

2010

Amber S. Taylor, f/k/a/ Amber Elison v. Clinton J. Elison : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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| <p>AMBER S. TAYLOR, f/k/a/ AMBER ELISON, Petitioner and Appellant, v. CLINTON J. ELISON, Respondent and Appellee.</p> | <p>APPELLANT'S REPLY BRIEF Appeal No. 20100199 Civil No. 094500270</p> |
|---|---|

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IN THE UTAH COURT OF APPEALS

AMBER S. TAYLOR, f/k/a/
AMBER ELISON,

Petitioner and Appellant,

v.

CLINTON J. ELISON,

Respondent and Appellee.

APPELLANT'S REPLY BRIEF

Appeal No. 20100199

Civil No. 094500270

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Pursuant to Utah Rule of Appellate Procedure 24(a), Petitioner and Appellant

Amber Taylor (“Mother”) submits the following reply brief.

Table of Contents

Table of Authorities 2

Argument 3

Conclusion 4

Table of Authorities

Cases

Diener v. Diener, 2004 UT App 314, 98 P.3d 1178 4

Smith v. Smith, 793 P.2d 407 (Utah Ct. App. 1990) 3, 4

Wright v. Wright, 941 P.2d 646 (Utah Ct. App. 1997) 4

ARGUMENT

Father concedes, as he must, that the district court did not consider the best interests of the parties minor children when it transferred custody from Mother to Father. Father argues that this determination is not assailable on appeal because of the issues of res judicata and because there was no need to make a determination regarding best interests. These assertions are incorrect.

Appellee argues that the “court below properly dismissed Appellant’s petition and denied her requested relief.” Appellee’s Brief, p. 8. This mis-characterizes the determination at issue. As set forth in the Hearing Transcript, the parties were before the district court on their respective motions for temporary orders. *See* Hearing Transcript (R.381) p. 3. The district court *did not maintain the status quo*, but instead transferred custody of the parties’ minor children based on the terms of a default divorce decree. In such cases, the very case cited by Father, *Smith v. Smith*, 793 P.2d 407 (Utah Ct. App. 1990), dictates that res judicata does not apply: “custody decrees are not always adjudicated, and when they are not, the res judicata policy underlying the changed-circumstances rule should be subservient to the best interests of the child.” *Id.* at 410.

Because the district court did not maintain the status quo pending a determination on Mother’s petition to modify, but instead materially modified the parties’ custody arrangements by transferring custody of the parties’ minor children from Mother to Father, Utah case law required the district court to determine that the transfer of custody

was in the best interests of the children. See *Wright v. Wright*, 941 P.2d 646, 650-51.

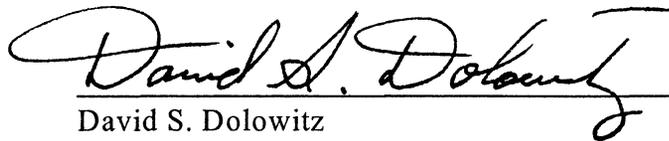
“The important public policy to have courts ensure that a child's best interests will be met before transferring custody of the child applies in all cases involving the change in a child's custody, not just in cases involving disputes between divorced parents that are decided upon the merits.” *Id.* at 651. See also *Diener v. Diener*, 2004 UT App 314, ¶ 5, 98 P.3d 1178 (“when presented with a petition to modify a child support order, the trial court may not simply rely upon a prior stipulation entered into by the parties and accepted by the court”); *Smith*, 793 P.2d at 410 (“Because an unadjudicated custody decree based on default or stipulation is not based on an objective, impartial determination of the best interests of the child, it may not serve the child’s best interests.”); Utah Code Ann. §§ 30-3-10(1)(a), 30-3-10.4.

Because it is undisputed that the district court made no findings regarding the children’s best interests, its order transferring custody of the children should be reversed and this case remanded for appropriate proceedings to determine the best interests of the children.

CONCLUSION

The district court transferred custody of the parties’ minor children without first considering or making factual determinations regarding whether that transfer is in the children’s best interests. This constitutes an abuse of discretion. Accordingly, Mother requests that this Court reverse the district court and remand for further proceedings.

DATED this 9th day of November, 2010.



David S. Dolowitz
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed, postage fully prepaid, on the 10th day of November, 2010, to the following:

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