

1998

Mathie v. Gough : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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CKET NO.

981452-CA

GARY MATHIE

Case No. 981452CA

Plaintiff and Appellant,

Civil No. 944701877

vs.

TWILA GOUGH,

Priority 4

Defendant and Appellee.

BRIEF OF APPELLEE

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.

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FILED

APR 21 1999

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

GARY MATHIE

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vs.

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Case No. 981452CA

Civil No. 944701877

Priority 4

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from the granting of permanent physical custody of the parties' minor child to the Defendant in the Second Judicial District Court in and for Davis County, State of Utah, on January 31, 1997, the Honorable Jon M. Memmott presiding. The Utah Court of Appeals has jurisdiction to hear this case pursuant to Utah Code Annotated Section 78-2a-3(2)(h).

**STATEMENT OF THE ISSUES PRESENTED AND STANDARDS OF
APPELLATE REVIEW**

Appellee is dissatisfied with the statement of the issues and standard of appellate review presented by Appellant. The following issues are presented on appeal:

1. Did the trial court abuse its discretion by giving undue significance to the fact that

Respondent was granted temporary custody of the minor child during the pendency of the divorce proceeding?

Standard of appellate review: Trial court judges are accorded broad discretion in determining permanent physical custody of a minor child. “Only where the trial court’s judgment is so flagrantly unjust as to be an abuse of discretion, will an appellate court interpose its own judgment.” Shioji v. Shioji, 712 P.2d 197, 201 (Utah 1985).

2. Did the trial court abuse its discretion in weighing the Appellant’s prior criminal history against when the criminal incidents occurred before the child was born?

Standard of appellate review: Trial court judges are accorded broad discretion in determining permanent physical custody of a minor child. “Only where the trial court’s judgment is so flagrantly unjust as to be an abuse of discretion, will an appellate court interpose its own judgment.” Shioji v. Shioji, 712 P.2d 197, 201 (Utah 1985).

CONTROLLING STATUTORY PROVISIONS

There are no statutory provisions directly related to the issues at hand.

STATEMENT OF THE CASE

A minor child was born to the parties out of wedlock on June 4, 1994, to wit: McKinlee Marie Mathie. (R. at 2). The parties have never been married, and have never resided together. (R. at 204, p. 30). The minor child has been continuously in the physical custody of the Respondent since the child’s birth. (R. at 204, p. 105).

Because the Respondent is a single parent, it was necessary for her to return to work to support the minor child a few months after the minor child was born. (R. at 204, pp. 105-

106). While Respondent worked, Petitioner babysat the child approximately two days per week from August of 1994 through November of 1994. (R. at 204, p. 106). The parties broke off their relationship in November of 1994. (R. at 204, p. 107).

In order to obtain an order of paternity and visitation in regard to the minor child, the Petitioner filed a paternity action on December 21, 1994 and an Order to Show Cause hearing was held in January of 1995. (R. at 1-7; 9-16). At that time, the Respondent was awarded full custody of the minor child and Petitioner was granted graduated visitation with the minor child for the succeeding 90-day period. (R. at 20-22).

In March of 1995, with the court's permission, the mother and child moved to Idaho to provide more financial and emotional stability for the minor child. (R. at 44-50). The Respondent's family lives in Idaho and is able to provide financial and emotional support to the Respondent and the minor child. (R. at 204, p. 108). Due to continuing problems with visitation, several Order To Show Cause hearings were held during the pendency of the divorce action. (R. at 72). Trial was held on November 22, 1996 and January 31, 1997. (R. at 204). At trial, Appellant testified to many alcohol and past criminal offenses (R. at 204, pp. 65-70). The trial court issued its findings of fact on January 31, 1997, analyzing seven factors. (R. at 204, pp. 228-235). The trial court found that both parties were relatively equal as far as stability, suitable environment, bonding with the child, and commitment to care for the child and relative parenting skills. The court further found that the ability and willingness to provide visitation clearly favored the Petitioner, but that the Respondent's character was more favorable in relation to the child's best interest. (R. at 204,

p. 230). The court also found it to be in the best interests of the minor child to maintain the Respondent's primary custodial relationship. (R. at 204, p. 232). Because the factors in Respondent's favor outweighed the factor's in Petitioner's favor, Respondent was awarded permanent custody of the minor child. (R. at 204, p. 235).

