

1979

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

Utah Supreme Court

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DISPOSITION IN LOWER COURT

That a trial on the issues was held before the Honorable J. Robert Bullock on the 13th day of November, 1978 in the Fourth Judicial District Court of Utah County, State of Utah. Upon the conclusion of said trial, the Court awarded the care, custody and control of the minor child, Stacy Lynn Jorgensen, born May 25, 1978, to the plaintiff-appellant. The Court awarded custody of the minor child, Brad Ray Jorgensen, born November 23, 1975, to defendant-respondent. The Court made no award in regard to the joint savings account in the amount of between \$4,853.73 and \$6,000.00, and allowed to stand defendant-respondent's explanation as to spending said monies.

NATURE OF RELIEF SOUGHT ON APPEAL

Plaintiff-appellant seeks to have the judgment awarding custody of the minor child, Brad Ray Jorgensen and this Honorable Court should award the care, custody and control of said minor child to the plaintiff-appellant. That in addition, the plaintiff-appellant should be awarded one-half of the monies from the joint savings account used by the defendant-respondent.

STATEMENT OF FACTS

That the plaintiff-appellant and defendant-respondent were married to each other on the 17th day of August, 1972, at Salt Lake City, Utah, and had resided as husband and wife during that period of time.

That plaintiff initiated a divorce complaint on the 21st day of June, 1978, alleging that the defendant-respondent

was the father of the two minor children. That defendant-respondent alleged under paragraph 3 of his Answer and Counterclaim that he was not the father of Stacy Lynn Jorgensen. Blood tests were conducted by the parties with court approval, and the defendant-respondent was included as the putative father thereunder. The Court found, under paragraph 3 of the Findings of Fact that there was in issue based upon the counterclaim of defendant-respondent the issue of paternity on Stacy Lynn Jorgensen, and the Court resolved that issue in favor of plaintiff-appellant and against the defendant-respondent, holding that the defendant-respondent was the natural father of said minor child.

The appellant and respondent maintained a joint account and by respondent's testimony (page 5, line 13, Record on Appeal) in the amount of \$4,200.00, which he withdrew shortly after the parties separated during June of 1978.

Plaintiff-appellant testified at page 10, line 29 that there was a balance in the account of \$4,853.73. The defendant-respondent testified at page 5, line 17 through 30, page 6, lines 1 through 24, that he paid certain bills.

A total of the foregoing bills amounts to \$3,462.50, leaving \$737.50 unaccounted for by his testimony, and leaving \$1,391.23 unaccounted for as a result of plaintiff-appellant's testimony as to the amount of monies in the account.

That both children were in the care, custody and control of plaintiff-appellant since birth and resided with plain-

tiff-appellant during the pendency of the divorce action.

That after the parties separated and prior to the divorce hearing, defendant-respondent purchased a home and paid \$6,000.00 as and for a down-payment, which he claimed was a loan from his parents.

The Court, pursuant to a specific finding under paragraph 8 of the Findings of Fact in regards to the minor child, Brad Ray Jorgensen, "The Court finds that both parties could qualify as proper persons to be awarded custody of said minor child, the evidence as a whole preponderates in favor of the defendant for the custody of his minor son. The Court finds the opposite is true with respect to the minor daughter, and that the evidence preponders in favor of the plaintiff retaining custody of Stacy Lynn Jorgensen."

The defendant-respondent testified (at page 43, lines 8 through 19, Record on Appeal) that plaintiff-appellant kept the kids fed, she kept them neat, she kept them clean. He also testified that he thought she loved them dearly and showed that to them during their entire lives. The Court made no finding that the plaintiff-appellant was an unfit, or immoral, or unsuitable person. The Court awarded the house, together with the \$6,000.00 equity thereunder, to defendant-respondent.

ARGUMENT

POINT I

THE COURT ERRED IN AWARDED THE CUSTODY OF THE MINOR CHILD, BRAD RAY JORGENSEN, TO THE DEFENDANT-RESPONDENT, AND SAID JUDGMENT SHOULD BE REVERSED.

The Record on Appeal, and the Findings of Fact and Conclusions of Law, and Judgment and Decree of Divorce show that plaintiff-appellant is a fit and proper person to be awarded the care, custody and control of the minor child, Brad Ray Jorgensen, with reasonable rights of visitation in the defendant-respondent.

The law in the State of Utah is reasonably well-settled in regard to custody issues of minor children pending a divorce action and at the divorce trial.

