

1989

Marcelene Pierce Wehry v. Terry Ray Pierce : Amended Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

MARCELENE PIERCE WEHRY,

Plaintiff
Respondent,

vs.

TERRY RAY PIERCE,

Defendant
Appellant.

Argument Priority
Classification 7

Appeals No. 890239-CA

Civil No. 814900255

AMENDED REPLY BRIEF

Appeal from the Third Judicial District Court,

Salt Lake County, State of Utah

Judge Michael R. Murphy

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SUMMARY OF THE ARGUMENT

Plaintiff has alleged in her Response Brief that Defendant failed to show any substantial change of circumstances. The Defendant, however, set forth four changes in the parties' circumstances which together amount to a substantial change of circumstances. The first is that the Plaintiff had relinquished physical custody of the children for substantial periods of time prior to the Defendant's Petition for Modification. The second change is that the Plaintiff removed the children from the Defendant's physical custody without warning in the middle of the school year, contrary to her signed stipulation. The next change identified was the Plaintiff's numerous moves and her interference with the Defendant's contact with the children while they were in her custody. Finally, the fact that the boys expressed a desire for a change of custody and that the oldest child had attained

sufficient maturity to understand the consequences of this decision was the fourth change in the parties' circumstances. These four changes taken together amount to a substantial change of circumstances. Therefore, it was error for the Court below to rule that there was no substantial change of circumstances.

The Defendant has asserted that the Court erred in finding it was not in the best interests of the children to change custody even if there were substantial change of circumstances. The Plaintiff has attempted to point out facts and evidence supporting this ruling, but all of the evidence and the weight of the evidence were in favor of finding that the best interests of the children would be served by changing custody. The Court's reason for ruling that it was not in the best interests of the children to change custody was that the younger child Isaiah was afraid of his stepmother, was treated disparately from his older brother by the Defendant and his wife, and that the older child could better adjust to remaining with his mother than the younger child would adjust going to live with his father. This was all contrary to the testimony of the court ordered evaluator who found that Isaiah's fears were based upon brain-washing by the Plaintiff in response to the upcoming trial, that he did not experience these fears prior to his return to live with his mother, and that in spite of his fears, it would serve the best interests of the children to go live with their father. The fact that the Plaintiff testified that both children wanted to go live with their father two years

prior to the litigation proves that any fears or disparate treatment did not exist for the younger child until the time that the custody litigation was commenced and the Plaintiff began programming the child at that time. In light of the facts and testimony presented at court it was error to find that custody should not be transferred to the Defendant because of the younger child's fear of the Defendant's wife.

The Defendant alleges that it was error to admit hearsay evidence regarding many conversations reported by the Plaintiff which supported her decision to remove the children from the Defendant's home without warning and in the middle of the school year, contrary to the stipulation of the parties. The Plaintiff made no showing that the witnesses were unavailable to testify personally at the trial, and the hearsay testimony with regard to their statements was self-serving, uncorroborated and highly unreliable. The Defendant was unfairly surprised by the admission of hearsay evidence as he was unprepared to present rebuttal witnesses. Therefore admission of hearsay evidence was prejudicial and mandates reversal of the lower court's decision which relied heavily upon this testimony.

The Defendant made a motion to amend the Findings of the Court when the Court refused to sustain the Defendant's objections to the Plaintiff's proposed Findings. The Plaintiff's proposed Findings contained statements which had no basis in the evidence and which omitted statements which were relevant to the proceedings, namely that neither party had

committed any abuse of the children. This was an appropriate and necessary Finding for the reason that the Plaintiff had made allegations of abuse and cross-examined the Court appointed evaluator and the Defendant's witnesses with regard to alleged abuse on the part of the Defendant. Therefore, the Court should have granted the Defendant's Motion to Amend and should have adopted the Defendant's proposed findings which more accurately reflected the Court's ruling and the evidence presented in the trial.

