

1998

Mathie v. Gough : Reply Brief

Utah Court of Appeals

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Frank G. Smith; Wendy F. Fenton; Utah Legal Services Inc; Attorneys for Appellee.

Joseph R. Goodman, Jr; Nelson, Snuffer & Dahle; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

FILE NO

981452-CA

GARY MATHIE,

Plaintiff and Appellant

vs.

TWILA GOUGH,

Defendant and Appellee.

Case No. 981452CA

CIVIL NO. 944-018

Priority 4

REPLY BRIEF OF APPELLANT

THIS IS AN APPEAL FROM A DOMESTIC TRIAL
HELD NOVEMBER 22, 1996 AND JANUARY 31, 1997,
WHERE THE TRIAL COURT GRANTED CUSTODY
OF THE PARTIES' MINOR CHILD TO THE DEFENDANT.
IN THE SECOND JUDICIAL DISTRICT COURT IN AND
FOR DAVIS COUNTY, STATE OF UTAH, THE
HONORABLE JON M. MEMMOTT PRESIDING

UTAH LEGAL SERVICES, INC.
FRANK G. SMITH
WENDY F. FENTON
Attorneys for Appellee
550 - 24th Street, Suite 300
Ogden, UT 84401

JOSEPH R. GOODMAN, JR.
NELSON, SNUFFER & DAHLE, P.C.
Attorney for Appellant
10885 South State Street
Sandy, UT 84070

FILED

Utah Court of Appeals

JUN 28 1999

Julia D'Alesandro
Clerk of the Court

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UTAH LEGAL SERVICES, INC.
FRANK G. SMITH
WENDY F. FENTON
Attorneys for Appellee
550 - 24th Street, Suite 300
Ogden, UT 84401

JOSEPH R. GOODMAN, JR.
NELSON, SNUFFER & DAHLE, P.C.
Attorney for Appellant
10885 South State Street
Sandy, UT 84070

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ARGUMENT

I. TEMPORARY ORDERS SHOULD NOT BE GIVEN UNDUE WEIGHT IN SUBSEQUENT CUSTODY DETERMINATIONS.

The standard for determining custody in this matter is simply the “best interests of the child.” Boals v. Boals, 664 p.2d 1191, 1194 (Utah 1983). Gary Mathie was not required to show a “substantial change” in circumstances, or to show unfitness on the part of Ms. Gough. Id. All Gary Mathie had to show was simply that it was in the best interests of the minor child that he be granted custody. This standard was not applied because of the trial court’s admission of irrelevant evidence and its placing inappropriate weight on the temporary custody determination.

The purpose of a temporary order is to provide fast and easy resolution of complex issues. The orders are exactly what they are called, temporary, and are to have no impact on the parties’ permanent status.¹ Alimony and temporary support are routinely established, but it is contemplated by all parties that these amounts will change when the Decree of Divorce is entered. Temporary divisions of property are made, but can and often are altered in the Decree of Divorce. By allowing trial courts to use a temporary custody arrangement as the basis for establishing permanent custody, it has the effect of undermining the very purpose of such temporary orders, and flies in the very face of every other issue addressed and decided by such orders.

¹“A temporary order is only that, temporary. It is effective only until a fully informed custody determination can be made at a final hearing. *Temporary custody is not to be treated as permanent custody.*” Tucker v. Tucker, 910 P.2d 1209 (Utah 1996).

As a practitioner faced with such issues on a daily basis, the position of Appellee, were it to be upheld by this Court, would substantially impact the advice and counsel I would give clients. Realizing that a contested and complicated divorce may drag out for years, it would border on malpractice to advise a client interested in custody to stipulate to such orders. I would be forced to garner all resources at my disposal, including the opinions of expert witnesses, to turn the hearing for a temporary order into as much of a trial setting as possible. This would undoubtedly burden the courts, and defeats the reasons for having temporary orders in the first place. I would perceive failure to get temporary custody as ultimately a failure to get permanent custody.²

Although we do not dispute the broad discretion trial courts have in making such decisions, it is patent abuse of that discretion to rely upon temporary orders, often entered without substantive analysis by the preceding court, when making a permanent custody evaluation. There currently exists an incongruity in the law, which can and must be addressed. Cases like Tucker v. Tucker stand for the principle that temporary orders should not be given permanent status, and cites most of the above reasons as to why. The same opinion, as set forth in Appellant's brief, goes on to say that such arrangements "should not be ignored." The only guidance is that the trial court should not "abuse its