The court found the character and emotional stability of the Respondent to be lacking due to five alcohol related offenses, one theft charge, and a criminal trespass, which the court found to be indicative of the visitation disputes between the parties. (R. at 204, p. 231). The court considered the fact that the Petitioner brought an indecent calendar with partially-clothed women to court which he had hanging in his kitchen, as lacking in sensitivity on the part of the Petitioner. (R. at 204, p. 231). The court also considered the fact that Petitioner thought it was O.K. to have such a calendar because his girlfriend who was pictured in the calendar gave it to him, as indicative of his character and lifestyle, which factors went against awarding Petitioner custody in bringing up a young lady. (R. at 204, p. 231).

The other factor the trial court found in the Petitioner's favor was that it would be in the child's best interest to maintain the Respondent's primary custodial relationship with the child. (R. at 204, p. 234) The trial court duly noted and weighed the fact that the petitioner had provided significant amounts of caretaking to the minor child in awarding liberal visitation to the Petitioner. (R. at 204, p. 235).

Plaintiff filed a motion for extension of time to file his notice of appeal and the Notice of Appeal was filed on August 5, 1998. (R. at 197-198.)

SUMMARY OF THE ARGUMENT

The District Court properly weighed the effects of the temporary custody order and the Petitioner's prior criminal history in awarding permanent custody of the minor child to the Respondent. This Court has emphatically stated, "Only where trial court action is so flagrantly unjust as to constitute an abuse of discretion should the appellate forum interpose its own judgment." Wall v. Wall, 700 P.2d 1124, 1125 (Utah 1985). In order to show a flagrant abuse of discretion, the Appellant must show that the findings of fact were inadequate to support the custody award, are not supported by the evidence, or that the trial court erred in law in determining custody.¹

In the findings of fact presented in the case at hand, the trial court set forth seven factors supporting the permanent custody award to the Respondent. All seven factors were clearly supported by the evidence presented at trial. All seven factors are pursuant to the legal standards in determining custody which the Supreme Court has set, focusing on the best interest of the child and utilizing the suggested factors in determining custody found in the Utah Supreme Court decision, Hutchison v. Hutchison, 649 P.2d 38 (Utah 1982). Further, the trial court's analysis and weight given to each factor are reasonable and fully explained in its findings of fact.

Appellant specifically contends that undue weight was given to a temporary custody order in awarding permanent custody of the minor child to the Respondent pending the two

¹See Tucker v. Tucker, 910 P.2d 1209 (Utah 1996); See also Paryzek v. Paryzek, 776 P.2d 78 (Utah 1989).

and a half years prior to the trial. Utah case law clearly indicates that if a temporary custody period before the trial was lengthy, the factor of temporary custody becomes of greater importance in determining permanent custody. Paryzek v. Paryzek, 776 P.2d 78 (Utah 1989). In the case at hand, the child had been in the physical custody of the Respondent since the child's birth and was happy and well-adjusted in Respondent's care. Further, the court found that the child had lived much more with the mother than the father and that it was in the child's best interest to maintain the stability of the primary custodial bond. Because no custody evaluation was performed, all other factors being equal, the court properly found that the child's interests would be best promoted by maintaining the prior, stable and healthy custodial relationship with the Respondent.

Appellant further contends that undue weight was given to the fact that Petitioner committed five alcohol-related offenses prior to the birth of the child. Again, Utah law clearly states that in determining custody, the trial court "shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties. . ." (Utah Code Ann. § 30-3-10, emphasis added). At trial, the Respondent admitted to alcohol-related offenses in 1985, 1986, 1989, 1992, and 1994, which the court allowed as evidence to show a pattern in the Respondent's character. The court, noting that Respondent had committed the alcohol-related offenses prior to the birth of the child, also noted that character does not change overnight with the birth of a child. In determining Respondent's character, the court also considered the fact that the Respondent brought his kitchen calendar portraying semi-nude women to court. As further evidence of the Petitioner's character, the

court considered the continuing problems between the parties regarding visitation. In light of the fact that the Respondent has no criminal record of any kind, the court did not abuse its discretion by finding the factor of character in favor of the Respondent. It was reasonable and proper for the court to find in favor of the Respondent in determining custody, considering Petitioner's prior alcohol-related offenses combined with the Petitioner's present lack of judgment and lack of sensitivity to the best interests of the minor child.