Finally, the Plaintiff accuses the Defendant of filing numerous non-meritorious actions against her but in fact all of his actions have been meritorious. This action particularly is meritorious as it is based on the desires of both children at the time that it was brought, and because it was supported by the statement of the Court ordered evaluator that it was in the best interests of the children to change custody. To award attorney's fees and costs on appeal under these circumstances would be to chill the rights of non-custodial parents everywhere in their attempt to address the stated needs of their children who wish to change custody.

DETAIL OF THE ARGUMENT

I.

THE COURT ERRED AS A MATTER OF LAW IN FINDING THERE WAS NO SUBSTANTIAL CHANGE IN CIRCUMSTANCES.

Defendant has set forth detailed and compelling facts in his brief supporting his claim that the Defendant did

indeed show a substantial change of circumstances at the hearing on his Petition for Modification of custody. Defendant also set forth in his brief reasons why a rigid scrutiny of the change of circumstances prong of the modification procedure is not required in this case. The standard for a modification of custody under normal circumstances is a high standard and requires that the moving party demonstrate significant changes affecting the relationship between the custodial parent and the minor children involved. As stated in the Plaintiff's brief, this is to prevent "ping pong custody" situations where the children do not have the stability of one permanent home.

The children involved in the custody dispute in the case at bar, however, have had several planned and unplanned changes in physical custody. Plaintiff argues in her brief on the one hand that this had no negative effect on the children and on the other hand argues that a custody change should not be considered in this case because of the possible negative effects of custody changes to the children. The inconsistency of this position is obvious.

In any event, the minor children in this case have been subjected to two major changes in physical custody. One change was when they came to live with their father for an extended period of time according to the stipulation of the parties. Plaintiff minimizes the importance of this change of custody, stating that it was for a period of one calendar year only. (Brief of Respondent, Page 12.) Defendant wishes to point out

that prior to the Plaintiff's signing of a Stipulation agreeing to transfer custody to the Defendant for one year, he had been given physical custody of his minor son Isaac for the year prior to the stipulation. If the Court would have granted the Stipulation and Petition of both parties, which was signed by both parties, he would have changed physical custody to the Defendant, but this the Court refused to do in a minute entry of July 1, 1987. (Record at 65). The Plaintiff wishes to characterize this as a temporary change, lasting only one year. However the plan was for the older child to live with the Defendant for a two year period, a significant amount of time for a child of his age. Also significant is the fact that the custody arrangement in the year prior to the stipulation did separate the two children. Therefore, the Plaintiff's characterization of this visitation as temporary and insignificant is inaccurate. Defendant, however, recognizes that this by itself it would probably not amount to a significant change of circumstances. The subsequent events however, coupled with the changes in physical custody do amount to a legally cognizable change in circumstances.

The subsequent events, as set forth in the Defendant's brief occurred several months after the Plaintiff signed the stipulation agreeing to transfer custody of the children to the Defendant. Defendant made all arrangements necessary to having the children for the extended period of time as agreed, and possibly longer, as testified to by the Defendant, Trial

Transcript at 80, only to have the children removed by the Plaintiff without warning. Plaintiff in her brief justifies her behavior in removing the boys from their father's home without warning and in violation of the Stipulation she signed. She alleges that considerable amount of testimony was taken at trial wherein the Plaintiff explained her "objective rational proper reasons for her action." Respondent's Brief at Page 13. In fact, all of the testimony taken was from the Plaintiff herself and was self-serving, unsupported, uncorroborative and presented an unfair surprise to the Defendant who did not know ahead of time that hearsay evidence would be allowed with regard to the statements of numerous individuals. The opinion of the Court appointed custody evaluator was that the Plaintiff acted unreasonably in removing the children without prior warning to the Pierces. Dr. Morse stated that the appropriate response for a parent when there is suspicion of abuse is to "check it out," rather than to act in a precipitous manner. (Trial Transcript at 35). The Plaintiff's self-serving, uncorroborated testimony should be viewed with much suspicion in light of the demonstrated unreliability of her testimony. She demonstrated the unreliability of her testimony when she testified that the Defendant was behind in his child support for the month of July, 1988. See Plaintiff's Exhibit 11-P and Trial Transcript 187. In fact, Defendant offered into evidence a cancelled money order for child support paid in July of 1988. The Plaintiff then retracted her prior testimony that no support was paid in July.