The relevant statutes provide as follows:

30-3-5 of the Utah Code Annotated, 1953, as amended, 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 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, the custody of the children, and their support and maintenance, or the distribution of property as shall be reasonable and necessary. . ."

30-3-10, Utah Code Annotated, 1953, as amended, provides:

"In any case of separation of husband and wife having minor children, or whenever a marriage is declared void or dissolved, the Court shall make such order for the future care and custody of the minor children as it may deem just and proper. In determining custody, the Court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties. The

Court may inquire of the children and take into consideration the children's desires regarding the future custody; however, such express desires shall not be controlling and the Court may, nevertheless, determine the children's custody otherwise."

In Briggs v. Briggs (1947), 111 Utah 418, 181 P.2d 223, the Supreme Court of the State of Utah, in a habeas corpus proceeding, reviewed the custody of a seven-year-old child under the father's claim that the mother did not get along as well with the child as could be desired of a mother. The Court adopted the rule that the primary consideration under the circumstances is what would be in the best interests and welfare of the child.

The Court said at page 228:

"We are not impressed with the strong affection existing between the defendant and his child, with the care and attention he gave her while he had her with him, with the fact that his present wife is devoted to and has won the love and respect of this little girl and that all of them were living happily together and were adjusted to each other and their home."

The Court was concerned that the father had taken the child for twenty-one (21) months and that this situation was as of his own deliberate taking of the child from the state where the mother lived.

The Court said at page 228:

"During that time he had the opportunity of ingratiating himself and the affections of the child and to cause shortcomings of the mother."

Under this statute, the mother is entitled to the custody of the child unless it is made to appear to the contrary. Thus, the burden of convincing the Court is on the father, and he has not met that burden.

The Court further announced at page 228:

"We must keep in mind that ordinarily no one can take the place of a mother in the life of a girl of this age."

In the instant case, both minor children have been with their mother, the plaintiff-appellant, and were not separated until the divorce trial awarding custody of the minor son to his father, the defendant-respondent.

In the case of Steiger v. Steiger, 4 Utah 2d 273, 293 P.2d 418, the court, in a divorce suit, awarded custody of a three-year-old boy to the defendant-father, with supervision rights in the father's parents. The Court stated the case against the plaintiff-mother in the strongest possible manner, the testimony indicated (1) that she drank intoxicating liquors and on two or three occasions she was mildly intoxicated. (2) That she was frequently seen with another man other than her husband. (3) She was not a good housekeeper.

There was a dispute in regards to the testimony and the plaintiff-mother denied the allegations. The Court said at page 420:

"It appears to the Court that the plaintiff has been in the past careless and indiscreet, but that her love for the child has caused her to work to provide for him, has caused her to spend her free time with him and care

for his custody. In light of these facts it cannot be said that she is unfit."

The Court further stated at page 420:

"This Court has said that a divorced mother has no absolute right to the custody of minor children under the Utah Code Annotated, 1953, 30-3-10, Sampson v. Holt, 115 Utah 73, 202 P.2d 550, but the policy of our decision has been to give the 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, notwithstanding that the divorce was awarded to the father. . ."

"The trial court apparently felt that the child could be provided with a better home than that offered by the plaintiff, and made his order so that she would improve the conditions of the house and her associations, but in so doing, he has failed to give proper weight to the other factors here involved."

In the foregoing case, the plaintiff had not had custody for over one year, sufficient time for her to have improved the situation which disturbed the trial court's mind. The Supreme Court then entered an order that the trial court review said custody.

The District Court in the instant case was apparently reluctant to award plaintiff-appellant custody of the minor child, Brad Ray Jorgensen, because of the close relationship that the defendant-respondent testified to. The trial court, having indicated that a good relationship exists between the respondent and his son in this case, is insufficient under the rule announced in Steiger v. Steiger, *infra*, to establish that the defendant-

In White v. White, (1973) 29 Utah 2d 148, 506 P.2d 69, the Supreme Court of the State of Utah reversed the trial court's decision in awarding custody of a four-year-old girl to the father on the basis that the mother was unfit. The Court stated that the record revealed that each of the parties had engaged in illicit sexual relations during the course of their marriage. Each of the parties had engaged in the use of marijuana and other drugs. The Court stated at page 70:

"We are of the opinion that the best interests of the child here involved would be best served by awarding the custody to the mother, this is in accordance with the statutory pronouncement as set forth in Section 30-3-10, Utah Code Annotated, 1953, that the mother is best suited to have the care of the young children."

