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Miles Murray Smith v. Phyllis D. Smith : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

MILES MURRAY SMITH,
Plaintiff and Appellant,

vs.

PHYLLIS D. SMITH,
Defendant and Respondent.

Civil No.
8004

BRIEF OF APPELLANT

APPEAL FROM THE THIRD JUDICIAL COURT
IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH.

HONORABLE MARTIN M. LARSON, JUDGE.

FILED
JUL - 8 1953

SUMNER J. HATCH
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and Appellant*

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STATEMENT OF FACTS

This is an appeal from a ruling by the District Court of the Third Judicial District, Salt Lake County, State of Utah, giving the defendant in the action sole

care, custody and control of a minor child of the age of four years upon hearing together of petitions by both parties to modify the original divorce decree with respect to custody of the child.

The parties hereto were divorced by entry of an interlocutory decree of divorce by the Third District Court in and for the County of Salt Lake, State of Utah, on the 4th day of June, 1951, after three years of marriage. The decree of divorce among other things set up a split custody arrangement, each parent to have the child for alternate six month periods, the father's (plaintiff) first term commencing on granting of the divorce and running to December 4, 1951, when the mother's (defendant) term was to begin. (Rec. 1-2)

The minor was 28 months of age at the time of the divorce and 4 years and 1 month old at the time of the hearing on the petitions to modify.

Said minor has resided with the plaintiff and been in his continuous custody and control since the date of the divorce (Tr. 8). The mother having failed to assert her right to custody of the child at her first period of custody as she thought it in the best interests of the child to let it remain in the custody of the father, under the care of the father's mother, and because she was in California on a trip when the custody period began. (Tr. 32) When her second custody period began (Dec. 4,

1952), defendant was again in California residing with her new husband and had made a tentative trade of custody periods with the plaintiff. (Tr. 24-25 and 32)

Both parties have remarried since the divorce action. The Plaintiff to one Betta Lane Smith on September 12, 1952, and the child has been residing with the plaintiff and his new wife since that time. (Tr. 3-5) The defendant on July 6, 1952, to one Steve Trask (Tr. 23-24). This marriage making the second for the Plaintiff, the first ending in the divorce action for which modification is sought. Defendant is married for the third time, the previous two having ended in divorce (Tr. 35). Plaintiff's present wife has had one previous marriage with no children, her husband now deceased (Tr. 13). Defendant's present husband has had one previous marriage ending in divorce, with one minor child now 10 years old which Mr. Trask has not seen in years nor helped to support (Tr. 47-48).

The plaintiff is an employee of seven continuous years with The Mountain Fuel Supply Company in Salt Lake City, earns \$240.00 per month, and lives with his wife and child at 1729 South 9th East Street in Salt Lake City, in a duplex (Tr. 15-16) which is plaintiff's permanent residence. Plaintiff habitually spends several hours each day with the child (Tr. 4 and 15). The plaintiff's present wife has no further responsibilities than caring for the home and the child (Tr. 16), she professes

a love for the child, has cared for him for the entire period since her marriage, and has set up a trust fund for his advance education (Tr. 15-16).

The defendant now lives with her husband at 2344 State Street in San Diego, California, in another woman's home with said other woman and her two children, ages 7 and 10 years. Defendant by agreement takes care of the home and is responsible for the other children while their mother is at work (Tr. 46-47).

Defendant's husband is a roofer who in order to follow his trade finds it necessary to make two interstate moves, both during the normal school year, working in Utah during the clement weather and in California during winter (Tr. 42-46).

Defendant and her husband contemplate returning to Salt Lake in May, but have made no definite arrangements for lodging or employment upon return (Tr. 30-31 and 45).

Defendant and her husband have no arrangements to bring the child into the home they now share in San Diego (Tr. 49-50).

Defendant visited the child on week ends while working, and three to four times per week after her marriage prior to leaving for San Diego in November, 1952.

Defendant's testimony and the testimony of Betty McKendrick and Gladys LaVon McKendrick show the plaintiff to have been seen on several occasions when he had been drinking since the time of the divorce. Defendant admitted on cross examination that she was also drinking on the occasions she testified as to the imbibing of the plaintiff.

Defendant returned from San Diego on a visit in January of 1953. On or about February 9, 1953, plaintiff told defendant he was going to try to get permanent custody of the child. Defendant asserted her right to custody under the decree of divorce. Plaintiff filed on February 9, 1953, a petition to modify the divorce decree (Rec. 3-5). Defendant filed her Petition to Modify the Divorce Decree on February 13, 1953 (Rec. 8-12); both petitions were heard together. The Court awarded custody to the defendant (Rec. 82-83). Plaintiff moved for a rehearing and for amendment of Findings of Facts (Rec. 84-86). Such motions were denied (Rec. 88). Plaintiff appeals.