(See Defendant's Exhibit 16 D).

Plaintiff further attempts to minimize the significance of the unplanned removal of the children from the Defendant by stating that the evaluator, Dr. Louis Morse, testified that he could not conclude that there was any clinical finding of instability as a result of the boys' return to the Plaintiff's physical custody. Dr. Morse did not testify that it did not happen, simply that he did not observe it. Trial Transcript at 44. This does not mean that the same did not exist and that the facts of the removal of the boys was not a serious one affecting their relationship with their custodial parent. In fact, a letter filed by the Plaintiff some time after this proceeding proves the fact that the boys' return to their mother has had a negative effect upon Isaac as set forth in the letter of Dr. Dale K. Wallin, Record at 248, wherein he states:

"During these two sessions it became quite apparent that Isaac was not adjusting to continuing to live with his mother here in Chico and his brother Isaiah and indicated strongly that he wanted to return to Utah whereby he could live with his father, Terry Pierce.

In summary, Plaintiff attempts to minimize and rationalize the seriousness of her abrupt, unplanned removal of the children contrary to the prior plans of the parties. However, the court should consider this, together with the facts set forth below to have had a significant impact upon the children involved. These facts adequately fulfill the change of circumstances prong of the Hogge vs. Hogge, custody test, and this court should so find. (See Hogge vs. Hogge, Utah 649 P.2d.

51, 1982).

A third ground set forth by the Defendant in his brief as constituting a substantial change of circumstances is the Plaintiff's interference with his relationship with the children which occurred once the children were removed from the Defendant's care. The Plaintiff in her brief denies that there has been any interference with visitation, however, the Defendant stands by his presentation of the facts and circumstances brought forth in the trial transcript as set forth in his brief.

Finally, the Defendant urges the court to consider the wishes of a mature child, in appropriate circumstances to constitute a substantial change of circumstances. The Plaintiff argues in her brief that this position would deprive the court of its decisionmaking powers, conferring them instead on the minor children involved. The Defendant is not asserting this position, he is proposing that where there is a strong preference on the part of a child to change custody, bolstered by an evaluation stating that it is in the child's best interest to live with the parent of his preference that this should be considered a substantial change of circumstances when the child reaches a sufficiently mature age to form such an opinion.

Plaintiff argues that in this case, to change custody based upon the desires of the older child, Isaac, ignores the preferences of the younger child, Isaiah. The Plaintiff asserts that Isaiah, the parties' youngest son, had a fear of being

with his step mother and that he was "unequivocal," about his custody preference. This is contrary to the findings of the custody evaluator who found that Isaiah was ambivalent, moldable, and did not always tell the truth. Trial Transcript at 16 and 18. Dr. Morse documented the fact that Isaiah's stated preference changed over time. When the custody evaluation was undertaken he wished to live with his father. Trial Transcript at 15. When he returned to live with his mother he stated that he wished to live with his mother. Trial Transcript at 15. The fear that he expressed of his step-mother according to the custody evaluator was the result of programming. Trial Transcript at 17. The Court's finding that Isaiah could not adapt to living with his father was not supported by the evidence, the testimony of the individuals involved, or the expert. In light of the custody evaluation, it is not "preposterous and frightening" to accept the proposition that the wishes of the older child should be taken into consideration. This is so even where a younger child's preference are to the contrary. The Plaintiff asserts that the Defendant must comply with the rigid standard set forth in Kramer v. Kramer, 738 P.2d 626 (Utah 1987) which requires a finding that the custodial parent's relationship with the children was affecting them adversely. The Plaintiff asserts that there was no evidence presented by the Defendant at the modification hearing which gave an indication that the Plaintiff had become incapable of adequately parenting her children. As

set forth in the Defendant's brief, the Defendant asserts that Plaintiff's behavior in giving up custody of both boys for extended periods of time and then forcing the children to return to her without prior warning is demonstration of inadequate parenting. Her actions designed to interfere with the relationship with the boys and their father after she removed the boys from the father's custody are evidence of inadequate parenting and subsequent letters filed by her own counsel indicate that the custodial arrangement is non-functioning, unhealthy and detrimental to Isaac. (See letter from Dale K. Wallin, Record at 248 stating that Isaiah was not adjusting to continuing to live with his mother). In addition, Dr. Morse did testify that it is detrimental to a child to ignore his preferences as to custody, all other things being equal. Trial Transcript at 21.