²My observations and concerns are far from novel or unique. In Tucker, the Supreme Court of Utah recognized that "if a temporary order of custody were to be given permanent status...no party would ever stipulate to a temporary arrangement, and every hearing on temporary custody would involve the time-consuming presentation of witnesses, both expert and lay, as well as other types of evidence. In short, a *temporary custody hearing would become a permanent custody hearing.*" Tucker, at 1216.

discretion” and that a trial court is “entitled to accord no more or no less significance to the existing custody arrangement than it deemed appropriate.” Tucker at 1216

This is, in practice, no standard at all. Trial courts, as happened to Gary Mathie, can and do use the temporary custody determination as the determinative factor in making custody decisions. The abuse of discretion standard is so high, so nebulous, that the alleged limitation on the determinative weight given to temporary orders is a myth. No attorney can adequately or even competently advise his client as to the later impact of a temporary order. Should Gary Mathie lose this appeal, as a great deal of the underlying case law would seem to indicate, then the only appropriate advice given a client would be to fight like a bulldog to get temporary custody, regardless of the cost and expense, because the alternative is to lose custody in the future. This Court can and should set forth a rule that the substantive effect of temporary orders be given no weight at all in making permanent determinations, and that custody analyses focus solely upon the relative fitness of the parents and the best interests of the child, regardless of prior custody determinations.

II. AT ALL TIMES RELEVANT TO THE CUSTODY DETERMINATION, APPELLANT ACTED APPROPRIATELY AND HAD NO CRIMINAL INVOLVEMENT.

The trial court placed emphasis on the prior criminal record of Gary Mathie when making a character determination with respect to the parties. This evidence is irrelevant,

unduly prejudicial, and should not have been admitted when making a custody determination.

The only thing relevant to Mathie's fitness as a parent is his current behavior and his involvement with the child. To this, there is no dispute from the record below that Mathie is a fit parent, and has "cleaned up" his life since the birth of his child. Instead of using his prior bad acts against him, he should have been commended for the turn around he has made in his life, and seen as the example he can be for his young child.

CONCLUSION

This matter was briefed earlier by another attorney, and most of the substantive and factual issues were adequately addressed in the prior filings. The supporting case law is before this Court, and little to nothing can be added by my merely throwing additional cases into the mix. Coming late to the game, and learning of this case under circumstances similar to those of this Court, I would admit to being struck by the difficulty and complexity of the underlying issues presented in this matter. Trial courts are faced with difficult decisions when making child custody determinations, but being difficult cannot be allowed as an excuse for being unfair. The determination below was and is unfair to Gary Mathie.

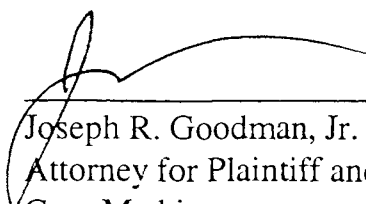
On the one hand, the courts of this state have repeatedly stated that temporary orders are not permanent orders, and should not be relied upon as such. On the other

hand, trial courts are allowed to use this determination as long as it is not an “abuse of discretion.” How can these two, apparently mutually exclusive standards, coexist? What is the standard for “abuse of discretion” under these circumstances? Is it even possible to articulate such a standard, or are we merely to rely upon the good judgment and discretion of trial court judges? It appears that the current state of the law in this area is confusing and contradictory, provides no predictive value, and is most certainly applied in vastly different manners throughout the state.

What is undisputed is that there are two people who dearly love their child. Both were found fit to be parents, with one being awarded custody by the “slimmest of margins.” R. at 235. What is also undisputed is that the trial court made this determination after relying heavily upon the temporary order, and that this was unfair and unjust to Gary Mathie.

In conclusion, the only fair and just way to resolve this matter, and other matters similarly situated, would be to prohibit trial courts from applying any weight deriving from circumstances resulting from temporary orders when making permanent child custody determinations.

DATED this 28 day of June, 1999.



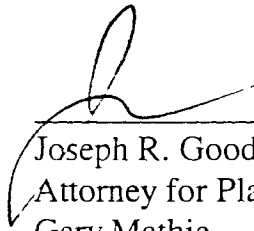
Joseph R. Goodman, Jr.
Attorney for Plaintiff and Appellant,
Gary Mathie

CERTIFICATE OF MAILING

I hereby certify that I served two (2) true and correct copies of the foregoing
REPLY BRIEF OF APPELLANT, via first class mail, postage prepaid, on the following:

UTAH LEGAL SERVICES, INC.
FRANK G. SMITH
WENDY F. FENTON
Attorneys for Appellee
550 - 24th Street, Suite 300
Ogden, UT 84401

on this 28 day of June, 1999.



Joseph R. Goodman, Jr.
Attorney for Plaintiff and Appellant,
Gary Mathie