POINT NO. I

THAT THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDING OF FACT OF THE COURT THAT: UNDER THE CIRCUMSTANCES NOW PREVAILING, WHICH CIRCUMSTANCES ARE SUBSTANTIALLY CHANGED FROM THE CIRCUMSTANCES PREVAILING WHEN THE ORIGINAL DECREE OF DIVORCE WAS GRANTED TO THE DEFENDANT HEREIN, IT IS IN THE BEST INTERESTS OF THE MINOR CHILD THAT HIS CARE, CUSTODY AND CONTROL BE AWARDED TO THE

DEFENDANT, RESERVING TO THE PLAINTIFF THE RIGHT TO VISIT SAID MINOR CHILD AT REASONABLE TIMES AND PLACES.

It is the plaintiff and appellant's contention that the evidence is insufficient to support the findings of fact in any way so far as those findings show the best interest of the minor child to be served by granting the care, custody and control of said child to the mother (the defendant and respondent herein). A review of the evidence herein as is in the power of the reviewing court as pointed out in *Sampsell v. Holt* (Utah 1949) 202 P. 2nd 550; rehearing denied 115 Utah 73 at headnote 4:

Supreme Court may review the facts as well as the law on appeal in child custody proceeding between divorced parents. U.C.A. 1943, 40-3-5, 40-3-10,

will show the following facts:

1. The minor child has lived continuously with its father for the past 20 months immediately preceding the initial action from which the appeal arises (Divorce decree, record pg. 1; Tr. 5-6-7; Tr. 23-24-25). The father has regular employment, earns \$240.00 per month and has been working for the same company for a period of seven years; he lives in a home in a desirable residential district in Salt Lake City, which he is purchasing; the father for the 20 months prior to the commencement of the action from which this appeal arises, spent a number

of hours with the child each day; the father remarried having as a second wife a woman who professes great love for the child, has cared for the child and supervised its upbringing for months and has arranged a trust fund from the proceeds of her former husband's estate to provide the child with advanced education. The father, together with his present wife, have made plans for the child's welfare and schooling, have acquired a domicile where the child can reside in security, attend one system of schools and grow up in a proper residential neighborhood. The child has been in excellent health throughout the period of custody in the appellant, has had the constant companionship of his father, has attended Sunday School and has become properly acclimated to his environment.

On the other hand to weigh against the father's custody the evidence shows; that the defendant and respondent is the child's natural mother; that though she has visited the child regularly while in Salt Lake City, that she has been outside the State a portion of the time and has never had actual care, custody and control of the child since the day of entry of the divorce decree; that though under the divorce decree she was entitled to the custody of the child on two different occasions she failed to assert her custody thereto, on the first occasion because she was working and couldn't properly care for the child, but admitted on examination that when her first period of custody arrived she was

on a trip to California (Tr. 33); on the date for her second period of custody to begin the mother was married again, able to, by her own testimony, provide a proper home for the child but arranged a trading of periods of custody as she was again going to California with her husband.

The record also shows by the testimony of the defendant and of her present husband, Mr. Trask, that they do not have permanent or even semi-permanent place of abode; that Mr. Trask's employment requires two interstate moves per year, with both moves being during the normal school year. Defendant and her husband were living at the time of the initial action in the home of another person in San Diego, California, together with such other person and her two children ages seven and ten, with the defendant having the duties of caring for the house and the children while the other woman worked. The testimony of the defendant and her husband also show that they contemplate moving back to Salt Lake City some time in May, but that they have no arrangements for living quarters in Salt Lake City, nor have they made arrangements for bringing a child into the abode in San Diego, California. Mr. Trask indicates that he is willing to change occupations to make a home for the child, but also contemplates coming back to Salt Lake to take a job in the roofing industry, which by his own admission will require another move to a milder climate upon the onset of winter.

The defendant is married for the third time; the previous two marriages having ended in divorce. Her present husband testifies that he has an affection for the child and would like to have him in the home because (Tr. 41, line 24 et seq.)

“Absolutely. My love for my wife, and I know her being a natural mother, and I think it is only right; I know I can always try to do my part to right; I know I can always try to do my part to be an affectionate person to see that the child has its wants in every way. I feel very much, affectionate toward Gavyn. I like him very well. He is a nice little boy; like to see him with his mother if possible.”

Then Mr. Trask goes on to testify on cross examination, that he has a child of his own by a former marriage, a girl age ten years, that he does not assist to support and has not seen for several years and upon cross examination (Tr. page 58, line 21 et seq.)

Question . . . What attempts have you made to do everything in the world as you stated for your own child.

Answer . . . Well, I can't answer that.