Defendant cites the case of Hirsh v. Hirsh, 725, P.2d 1320 (Utah 1986) as a case governing substantial change of circumstances in which the facts were similar to the case at bar. The Plaintiff argues in her brief that the case of Hirsh vs. Hirsh is not directly on point. This is true. The facts are not exactly the same as in the Pierce case, however, the Hirsh case stands for the proposition that a change of physical custody may amount to a substantial change of circumstances. Defendant argues that the Plaintiff's actions arise to the same level of seriousness and significance as in the Hirsh case. The Defendant did not have the Plaintiff's telephone number after

her removal of the boys and he was therefore unable to initiate contact with them. The Plaintiff argues that because she allowed the children to have telephone contact with the Plaintiff during this period of time that this was not a serious problem. Under these circumstances it is patently false that the Plaintiff never took any steps to terminate or interfere with the boys' contact or communication with their father. The same should be considered a change of circumstances justifying a review of custody. Aside from arguing that her actions did not amount to a change of circumstances justifying review of custody, the Plaintiff suggests that the Court should look at this particular case with great scrutiny because of "numerous litigations" filed by the Defendant against the Plaintiff. In fact the Defendant has only been involved in two prior litigations, one was to obtain specific visitation rights, (R. at 31,) which he received by stipulation of the parties. (R. at 49) A second involved an Order to Show Cause filed by him on March 28, 1985 when the Plaintiff moved from the State of Utah. Defendant's summer visitation was increased in this action to 60 days rather than the previous 30 days. (R. at 64). Plaintiff is exaggerating and misrepresenting the facts when she states in her brief that the Defendant has brought several post divorce petitions to modify and has never prevailed. On page 15 of her brief the Plaintiff refers to a petition presented for a seventh or eighth time. This is simply not true as a review of the record reveals. The Defendant's position is that he is not

required to present evidence demonstrating a problem with the Plaintiff's parenting. The facts presented by the Defendant at trial, however, and set forth in his brief justify a finding of a substantial change of circumstances.

II.

THE COURT ERRED IN FINDING THAT IT WAS IN THE BEST INTEREST OF THE CHILDREN TO REMAIN WITH THEIR MOTHER BECAUSE OF ISAIAH'S FEAR OF HIS STEPMOTHER.

The Defendant asserts in his brief that the Court's finding that it was not in the best interests of the children to change custody was an abuse of discretion and against the clear weight of the evidence. The Court's ground for so finding was largely based upon the younger child Isaiah's fear of his stepmother. The Plaintiff justifies the Court's reasoning by asserting in her brief that Isaiah's fears of his stepmother were "real." This ignores the fact that Dr. Morse was able to meet with both the children prior to the hearing. His evaluation of Isaiah's fears was that they were not substantiated, were not in proportion to reality, and were the result of the Plaintiff's "programming." Trial Transcript at 17, 26. The Court in effect rewarded the Plaintiff for her programming of the minor child which resulted in his fear. Defendant has not mischaracterized Dr. Morse's testimony at all but has quoted it directly. Plaintiff alleges on Page 29 of her brief that Isaiah's fears of his stepmother are not recent, however, this contradicts her own testimony that Isaiah wanted

to go live with his father in the past. At the time that Isaiah requested he be able to live with his father he was free from the pressure of a custody evaluation and custody trial, i.e., free from programming. Therefore Isaiah's feelings and attitudes prior to this action should be considered more a more accurate indication of his feelings and should be given the most weight. His feelings which were the result of "programming" should not be considered to be as accurate or as important to the custody decision because, as stated by Dr. Morse, they are not based upon reality.