The Court further said that this ruling was in keeping with the prior pronouncements of this Court. Dearden v. Dearden, 15 Utah 2d 105, 388 P.2d 230, Baker v. Baker, 25 Utah 2d 337, 481 P.2d 672.

In Baker v. Baker, (1946) 110 Utah 462, 175 P.2d 213, the Supreme Court of the State of Utah reviewed the trial court's award of custody to the father and at page 216, the Court said:

"As a guide on retrial of this case, we refer to its action in awarding the custody of two children, ages approximately 2½ and 14 months at the time of the divorce trial to the father. This was done even though the father, in his answer to Mrs. Baker's complaint, alleged that he is not the father of the youngest child and even though the Court found that both Mr. and Mrs. Baker are fit and proper persons to have complete custody, . . ."

In Smith v. Smith, (1977) 564 P.2d 307, the Supreme Court of the State of Utah reviewed a custody order where the trial court changed custody from the natural father and awarded same to the mother, had further occasion to review 30-3-5 of the Utah Code Annotated, 1953, as amended, in its current status, the Supreme Court said at page 309:

"As to (2) above: There is no doubt about the correctness of plaintiff's contention that the trial judge was in error in referring to 'statutory presumption of a natural mother' to the custody of children of tender years; and that she has no absolute right to their custody. However, appropriate to be considered on this problem is the fact that, irrespective of any statute, the invariably declared policy stated in our decisions is that 'all things being equal, preference should be given to the mother in awarding custody of the children of tender years. . . and this is true even when . . . the divorce is granted to the father.'"

The foregoing quotation and rule was announced by the Supreme Court of the State of Utah through Justice Ellett in Hyde v. Hyde, 22 Utah 2d 429, 454 P.2d 884.

In Henderson v. Henderson, (1978) 576 P.2d 1289, the Supreme Court of the State of Utah, in reviewing a custody issue between parents, said at page 1290:

"As to the issue of child custody, both parties rely 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. See Steiger v. Steiger, 4 Utah 2d 273, 393 P.2d 418, Smith v. Smith, 564 P.2d 307."

The Court further stated that the foregoing cases say the best interests and welfare of the children is the controlling factor. See Bingham v. Bingham, (1978) 575 P.2d 703, Arrends v. Arrends, (1974) 30 Utah 2d 328, 517 P.2d 1019, Hyde v. Hyde, (1969) 22 Utah 2d 4209, 454 P.2d 884.

In the instant case, the plaintiff-appellant, Ruth Guenther Jorgensen, is as qualified and competent a person to have the care, custody and control of the minor child, Brad Ray Jorgensen, and is on an equal footing with the defendant-respondent, and, as testified to in the divorce trial by defendant-respondent, plaintiff-appellant kept the children fed, kept them neat, kept them clean, and clearly demonstrated at all times that she loves the children dearly (page 43, lines 8 through 19, Record on Appeal).

The defendant-respondent further testified that about a month prior to the divorce hearing, he wanted to reconcile with her and a brief attempt was made; however, she subsequently left and went back to Salt Lake City (page 36, lines 11 through 30, page 37, lines 1 through 11, Record on Appeal). He further stated, "I felt like if she was willing to give it a chance, I was willing to go along with that. I felt good about it. I discussed this with my Bishop and he felt good about it. We felt like it was something that was right and good, and that we could get together and go from there." (Record on Appeal, lines 11 through 16, page 37)

take her back and continue the marital relationship, he would be leaving the care, custody and control of the minor children in her hands while he was working. This would certainly not be indicative that he really felt his wife was an unfit mother, or that it would not be in the best interests of the minor children to spend their time with her while he was at work.

The defendant-respondent further testified at page 38, lines 2 through 6, Record on Appeal:

"Question - Did you feel that during the times that you were attempting to make things go, did you feel like this was in the best interests of the children also?

Answer: I felt that was a factor, the children definitely should have a father and a mother and a happy home."