In *Sampsell v. Holt*, 115 Utah 73, denying a rehearing of *Sampsell v. Holt* (202 P. 2nd 550) which was a case of a father prevailing in getting partial custody of a son three years of age, after sole custody in the mother

since the time of the divorce decree, sets out at headnote 3 thereof;

Divorce. Child custody proceedings between divorced parents are equitable, and best interest and welfare of the minor child is the controlling factor. UCA 1943, 40-3-5, 40-3-10.

The Court in the person of Justice Wolfe in discussing the matter points out the legislative history of the two statutes and holding that 40-3-5 applies to situations involving a divorce and that 40-3-10 is applicable to cases of separation and in differentiating there between goes on to point out that at 115 Utah 79, paragraph 3

“In holding as we do, we do no violence to previously established concepts, even in those cases intimating or assuming that Sec. 40-3-10 was applicable to divorce suits, it was held that under such

‘statute, the paramount question still remains what disposition of the custody of the child is for its best interest and welfare?’ *Cooke v. Cooke*, 67 Utah 371, 248 P. 83, 102. See also the recent case of *Briggs v. Briggs* 111 Utah 418, 181 P. 2nd 223.”

The Court therein holding that custody must be determined on the basis of the best interest and welfare of the child from all considerations and giving no legal right in the mother to custody of the child as under U.C.A.

40-3-10 or even a preference to such custody.

In the case at the bar, the record shows not one scintilla of evidence showing the best interests of the child to lie in custody by the mother other than the fact that the defendant is the natural mother of the child.

The Court in making its ruling in paragraph 7 of its Findings of Fact (Record 80) and in paragraph 1. (a) of its Conclusions of Law (Rec. 8) and again in paragraph 1. (a) of it's Order (Rec. 82) was not supported by the evidence as a whole; the Court therein allowing the fact that the defendant was the natural mother of the child to outweigh all other facts concerning the interests and welfare of the child, to-wit: the established home in which the child had been living, the permanent nature of such home, the probability of being enabled to attend one system of schools and make a circle of permanent acquaintances, the fact that the child had enjoyed the society, counsel and affection of his father through the past 20 months. We repeat that an examination of the record shows not one scintilla of evidence favoring custody in the mother other than her relationship as natural mother.

POINT NO. II

THAT THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE INSUFFICIENT TO SUPPORT THE DECREE.

Plaintiff contends that the findings of fact and

conclusions of law set out by the Court (Rec. 79-81) are merely reiterations of the allegations of defendant's affidavit (Rec. 9-11) and defendant's motion for modification (Rec. 8), and as such fail to make a Finding of Facts supported by any evidence sufficient to support the decree based thereon.

The material issues herein arise from the petitions of both parties herein and are as follows:

1. Has there been a material change of circumstance since the date of the initial divorce decree.
2. Is the split custody arrangement effected by the divorce decree in the best interests of the child under the prevailing circumstances.
3. Is the best interest of the child to be effected under the present circumstances by custody in the father (Plaintiff's Petition, Rec. 5 Para. 10).
4. Is the best interest of the child to be served by granting under present circumstances custody to the mother (Defendant's Petition, Rec. 11, Para. 8).
5. Would allowing the child to be taken out of the State by plaintiff to a strange and probably temporary domicile be detrimental to the health,

welfare and best interest of the child (Plaintiff's Petition, Rec. 5, Para. 11).

All of the above matters were put in issue by plaintiff's Order to Show Cause (Rec. 6), and the stipulation of parties as to joint hearing.

There is no question of fact as to items 1 and 2 above, the parties being in agreement thereto.

The Court makes an affirmative finding of facts as to item 4 above, but fails to find either affirmatively or negatively as to issue 3 above except by possible implication from the Court's affirmative finding on issue number 4 above.

The findings of fact show no finding either affirmative or negative with regard to issue number 5.

It is the contention of the appellant that the failure of the findings to find either negatively or affirmatively on ultimate questions of fact raised and controverted by the pleadings makes said findings insufficient to support the decree under Rule 52a, Utah Rules of Civil Procedure.

Citing with respect thereto: *IXL Stores Co. vs. Moon*, 49U262, 162 P. 622,

“The findings should be on all issues both affirmative and negative.”

and from *Doe vs. Doe*, 48U200, 158 P. 781,

“Under statute requiring specific and direct findings of ultimate facts on all material issues, and a separate statements of conclusions of law, until there are findings on all material issues raised by the pleadings, the findings are insufficient to support the judgement.”

The plaintiff further contends that paragraphs 2, 3, 4 and 5 of the findings of facts (Rec. 79-80) are findings incidental to the ultimate issues and that said paragraphs and particularly paragraph 4 thereof are not supported by any evidence except affirmative statements of opinion by defendant and her husband, which are by themselves rebutted by statements as to the insecure and transient nature of their present and future contemplated domicile and are not ultimate facts based on the evidence.