Plaintiff attempts to bolster her position that Isaiah's feelings were actually based upon reality by making reference to several friends who could have testified, however, this argument is speculative, and should be disregarded. The Plaintiff had the opportunity to present evidence and she chose not to do so.

The Plaintiff argues that it was not erroneous for the Court to disregard the recommendation of the custody evaluator when it was against the wishes of Isaiah. This may be a good theoretical position, but in this case, where Isaiah's fears were a result of the Plaintiff's own programming, it was certainly inappropriate to give those more weight than the mature views of an expert who has thoroughly studied the situation. Plaintiff alleges that several witnesses in addition to Dr. Morse testified that Isaiah was afraid of his stepmother, however, Plaintiff does not refer to a single one or to a single

page of the trial transcript in support of her statement. In fact, no other witnesses testified that Isaiah was afraid of his stepmother. The Plaintiff's representations that other witnesses testified on this subject in support of her position are erroneous. In conclusion, the Court erred in finding that the best interests of the children mandated maintaining the status quo. Its finding was an abuse of discretion and against the clear weight of the evidence.

The Defendant argues in his brief that the court did not make adequate findings with regard to the best interests of the children under the standard set forth in Jensen v. Jensen, 775 P.2d 436 (Utah App. 1989). The Plaintiff alleges that the Court made adequate findings, however, the Court's findings do not rise to the level required by case law cited by the Defendant in his brief.

The evidence at trial was clearly in favor of custody being awarded to the Defendant. The Court relied upon unsubstantiated, uncorroborated statements of the youngest child Isaiah and the Plaintiff's hearsay testimony justifying the Plaintiff's actions. The court failed to based its decision upon any substantiated, corroborated reason contrary to the recommendations of the custody evaluator. As set forth in the Defendant's brief, the Court erred in its findings that the best interests of the children required that both children remain with their mother.

III.

THE COURT ERRED IN ADMITTING HEARSAY

EVIDENCE WHICH WAS PREJUDICIAL TO THE DEFENDANT

Plaintiff argues in her brief that it was proper for the Court to admit the exceptions to the hearsay rule under 803 (3) of the Utah Rules of Evidence. Statements presented in evidence to which the Defendant objected do not fall under 803 (3) because they do not reveal the existing state of mind, emotions, sensation or physical condition of the declarant. The hearsay statements offered by the Plaintiff over the objections of the Defendant were self-serving, uncorroborated and highly unreliable. As set forth above, the Court had reason to view the testimony of the Plaintiff with suspicion because of earlier erroneous claims with regard to the child support amounts paid. The admission of the hearsay statements over the objections of the Defendant was extremely prejudicial to the Defendant in that it did not allow him an opportunity to cross-examine the witnesses who were claimed to have made the statements. There was no showing made that the declarants were unavailable, and the Defendant was not able to present rebuttal testimony because he did not know in advance that hearsay evidence would be admitted with regard to statements of these individuals. In the absence of the hearsay evidence, the Court might well have found that the Plaintiff had acted unreasonably, had failed to take into consideration the best interests of the children, and that a substantial change of circumstances had

occurred. Therefore, as set forth in the Defendant's brief, it should be deemed to be error to admit the hearsay statements made by the Plaintiff and because of the weight given these statements by the Court, the ruling below should be reversed.

IV.

THE COURT ERRED IN FAILING TO AMEND THE FINDINGS

AS PER THE DEFENDANT'S MOTION TO AMEND FINDINGS

The Defendant asserted in his brief that the Court's failure to grant his Motion to Amend the Findings was error. One statement made by Judge Murphy from the bench when he rendered his decision was that he found no abuse had been committed by either party. This statement was not included in the Plaintiff's proposed Findings. Defendant objected to the Plaintiff's Findings and requested that this statement be included. Record at 145-150. When the Judge signed the Plaintiff's Findings without the statement included, the Defendant made a Motion to Amend the Findings to include the language. The Court denied this motion. The Plaintiff alleges in her brief that the finding with regard to abuse was not relevant, and therefore it was correct that the Court should deny the Motion to Amend. Defendant asserts, however, that the Court thought this issue was important or it would not have made the finding. The Plaintiff made abuse an issue in the hearing on the Petition for Modification which required that the Defendant call witnesses to establish that no abuse had occurred. Trial Transcript at 30. These individuals were