Finally, the trial court's decision should not be disturbed because the trial court was in the best position to look at the totality of the circumstances in making the custody decision. This Court has stated that "A determination of the 'best interests of the child' frequently turns on numerous factors which the trial court is best suited to assess, given its proximity to the parties and the circumstances." Wall at 1125. By Personally observing the parties, the trial court was able to assess the parties' true characters, and make the proper decision regarding the best interest of the minor child.

ARGUMENT

POINT I.

THE TRIAL COURT PROPERLY WEIGHED THE EFFECT OF THE TEMPORARY CUSTODY ORDER IN DETERMINING THE BEST INTEREST OF THE CHILD AND IN AWARDING CUSTODY OF THE MINOR CHILD TO THE RESPONDENT.

In the landmark case, Hutchison v. Hutchison, 649 P.2d 38 (Utah 1982), the Supreme

Court of Utah stated that a custody award should be determined solely by reference to the best interests of the child. Id. at 40. The Court further stated that some factors the trial court may consider in determining the child's best interest are as follows:

The preference of the child; keeping siblings together, the relative strength of the child's bond with one or both of the prospective custodians; and, in appropriate cases, *the general interest in continuing previously determined custody arrangements where the child is happy and well adjusted*. Other factors relate primarily to the prospective custodians' character or status or to their capacity or willingness to function as parents: *moral character and emotional stability*; duration and depth of desire for custody; ability to provide personal rather than surrogate care; significant impairment of ability to function as a parent through drug abuse, excessive drinking, or other cause; reasons for having relinquished custody in the past; religious compatibility with the child; kinship, including, in extraordinary circumstances, stepparent status; and financial condition.

Id. (emphasis added).

Appellant contends that the trial court improperly weighed the previously determined custody arrangement. However, it is clear from the court's statement in Hutchison that an appropriate factor to consider when determining permanent custody is the temporary custody arrangement. The question then becomes whether the trial court blatantly abused its discretion by giving the previously determined custody arrangement too much weight.

Appellant cites Tucker v. Tucker, 910 P.2d 1209 (Utah 1996), which states that temporary orders should not be treated as permanent custody orders which require a substantial and material change of circumstance to modify. However, Appellant failed to cite the rest of the opinion which states,

This is not to say that the environment in which a child has lived prior to the final custody hearing should be ignored in determining initial custody. As long as the trial court did not abuse its discretion, it was entitled to accord no more or less significance to the existing custody arrangement than it deemed appropriate.

Id. at 1215.

In fact, the Utah Court of Appeals specifically held in Paryzek v. Paryzek, 776 P.2d 78 (Utah 1989), that the trial court erred in explicitly disregarding the fact that the minor child had resided with one of the parents for two and one-half years prior to trial on a temporary custody award. The Court further held that a trial court must examine a child's need for stability, and therefore, consider prior custody arrangements, including the duration of those arrangements, and the potential harm to the child if the arrangement is changed. Id. at 82.

The next question regarding how much weight should be given to the temporary custody arrangement is also addressed by the Court in Paryzek:

What particular weight to be accorded those factors in a given case must depend on the duration of the initial custody arrangement . . . A very short custody arrangement of a few months, even if nurturing to some extent, is not entitled to as much weight as a similar arrangement of substantial duration . . . Because of the length of time of the temporary custody, that factor becomes one of relatively greater importance in determining permanent custody . . . This was a close case . . . Where the call is a close one, we believe the child's interests will best be promoted by maintaining the prior, stable and healthy arrangement. That is, where the evidence was otherwise inconclusive . . the paramount consideration of stability tips in [that parent's] favor and warrants awarding custody to [that parent].

Id. at 82-83.²

Thus, because of the length of the temporary custody order, greater weight should have been given to that factor. The courts try to avoid “ping-ponging” the child from one parent to the other unless there are specific findings showing that it would be in the child’s best interest. The evidence at trial showed that the minor child was thriving as a normal child in the Respondent’s care and custody. Therefore, the court properly found that it would be in the best interest of the child to continue the stability of this thriving custodial relationship.

