The difference was clearly distinguished by the Supreme Court of Montana in Henderson v. Henderson (Mont.1977), 568 P.2d 177, at Page 181:

> The "best interest of the child" test is correctly used to determine custody rights between natural parents in divorce proceedings. In this situation the "equal rights" to custody which both the father and mother possess...are weighed in relation to each parent's ability to provide best for the child's physical, mental, and emotional needs upon the breakdown of the marital relationship. "Fitness" of each parent is determined only in relation to the other and not to society as a whole.

The Montana court then explained that where parties who are not parents seek custody of children, they must first show that the natural parents' conduct does not meet the minimum standards of child abuse, neglect and dependency statutes, and they must be found to be unfit

parents. Such was not the case here. The emotional instability of the appellant manifested by her desires for reconciliation and her reluctance to leave her live-in boy friend (R-P.85) contrasts rather markedly with the stability and reliability of respondent. The lifestyle of appellant could be severely damaging to a 3-year-old attempting to relate to a father image, though not so crucial to a 6-month-old baby.

Appellant states in her brief at Page 12 that her former lifestyle and live-in arrangement are now moot in view of her affidavit and the changes she has made since the trial. Though such changes may be highly commendable, they are certainly after the fact and not part of the evidence upon which the trial judge could rest his decision, and for the same reason this honorable court cannot consider the alleged change of circumstances as bearing on the propriety of the trial court's decision. The trial court's decision was based on the evidence at trial and not on the allegations of an affidavit filed three months later in connection with this appeal.

Under the erroneous concept of "unfitness" appellant contends on Page 7 of her brief that "the mother is entitled to the custody of the child unless it is made

to appear to the contrary". Such is not the law that has painstakingly evolved over the past thirty years in the State of Utah. A divorced mother is not entitled, as a matter of law, to custody of a child of tender years, merely because there is no showing that she is an improper or unfit person. Johnson v. Johnson, supra; Sampsell v. Holt, supra. The basic rule announced by the court in Hyde v. Hyde, 22 Utah 2d 429, 454 P.2d 884 (1969) and confirmed in Smith v. Smith (Utah 1977), 564 P.2d 307, recognizes that the mother has no statutory preference as suggested in 30-3-10, U.C.A., and its statutory predecessors, but confirms the concept that parents' rights to custody are equal under the law and that mother gets the preference only if the evidence before the court is equal or in her favor. The evidence before the trial court relating to appellant's lifestyle, her emotional instability, her possible removal from this state, and the general behavior of appellant in the marriage constituted an evidenciary inequality that could not be ignored by the trial judge, and because of that inequality appellant had no preference before the court, and the court's ruling on custody does not offend the rule of law enunciated by the Supreme Court of the State of Utah.

For these reasons the rationale of Baker v. Baker, 110 Utah 462, 175 P.2d 213 (1946) and the dictum from White v. White, 29 Utah 2d 148, 506 P.2d 69 (1973) quoted on Page 9 of appellant's brief serve only to strengthen respondent's position, though perhaps legally not applicable. The demonstrated lifestyle of appellant, to which she herself has testified, can hardly be compared with the relatively innocuous behaviour of Steiger v. Steiger, 4 Utah 2d 273, 293 P.2d 418 (1956) or Stuber v. Stuber, 121 Utah 632, 244 P.2d 650 (1952). Appellant further cites Henderson v. Henderson (Utah 1978), 576 P.2d 1289 on Page 10 of her brief, but the quote is not accurate, the last phrase having been omitted, and it should read as follows:

> As to the issue of child custody, both parties rely on and cite substantially the same cases previously decided by this court, and while those cases do stand for the proposition that everything being equal, preference should be given to the mother in determining custody, they also say that the best interests and welfare of the children is the controlling factor. (emphasis given)

With only slight variation, the same concept was the basis for decision in Hyde v. Hyde, supra, Rice v. Rice supra, Humphreys v. Humphreys, infra, and Bingham v. Bingham (Utah 1978), 575 P.2d 703, where the court

stated at Page 704:

> The plaintiff grounds her attack upon the order on the rule to which we agree as a general proposition: That it is presumed to be for the best interest and welfare of a child of tender years to be with her mother. However, under the modern trend of social thinking away from former fixed rigidities, toward equality of the sexes and greater flexibility in considering the qualifications of the parents on an individual basis, that presumption is subordinate to the higher rule that the paramount concern in such cases is the best interest and welfare of the child.

The court concluded its opinion in Bingham with the following comment on Page 704:

> Inasmuch as the evidence does not clearly preponderate against the findings and order of the trial court, as would be required for reversal, but on the contrary seemed to clearly preponderate in favor of those findings, the order made is well within the prerogatives of the trial court in such matters.

POINT II

THE COURT PROPERLY AWARDED TO APPELLANT ONE-HALF OF THE JOINT SAVINGS ACCOUNT AFTER THE BILLS WERE PAID.

Appellant was uncertain as to the time she checked the joint savings account, and her testimony under questioning by her attorney is on Pages 58 and 59 of the record:

> Q. I asked you to secure the balance or the close-out of the checking account after you

were separated. What were the balances right before the 19th of June?

