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Blanche Zollinger Madsen v. Delbert Murray Madsen : Brief of Appellant

Utah Supreme Court

L. Tom Perry; Ted S. Perry; Attorneys for Plaintiff and Appellant;

In the Supreme Court of the State of Utah

BLANCHE ZOLLINGER MADSEN,
Plaintiff and Appellant,

vs.

DELBERT MURRAY MADSEN,
Defendant and Respondent.

Civil No. 8151

APPELLANT'S BRIEF

Appeal from the District Court of the First Judicial District of the State of Utah
In and for the County of Cache

Honorable Lewis Jones, District Judge

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STATEMENT OF FACTS

Plaintiff and defendant were married in Logan, Utah, on the 22nd day of July, 1949 (Tr. 1). The parties have three children, Brenda, a girl, age 3, Brent Delbert, a boy, age 2, and Alexis, a boy, born after the filing of the complaint (Tr. 1). At the time of the marriage plaintiff was the owner of $1000 in cash and owned U. S. Government bonds of the value of $900 (Tr. 31). The defendant at the time of the marriage owned a small tract of land in Washington County, Utah, valued at $1500 on which there was a mortgage (Tr. 11, 12). During the marriage the parties acquired the following property: A Pontiac automobile on which plaintiff made the down payment of $900; one new automatic Maytag washing machine; one new electric refrigerator; one new fruit juicer; and some second hand household furniture for which they paid $61.00 (Tr. 33, 34).

Plaintiff sued defendant for a divorce on the grounds of cruelty and requested custody of the children, $150 for alimony and support money and a division of the property (Tr. 1).

After hearing the evidence the Court gave judgment to plaintiff, awarding her a divorce from the defendant on the grounds of cruelty, giving plaintiff an undivided one-half interest in the land, the washing machine, refrigerator, juicer and other household furniture in lieu of alimony and gave the defendant the automobile. (Tr. 12).

The court found that plaintiff was a fit and proper person to have custody of the children, that from the appearance and demeanor of defendant on the witness stand the court found that the defendant is an emotional person and in order to aleviate his condition he should be given liberal privileges in visiting the children (Tr. 10). As a conclusion of law from the foregoing findings the Court concluded:

> "Plaintiff should be awarded the custody of the three minor children of the parties above named provided that if defendant delivers the washer and electric refrigerator now under his control to the plaintiff and does not become delinquent in the payment of the support of the minor children as above provided he shall have the privilege during 9 months of each year commencing September 1st and running to June 1st of the following year of visiting each of said children who shall have attained the age of 36 months by taking them from the actual custody of the mother and into his care for not more than three times each month for a period of 12 hours for each visit and one time each month for a period not to exceed

48 hours, provided 12 hours notice either by mail, telephone or telegraph is given to plaintiff prior thereto. And after a hearing if it is determined that it would be for the best interests of said children who have attained the age of 36 months, that defendant shall have custody of said children for these months each year; the defendant may place said children in a home approved by this Court in the State of Utah or the State of Nevada during the months of June, July, and August of each year and during said time that the children are in the home approved by the Court this defendant may have unrestricted privileges of visiting said children in said home during said months provided he pays the charges for the board and room of said children in said home. And if said children are placed in said home under order of the Court to be made he, the defendant, shall be released from the payment of the $25.00 per month for each child during the time said children are in said home. It is further provided that if the Court does not permit the taking of said children from the custody of the mother during the months of June, July, and August, the defendant shall have the same visiting privileges during said three months herein before provided for the nine months period."

In the Decree of Divorce the court divided the custody of the children giving defendant custody of the children who had attained the age of 36 months for five days out of the month, and for the balance of the time to the mother and provided that upon proper hearing the father have custody for three months of the year of such children who had attained the age of 36 months. The Court further decreed that the defendant should pay the plaintiff $25.00 per month for each child's support.

From that portion of the decree denying plaintiff monthly alimony payments, making an allowance of but $25.00 per month for each child and granting defendant partial custody of the children this plaintiff appeals.

STATEMENT OF POINTS

POINT I: THE COURT ERRED IN GRANTING PLAINTIFF PROPERTY IN LIEU OF ALIMONY AND IN REFUSING TO GRANT TO PLAINTIFF ALIMONY FOR HER SUPPORT.

POINT II: THE COURT ERRED IN GRANTING ONLY $25.00 PER MONTH FOR THE SUPPORT AND MAINTENANCE OF EACH CHILD AND ERRED IN NOT GIVING PLAINTIFF AN ADEQUATE SUM FOR THE SUPPORT AND MAINTENANCE OF EACH CHILD.

POINT III: THE COURT ERRED IN FINDING THAT PARTIAL CUSTODY OF THREE MINOR CHILDREN OF THE PARTIES BE AWARDED TO DEFENDANT AND IN ALLOWING THE DEFENDANT LIBERAL VISITING PRIVILEGES IN ORDER TO ALEVIATE HIS EMOTIONAL CONDITION.

POINT IV: THE COURT ERRED IN FAILING TO CONSIDER THE BEST INTERESTS OF THE THREE MINOR CHILDREN AS THE BASIS OF HIS AWARD OF LIBERAL VISITING PRIVILEGES AND PARTIAL CUSTODY TO THE DEFENDANT.