POINT II.

THE TRIAL COURT PROPERLY WEIGHED THE PETITIONER’S PRIOR CRIMINAL HISTORY IN AWARDING CUSTODY OF THE MINOR CHILD TO THE RESPONDENT.

In addition to the Hutchison factors, Section 30-3-10 of the Utah Code states 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.” In a Utah Court of Appeals case, Hansen v. Hansen, 736 P.2d 1055 (Utah 1987), evidence of respondent’s convictions for money order theft, check alteration, and making a false statement on a loan

²See also Pusey v. Pusey, 750 P.2d 599 (Utah 1988)(party awarded custody did not act wrongly in obtaining temporary custody); Hogge v. Hogge, 649 P.2d 51 (Utah 1982),(in any determination of the best interests of the child, it is appropriate for the trial court to consider the child’s present custody arrangement).

application were considered in determining permanent custody of the minor child.³

In the present case, the trial court, overruling Petitioner's objections to the admission of evidence relating to these criminal charges, stated that the evidence would be appropriate to show Petitioner's pattern of behavior, although the weight the court gave those charges may be less considering the fact that no charges had occurred since the birth of the minor child. In its findings, the trial court stated that the criminal charges were indicative of disputes the parties were having over visitation. Appellant contends that his past criminal history does not affect his parenting ability; however, the court need not find one parent inadequate to award custody to the other.

The court also considered Petitioner's calendar of semi-clad women, which darkened the Appellant's character and sensitivity to meet child's needs. "The plaintiff had the record and I think he's to be commended that it has changed but I still think that lifestyle character, it's part of his character and lifestyle. I think there has been an explanation as to the calendar and the concern of the calendar had to do with .. His sensitivity to those factors in relation to long-term, if I'm going to award custody in bringing up a long lady, sensitivity to those issues of having and presently those. And I think it exhibited a lack of sensitivity which would affect, some effect on the character of the plaintiff." (R. at 204, p. 231).

Because character was not the only factor in determining custody and because no

³ See also Smith v. Smith, 725 P.2d at 425 (several of the factors used in reaching a custody determination that was in the best interests of the minor child included: appellant's history of assaultive behavior; respondent's history of criminal behavior . . . Each of these factors is relevant in a custody determination.)

custody evaluation had been performed, it was appropriate for the court to look at the Petitioner's criminal history. In addition to the Petitioner's prior criminal history, it was appropriate for the trial court to be concerned with the stability, character and sensitivity of person raising a minor child. The trial court did not err in weighing the effect of the Petitioner's criminal history because it was required to make adequate findings regarding the best interests of the child and past conduct and demonstrated moral character of each of the parents, the court found it in Respondent's favor that she had moved to Idaho

POINT III.

THE TRIAL COURT IS BEST SUITED TO ASSESS THE NUMEROUS FACTORS WHICH DETERMINE THE BEST INTERESTS OF THE CHILD, GIVEN ITS PROXIMITY TO THE PARTIES AND THE CIRCUMSTANCES OF THE SPECIFIC CASE.

The standard of review in custody cases is as follows:

Only where trial court action is so flagrantly unjust as to constitute an abuse of discretion should the appellate forum interpose its own judgment. In the instant case the evidence, depending upon how it is viewed, could support a custody award to either party. In such case, we will defer to the judgment of the trial court.

Wall at 1125.

The standard of review is so high because the Court realizes that the trial court is in the best position to observe the circumstances of a specific case. No one set list of factors concerning the best interests of the child can govern custody determinations in all cases.

Therefore, the Court defers to the trial court absent a flagrant abuse of discretion and allows trial courts to give different weight to different factors.

The Court has stated:

Proper findings of fact ensure that the ultimate custody award follows logically from and is supported by, the evidence and the controlling legal principles. We understand this to mean that a custody award must be firmly anchored on findings of fact that (1) are sufficiently detailed, (2) include enough facts to disclose the process through which the ultimate conclusion is reached (3) indicate the process is logical and properly supported, and (4) are not clearly erroneous.” Smith at 426

In the case at hand, the trial court has clearly stated its findings, which are logically and legally based. The personal observations of the trial court regarding the Petitioner’s character, especially in regard to the indecent calendar, which is barely referenced in the record, underscores the importance of the Court deferring to the trial court’s judgment in a close case where the trial court has properly based its findings. Therefore, the Court should defer to the judgment of the trial court in this case.