The trial court judge nowhere indicated his concern that during the trial the plaintiff-appellant was living with Mr. Ron Koestel, however, that is a moot question at the present time based upon the plaintiff-appellant's Affidavit dated the 21st day of February, 1979, under paragraph 2, which provides: "That since approximately December 15, 1978, affiant has not lived with or cohabitated with any male person whatsoever, including Ron Koestel, and that affiant in fact is living alone with her minor daughter." The foregoing issue is therefore a moot question, and is not pursued in this appeal. However, where a divorced wife lived for a period of time with a man she expected to marry, although censurable, it does not in itself make her an unfit and improper person to have custody of

There is no showing on the record that any improprieties occurred in the presence of the children.

The trial court judge did not interview the minor child for purposes of determining the child's feelings on the relationship with his mother and his father, and the court gave no opportunity for the child to express a desire to live with his mother, and plaintiff-appellant believes that it is the child's overwhelming desire to be with his mother, both before the divorce trial and subsequent thereto.

Therefore, there is insufficient evidence to establish a preponderance of evidence in favor of the defendant-respondent to custody of the minor child. The defendant-respondent has failed in his affirmative burden of proof. The minor child, Brad Ray Jorgensen's best interests would be clearly served by the custody being divested from the respondent and awarded to the appellant. It would be the continuing relationship between mother and child that has existed since birth, and only during the last four months has the minor child been away from his mother for any extended periods of time.

POINT II

THE COURT SHOULD HAVE AWARDED A JUDGMENT AGAINST THE DEFENDANT-RESPONDENT IN AN AMOUNT EQUAL TO ONE-HALF OF THE JOINT SAVINGS ACCOUNT.

The defendant-respondent testified that he had withdrawn all of the monies from the joint account, and he testified

at page 5, line 17 through 30, page 6, lines 1 through 24, that

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he had expended all of the monies and in doing so, a substantial amount of his own personal bills were paid. There still remains between \$737.50 and \$1,391.23 which are unaccounted for, and a fair implication of the testimony is that a portion of those monies were used to sustain the defendant-respondent during the pendency of the divorce action and as a partial down-payment for the real property he purchased during the pendency of the action.

In Humphries v. Humphries, 520 P.2d 193, the Supreme Court of the State of Utah noted that the plaintiff mother had invested \$3,400.00 which was used as a down-payment for the purchase of the family home, and that she should be reimbursed for that amount, and that it should be a preferred claim on the proceeds of the sale with a priority before the payment of other debts. The Court also reiterated the guidelines in regards to custody of minor children.

The plaintiff-appellant's assets in the divorce case were meager at best, however, they included at least one-half of the joint account held by the parties hereto.

The trial court allowed the defendant-respondent to withdraw and use the monies from the joint account, as he saw fit. Admittedly the monies were spent for obligations and debts, including the defendant-respondent's debts. However, the foregoing court approval operated to relieve him of past debts incurred during the marriage, and at the time the trial was held, his only major debt was the claimed \$6,000.00 due

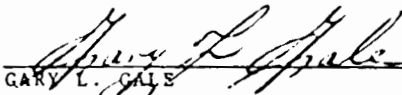
and owing to his parents. To allow the trial court's ruling to stand in this area, would be a violation of the concept of doing equity between the parties. This Honorable Court should require a reimbursement of the funds taken from the joint account, and award same to the plaintiff-appellant.

CONCLUSION

The trial court erred in awarding custody of the minor child, Brad Ray Jorgensen, to the defendant-respondent hereunder. Both parties are equally positioned in court, and the plaintiff-appellant mother should be entitled to the care, custody and control of said minor child so as not to disrupt the relationship between mother and child since his birth. It would certainly be in the minor child's best interests to have this Honorable Court award care, custody and control to his mother so that he could continue the relationship with his mother and with his sister, which should now compose the basic family unit.

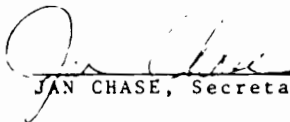
The trial court erred in not awarding the plaintiff-appellant a judgment in the amount of one-half of the joint funds accumulated by the parties during their marriage, and the defendant-respondent should not be allowed to receive the monies in the form of a windfall to clear all of his debts and obligations so that he is responsible only for the ongoing current obligations. Therefore, the trial court's ruling on the foregoing issues should be reversed, and the plaintiff-appellant should be granted the relief as prayed for herein.

RESPECTFULLY SUBMITTED this 26th day of March, 1979.


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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing Brief, postage prepaid, to Mr. David E. Bean, Attorney for defendant-respondent, 190 South Fort Lane, Suite 2, Layton, Utah 84041, on this 27th day of March, 1979.


JAN CHASE, Secretary