POINT V: THE COURT ERRED IN GRANTING TO DEFENDANT PARTIAL CUSTODY OF THE THREE MINOR CHILDREN OF THE PARTIES AFTER THEY HAVE ATTAINED THE AGE OF 36 MONTHS.

ARGUMENT – POINT I

In this action the evidence showed that the plaintiff owned approximately $1900 at the time of marriage and that defendant owned real property of the value of $1500.

That they acquired during marriage a washer, refrigerator, juicer, and other household furniture and a Pontiac on automobile on which the plaintiff paid the down payment of $900. That plaintiff worked while defendant attempted a mission and that she expended for living expenses for the family the $1000 which she had at the time of the marriage. That the parties lived together from July 22, 1949, to February 1952 and that during said time two children were born. That another child was born after plaintiff filed her complaint. The court in its division of property gave the plaintiff one-half interest in the land on which there was a mortgage and the household furniture and gave defendant the automobile and decreed that such property settlement was in lieu of alimony. Such a decision cannot be justified under the laws of the state of Utah especially where the court found that the husband was working and earning not less than $375 per month and that plaintiff was unemployed. Bullen v. Bullen, 71 Utah 63, 262 Pac. 292; Stewart v. Stewart, 66 Utah 366, 242 Pac. 947; Freidli v. Freidli, 65 Utah 605, 238 Pac. 647.

ARGUMENT – POINT II

On this point the court found that the defendant was receiving from the U. S. Government as partial disability the sum of $96.00 per month and was employed in Las Vegas, Nevada for $70 per week. At the conclusion of the testimony the Court provided that defendant should pay $30 per month for each child until the final decree of divorce was signed. (Tr. 24). But when the decree was finally signed some months later the court awarded to the plaintiff the sum of $25.00 per month for the support and maintenance of each child. The court erred in this award.

In the case of Peterson v. Peterson, 112 Utah 542, 189 P2nd 961, the husband was granted a divorce from the wife. The custody of the children were awarded to the wife and the court gave $50 per month for the support of the two minor children. In this case the court said:

> It is common knowledge that under present day conditions $50.00 is a mere pittance and unless plaintiffs earning capacity is such that he cannot pay more the allowance is unreasonable.

Under this decision allowance to the plaintiff should be increased.

ARGUMENT – POINT III, IV, and V

Section 30-3-10, Utah Code Annotated, 1953, provides:

> In any case of separation of husband and wife having minor children, the mother shall be entitled to the care, control and custody of all such children; provided, that if any of such children have attained the age of ten years and are of sound mind they shall have the privilege of selecting the parent to which they will attach themselves; provided further, that if it shall be made to appear to a court of competent jurisdiction that the mother is an immoral, incompetent or otherwise improper person, then the court may award the custody of the children to the father or make such other order as may be just.

In violation of this statute the court divided the custody of the children who had attained the age of 36 months and five days custody per month was given to the father and the balance of the time to the mother with the provision that the father may under certain circumstances have exclusive custody during three months of the year.

Under the statute the custody of children of tender age should be awarded to the mother. She can best care for them. It is likewise important that such custody be exclusive. It is at this tender age that the health habits are being formed. Relapses of a few hours may undo the work of many days. Likewise the child's habits of proper conduct are being formed. Any change in custody may seriously interfere with the process of weaving into the child's life correct moral standards. It was for this purpose of giving exclusive custody to the mother during this formative period that the statute was enacted.

Our Utah Courts have always held that the best interest of the child will determine its custody (Walton vs. Coffman, 110 Utah 1, 169 P. 2d 97; Briggs v. Briggs, 111 Utah 418, 181 P. 2d. 223; Smith vs. Smith, Utah 262 P. 2d. 283).

Instead of the welfare and best interest of the child being the test, the court sets up a new rule for us to follow, namely, "What is best for the father." The language of the court cannot be construed otherwise for the court found "the defendant is an emotional person and in order to aleviate (the father) his condition he should be given liberal privileges in visiting his child." For some reason the court departs from the well established rule. He sets up a new guide for us to follow, namely, "What is the best interest and welfare of the father." In effect the court decides that it makes no difference whether children of tender age must suffer, the father's personal feelings only must be the guide

The only possible explanation of the action of the trial judge in giving consideration to the welfare of the

father and not of the child may be found in the order of the trial judge made at the conclusion of the trial (Tr. 25, 44, 45) ordering plaintiff to attempt a reconciliation and her blunt refusal. We think she was justified not in her bluntness but in her refusal because she feared her personal safety would be jeopardized (Tr. 8).

I cannot believe that the trial judge wished to punish her for refusing to obey, but I am inclined to suspect that her blunt refusal may have weighed in the trial judge's mind when he made his niggardly allowance of alimony ($25.00 per month for each of the three children when the father was earning nearly $400.00 per month), and gave partial custody of children of tender age to the errant and emotional father.

Such a decree should be modified. It is not in accordance with the laws of this state. As was said in the recent case of Briggs v. Briggs, 111 Utah 418, 181 P. 2d 223:

> Under Section 30-2-10, U.C.A., 1953, the mother is entitled to the custody of children of tender age unless it is made to appear to the contrary. The burden of convincing the court is on the father. We must also keep in mind that ordinarily no one can take the place of the mother in the life of a girl of this age (the girl in the Briggs case was seven years of age.)

We therefore conclude that the decree must be modified.

Respectfully submitted
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Attorney for Plaintiff
and Appellant.