POINT NO. III

THAT APPELLANT'S MOTION FOR AMENDMENT OF FINDINGS OF FACTS SHOULD HAVE BEEN GRANTED.

The plaintiff's contention that the Court erred in denying plaintiff's motion for amendment of Findings of Fact (Rec. 88) is based on the arguments presented on points No. 1 and 2.

POINT NO. IV

THAT THE PROPER LAW TO BE APPLIED IN DETERMINING THE CASE AT HAND IS TITLE 30, SEC-

TION 3-5 RATHER THAN TITLE 30, SECTION 3-10, U.C.A. 1953, AND THAT THE EVIDENCE IN THE HEARING OF FEBRUARY 16, 1953, WILL NOT SUPPORT THE CONCLUSIONS AND FINDINGS OF THE COURT UNDER SAID LAW.

The Supreme Court of Utah in the case of *Sampsell vs. Holt*, 202 P. 550, and again in a denial of rehearing of that case at 115 Utah 73, fully differentiates the two statutes and holds at headnote 1 thereof:

“Divorce. Statute giving mother absolute right to custody of child under ten years of age upon separation of parents, unless established that she is an improper person, is intended to apply only in cases of separation, and upon divorce, the statute authorizing court to make such orders in relation to custody of children as may be equitable should be applied. U.C.A. 1943, 40-3-5, 40-3-10.”

and at head note 3 of the same case,

“Divorce. Child custody proceedings between divorced parents are equitable, and best interest and welfare of the minor child is the controlling factor.”

The Court discusses the legislative history, reconciles the two sections being under the same title and in so differentiating sets forth:

115 Utah at page 79, para. 2: “We are not unmindful that prior opinions of this Court have intimated that Section 40-3-10 was applicable to

divorce actions. In all probability, that section is generally understood by the bench and bar of this state as being applicable to divorce suits. However, the question has never been squarely presented to this court before, and there has been no occasion heretofore for the court to analyze with great care the real problem. The result has merely been assumed by both court and counsel without careful consideration of these statutes, and without examination of the legislative history of the statutes.”

The above two statutes being the only law applicable to the Court’s power to control and regulate the custody of minor children within our State, with the exception of statutes controlling juvenile court actions which are not here applicable, it is the contention of the appellant herein that 40-3-5 U.C.A. 1943, now 30-3-5 U.C.A. 1953, must be the law applied to the facts in the instant case as well as to *Sampsell vs. Holt* (supra) and under such law there being no legal right to custody in the mother of the minor, nor so much as a presumption under the statute or the cases decided thereunder that the best interests and welfare of a minor child are served by custody in the maternal parent rather than the father. The instant case must be controlled by the best interests of the minor determined from the facts produced upon the action for modification; and that said evidence, by a clear preponderance as discussed in point one of this brief, shows the interests and welfare of the minor, Gavyn Varley Smith, age 4, to be under the continued

care and custody of the father in a permanent home already established, under the care and affection of the father's present wife who has cared for the child as a mother for months past; rather than in the custody of the defendant whose entire case is based on a purported ability to provide a proper home and welfare for the child with no basis of fact shown by the evidence that defendant is in a present position to provide the child with a proper home or environment and has no concrete plans for the future, but indicates a willingness to lay such plans for the future. In short, the facts show a present proper home environment for a minor child in the plaintiff's current situation with only a stated willingness and desire to establish such a home by the defendant and a necessity to change the way of life and means of livelihood of defendant's present spouse in order to establish an adequate environment for a minor child.

The evidence herein when viewed under the statutory law applicable to this action cannot support either the Findings of Fact nor the Conclusions of Law on which the decree by the District Court was based.

CONCLUSION

In summary we can only refer the Court again to the record which contains the whole of evidence herein and which states the facts which in a case of this nature are reviewable with the law and in doing so reiterate our contention that the evidence shows by a clear preponderance

erance when considered as a whole that only equitable dispensation of the custody of the minor child must be with that parent who has established a permanent home for the child in which its security, continued affection, normal environment and the possibility of normal schooling can be continued and assured without biyearly pulling up of the child's roots and reestablishing the minor in a different and unknown environment.

We further contend that the same evidence, when construed in view of 30-3-5 U.C.A. 1953, which according to *Sampsell vs. Holt* is the law applicable herein and which contains no legal right or presumption of right to custody in either parent, is of such a nature that it cannot under any consideration support the Findings of Facts on which the decree herein is based, that the prime issue in the hearing on the merits was determination of the best interests of the child based upon a consideration of all the material evidence and without the aid of a statutory right in the defendant or a presumption of right in the defendant, the evidence of record does not and cannot support the Findings of Facts, the Conclusions of Law nor the decree herein.

Respectfully submitted,

SUMNER J. HATCH
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 and Appellant*