brought in by the Defendant merely to rebut the Plaintiff's accusations. Therefore, the Court's statement with regard to abuse was relevant to the proceedings and should have been included in the Plaintiff's Findings. When the Plaintiff refused to include this statement, the Court should have granted the Defendant's Motion to Amend.

In addition to the omission of the statement with regard to abuse, the Plaintiff erroneously incorporated a statement into the Findings that had no basis in the evidence from the trial. The Plaintiff included a statement that Isaiah's fears of his stepmother were "concrete, real and pervasive." Record at 133, 134. The Defendant objected to the inclusion of this language as erroneous. The fears were identified and articulated by Isaiah but discounted by the custody evaluator as set forth above and were not corroborated by any witness except Plaintiff herself. Therefore the Court should have granted the Defendant's Motion to Amend proposing that this language be dropped.

V.

ATTORNEY'S FEES AND COSTS ON APPEAL

The Court should not award judgment against the Defendant as this was a meritorious appeal. Plaintiff is constantly accusing the Defendant of filing non-meritorious actions. His first Petition for Modification filed June 27, 1983, Record at 31 asked for specific visitation which he received in the Stipulation dated December 15, 1983. Record at 49. It can

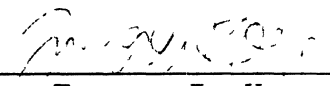
hardly be said that his successful request for specific visitation was a non-meritorious action. An Order to Show Cause asking for a change of custody due to the Plaintiff's move from the State was filed on March 28, 1985. Record at 57. The result of this was that the Defendant's summer visitation was doubled from 30 days to 60 days. Record at 62. This action cannot be characterized as a non-meritorious action either. The third Petition for Modification for Change of Custody was jointly signed by both parties and if non-meritorious, is the fault of both parties equally, as it is signed by both. Record at 65. (Plaintiff's signature is on Page 67). The custody claim which is the subject of this suit is due to the request of both sons as is documented by the evaluation of the custody evaluator who found that both boys wanted a change of custody at the time he evaluated the boys in Chico. The custody evaluator also felt it would serve the best interests of the children for custody to be changed to the Defendant. Under these circumstances, the Defendant's Petition for change of custody is meritorious. To find that appeal of the Court's refusal to change custody is frivolous would be to chill the rights of all non-custodial parents who wish to address the stated desires of their children to change custody. There is reasonable, legal and factual basis for this Petition or the custody evaluator would never have recommended a change of custody. Defendant was deeply concerned by the Plaintiff's behavior in violating the Stipulation signed by her removing the children from his care

without warning and her actions in restricting telephone contact. He also wanted to respond to the stated desires of both boys to come and live with him. He was also following the Court ordered custody evaluator's recommendation that steps be taken that he be given custody. None of these reasons amount to mere anger or disappointment that he has not received custody. It is ridiculous to suggest that sanctions be awarded against the Defendant and it would be chilling to the legitimate rights of non-custodial parents to do so.

CONCLUSION

Defendant is generally concerned for the well-being of his minor children. It is not his own needs which are foremost in this matter but those of the children. Nowhere are their needs are being addressed except by the custody evaluator whose recommendations were not followed by this Court. Counsel for the Defendant respectfully requests that this Court look at the needs of the children rather than technicalities in addition to the law and facts which are in favor of the Defendant and reverse the lower Court's decision and award custody to the Defendant.

DATED this 24th day of March, 1990.



Tamara J. Hauge
Attorney for Defendant/
Appellant

MAILING CERTIFICATE

I hereby certify this 24th day of March, 1990, I mailed four copies of the foregoing Amended Reply Brief of Appellant, by placing the same in the United States Mail, postage pre-paid, addressed as follows:

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