A. 40-8...

Q. What were the exact figures that you gave back to me?

A. Yes. It was $4,853.73.

Q. That's the sum of money that was in the account?

A. Yes.

Q. On what day is that? Is that the 20th of June?

A. Yes, 5/22.

Q. Or the 20th day of May?

A. Um hum.

Appellant testified under cross-examination that the account had a balance of $4,853.20 as of the 22nd day of May and that she did check the account when the parties separated in June but she couldn't remember what the balance was at that time (R-P.67). On the other hand, respondent testified in no uncertain terms that he withdrew the sum of $4,200.00 and paid the bills outstanding at that time (R-Pp.53,54). The balance in the account after payment of the bills, and particularly the bill on appellant's car which the parties agreed would be paid out of that account, was $629.83, and the finding of the

court with respect to that balance is fully set forth in the record at Page 110:

> THE COURT: I have concluded that I'm going to grant Mr. Lynn Jorgensen a decree of divorce on his counterclaim; further, that the home, there isn't any equity in the house, that the monies were expended in payment of family obligations with the exception of $600.00 which is still left...

In the findings of fact and the decree of divorce, that figure was adjusted to $653.00 to avoid the very onus that appellant now desires to put upon respondent on expenditure of some of the money for his personal utility bills after separation.

It is also true that as compared with respondent's estimate, appellant undervalued the household furniture and furnishings by $753.00 (R-Pp.55,71; Pltfs. Exh. No. 1). In every particular, respondent was more than equitable in his valuations and his reporting of assets. Had the court determined to divide the $4,200.00 equally as of the date of separation, the court likewise would have been free to divide the obligations as of the same date, and the result would have been exactly the same.

Counsel for appellant had an opportunity to further examine respondent as to any discrepancies between the

balance in the account and the total of the bills he testified he paid, and the failure to do so cannot now be laid to respondent's doorstep.

Finally, the total of the bills paid by respondent is $3,571.44, and that figure deducted from the $4,200.00 the trial court found to have been the amount withdrawn by respondent leaves a balance of $628.56, virtually the exact balance that respondent testified was in the account at the time of trial and available for division, and it would therefore appear that the figure of $737.50 set forth on Page 14 of appellant's brief is an error. The appellant cannot be serious in suggesting that the debts paid were any more respondent's debts than appellant's debts, especially in view of the fact that a sizeable repair bill was paid on her car as the last withdrawal from that account by agreement of the parties at the order to show cause on the 14th day of July, 1978. While it is true that the trial court's decision did operate to relieve respondent of debts incurred during the marriage, it also operated to relieve appellant of any such debts, and there is no question that appellant's conduct in the marriage was the precipitating cause of the divorce as found by the trial court.

Humphreys v. Humphreys (Utah 1974), 520 P.2d 193, cited by appellant, is hardly authority for the line of reasoning adopted by appellant. Contrary to the suggestion of appellant, the trial court did not allow respondent to spend any of the money he withdrew. The spending took place and the debts were paid immediately after separation of the parties, and full disclosure was made to appellant and her attorney at the order to show cause hearing held the 14th day of July, 1978. The trial court simply recognized that by virtue of the payments made by respondent, the parties had no outstanding debts at the time of the divorce hearing, and the balance in the account was then equally divided by the court.

CONCLUSION

The awarding of custody is no easier now than it was for Solomon, and whatever principles are used to determine custody, a loving person may be deeply wounded. To minimize the trauma to the child, the courts have long held that the best interest and welfare of the child is the paramount consideration. The court was justified from the evidence presented in considering the emotional instability of the appellant, her lifestyle, the possibility of her removal to the State of Washington, and her

behavior in the marriage relationship to determine if all things were equal between the parties. Likewise, the court was justified from the evidence in considering the stability of the respondent, his unusually close relationship with his 3-year-old son, his interest in actively pursuing the role of a parent with said child, and his lifestyle and demonstrated conduct in the marriage. The evidence supports the court's conclusion that all things were not equal between the parties, and from the preponderance of evidence the court was justified in placing the custody of the minor child with the respondent, recognizing that such placement might be subject to change as conditions in the future may warrant.

Further, the court's finding that the bank account less the balance remaining was used to pay joint obligations incurred during the marriage is fully justified by the evidence, and the order dividing the balance in the account between the parties and dividing the other personal property was equitable to appellant in the highest degree consistent with the principles governing divorce. Respondent's later decision to borrow money from his parents and buy the home as an investment has nothing to do with appellant because of her manifest disinterest

and her waiver of participation by living elsewhere and demanding that half the bank account be paid to her in cash. And based upon such evidence, the court found that there was no equity in the home to which appellant was entitled, and there is no evidence to the contrary.

Respectfully submitted this 9 day of April, 1979.

BEAN, BEAN & SMEDLEY

David E. Bean

DAVID E. BEAN
Attorney for Defendant and Respondent

CERTIFICATE OF MAILING

I certify that on this 12th day of April, 1979, I mailed two copies of Respondent's Brief to Gary L. Gale, Attorney for Appellant, Suite 205, The Legal Arts Building, 2568 Washington Blvd., Ogden, Utah 84401, postage prepaid.