CONCLUSION

The Court has stated, “So long as the discretion it exercises is within the confines of the legal standards we have set, and the facts and reasons for the decision are set forth fully in appropriate findings and conclusions, we will not disturb the resulting award.” Davis v. Davis, 749 P.2d 647, 648 (Utah 1988).

The court did not abuse its discretion in finding that the previous custody placement of the child and the Petitioner’s previous criminal history favored the Respondent in

awarding permanent custody to the Respondent. It is uncontroverted law that the trial court not only should, but must consider the previous custody arrangement when the temporary period is lengthy, as in the present case. It is also clear that the trial court must consider the past conduct and demonstrated moral standards of the parties when considering the child's best interest. The Court has stated that it will defer its judgment to the trial court in close cases. In the case at hand, the trial court's personal observations were invaluable in discerning the parties' true characters, and may have been one of the determining factors in this case, sliding the scale "even by the slimmest of margins."

Dated this 21 day of April, 1999.

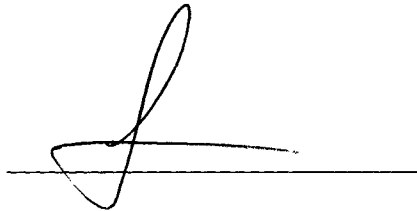


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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing Brief of Appellee, was posted on the 21 day of April, 1999 in the United States mail, postage prepaid and addressed to the following:

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ADDENDUM “A”

30-3-10. Custody of children in case of separation or divorce — Custody consideration.

(1) If a husband and wife having minor children are separated, or their marriage is declared void or dissolved, the court shall make an order for the future care and custody of the minor children as it considers appropriate. 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, but the expressed desires are not controlling and the court may determine the children's custody otherwise.

(2) In awarding custody, the court shall consider, among other factors the court finds relevant, which parent is most likely to act in the best interests of the child, including allowing the child frequent and continuing contact with the noncustodial parent as the court finds appropriate.

(3) If the court finds that one parent does not desire custody of the child, or has attempted to permanently relinquish custody to a third party, it shall take that evidence into consideration in determining whether to award custody to the other parent.

(4) (a) A court may not discriminate against a parent due to a disability, as defined in Section 57-21-2, in awarding custody or determining whether a substantial change has occurred for the purpose of modifying an award of custody.

(b) If a court takes a parent's disability into account in awarding custody or determining whether a substantial change has occurred for the purpose of modifying an award of custody, the parent with a disability may rebut any evidence, presumption, or inference arising therefrom by showing that:

(i) the disability does not significantly or substantially inhibit the parent's ability to provide for the physical and emotional needs of the child at issue; or

(ii) the parent with a disability has sufficient human, monetary, or other resources available to supplement the parent's ability to provide for the physical and emotional needs of the child at issue.

(c) Nothing in this section may be construed to apply to:

(i) abuse, neglect, or dependency proceedings under Title 62A, Chapter 4a, Family Services, or Title 78, Chapter 3a, Juvenile Courts; or

(ii) adoption proceedings under Title 78, Chapter 30, Adoption.

History: L. 1903, ch. 82, § 1; C.L. 1907, § 1212x; C.L. 1917, § 3004; R.S. 1933 & C. 1943, 40-3-10; L. 1969, ch. 72, § 7; 1977, ch. 122, § 5; 1988, ch. 106, § 1; 1993, ch. 131, § 1; 1997, ch. 43, § 1.

Amendment Notes. — The 1997 amend-

ment, effective May 5, 1997, added Subsection (4)

Cross-References. — Disposition of property and children, § 30-3-5

Removal of children from homestead, § 30-2-10

NOTES TO DECISIONS

Compiler's Notes. — In 1997, the Utah legislature changed the designation of parties

in domestic relations cases from "plaintiff" and "defendant" to "petitioner" and "respondent"