2010

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

Utah Court of Appeals

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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 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 appellate brief.

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Statement of Jurisdiction

This Court has jurisdiction over this matter pursuant to Utah Code section 78A-4-103(2)(j), as this case was poured over from the Utah Supreme Court. *See* Utah Code Ann. § 78A-4-2(j).

Issues Presented For Review

1. Whether the district court erred when it transferred custody of the parties' minor children without making a determination that such transfer was in the children's best interests. This issue is reviewed for abuse of discretion. *See Wright v. Wright*, 941 P.2d 646, 652 (Utah Ct. App. 1997); *Hudema v. Carpenter*, 1999 UT App 290, ¶ 21, 989 P.2d 491.

2. Whether the district court erred when it summarily denied Mother's motion for new trial. Denial of a motion for new trial is reviewed for an abuse of discretion. *See Hudema v. Carpenter*, 1999 UT App 290, ¶ 21.

Determinative Statutory Provisions

Statutes that may be determinative of this appeal include Utah Code section 30-3-10(1)(a) and section 30-3-10.4. *See* Utah Code Ann. §§ 30-3-10(1)(a), 30-3-10.4.

Statement of the Case

The parties were divorced by a Decree of Divorce in 2005. (*See* R.181; a copy of the Decree is attached hereto as Addendum A-1). The parties have two minor children, to wit, Kyle J. Elison (born 11/10/01) and Kaylee A. Elison (born 9/13/03). Pursuant to the Decree of Divorce, the parties were awarded joint legal custody, and Mother was designated as the

primary physical custodian. (*See id.*) The Decree of Divorce contained a relocation provision which states, et alia, that if Mother moves from the state of Utah, other than to Las Vegas, Nevada, the children should remain in Utah with respondent, who would then be designated as the primary physical custodian. (*See id*, ¶ 7).

At the time of the Decree of Divorce, both parties resided in Iron County, Utah. Subsequent to that time, Respondent and Appellee Clinton Elison ("Father") moved to Salt Lake County and Mother moved to Washington County. In February 2009, Mother filed a petition to modify the divorce decree, as she sought to relocate to Arizona in order to take employment there. In May 2009, Father filed a motion for temporary orders and objected to Mother's relocation with the children. Mother also filed a motion for temporary orders in May 2009. (*See* R.222, 238.)

The district court set a hearing on the motions for temporary orders on July 8, 2009. On that date, the Court heard evidence and argument. At the conclusion of that hearing, the district court ordered that custody of the children should be transferred from Mother to Father. (*See* Hearing Transcript, R.381.) No specific provisions were made for interstate visitation. This decision was based solely on the relocation provision contained in the Decree of Divorce. (*See id.*, pp. 121-30.) Mother subsequently filed a motion to set aside this order on the basis that the district court had not determined that this drastic change in custody was in the best interests of the children. (*See* R.297.) This motion was denied summarily. (*See* R.328.)

Mother now appeals the order of the district court transferring custody of the minor children as well as the order that denied Mother's motion for new trial.

Statement of Facts

1. The parties were divorced on May 19, 2005, at which time they were awarded joint legal custody of their two minor children, with Mother designated as the primary physical custodian. *See* Decree of Divorce (R.181).

2. The Decree of Divorce contained a relocation provision that provided that if Mother moved from the State of Utah the children should remain in Utah with Father as the primary physical custodian. Both parties were residents of Iron County, Utah, when the Decree was entered. *See id.*

3. In 2006 Mother moved from Iron County to Washington County, Utah. Father also moved from Iron County to Salt Lake County, Utah. (*See* R.238)

4. On February 19, 2009, Mother filed a petition to modify the Decree to permit her to relocate with the children to Arizona and be granted sole legal custody. (*See* R.201.) On April 9, 2009, Mother notified Father, in writing, of her intent to move to Arizona. Mother subsequently moved to Flagstaff, Arizona in May 2009. (*See* R. 238)

5. On May 14, 2009 Father filed his Motion for Temporary Order and objected to Mother's relocation. Mother filed her Motion for Temporary Orders the following day. (*See* R.222.).

6. A hearing was held on July 8, 2009, at which time the district court transferred

the primary care of the children from Mother to Father. This determination was based solely on the 2005 provision in the Decree that if Mother moved, Father would become the primary physical custodian. The district court did not make any determination regarding the best interests of the children when it ordered this change in custody. Nor did the district court consider the facts and circumstances surrounding both parties' moves away from southern Utah over the preceding 4 years. This determination was made during the course of oral argument (*see* Hearing Transcript, R.381, pp. 121-30), and was not finalized until March 2010. (*See* order entered March 22, 2010, R.346.)

7. On January 8, 2010, Mother filed a Motion to Set Aside, Alter or Amend the district court's ruling, and on January 22, 2010, Mother filed an Emergency Petition to Modify Decree, Permit Relocation and Establish Inter-State Parenting Time. (*See* R297, 307.) Each of these motions were summarily denied by the district court on January 27, 2010. (*See* R.328.)

Summary of Arguments

The district court erred when it changed custody of the parties minor children in this case without first making a determination that this change was in the children's best interests.

The district court also abused its discretion when it denied Mother's motion for new trial, which motion was based, in part, on the argument that the district court had to first make factual findings that a change in custody is in the children's best interests.

Argument

The District Court Abused its Discretion When it Transferred Custody of the Parties' Minor Children Without Making a Determination the Transfer Was in the Best Interests of the Children.

Utah case law requires trial courts to make the following two findings of fact before modifying a child custody order: "[1] there has been a material change in the circumstances upon which the earlier order was based, and [2] a change in custody is in the best interests of the child." *Wright v. Wright*, 941 P.2d 646, 650 (Utah Ct. App. 1997); *see also Soltanieh v. King*, 826 P.2d 1076, 1079 (Utah.Ct.App.1992)); *Hogge v. Hogge,* 649 P.2d 51, 54 (Utah 1982). The district court in this case failed to make either finding. Of particular concern, the district court made no findings regarding the children's best interests. Accordingly, 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.

"[S]trong public policy reasons underlie the two-step requirement of these child custody cases. This procedure allows courts to monitor the best interests of children and especially to provide stability to children by protecting them from "ping-pong" custody awards." *Wright*, 941 P.2d at 650; *see also Kramer v. Kramer*, 738 P.2d 624, 626, 627 (Utah 1987) ("[S]table custody arrangements are of critical importance to the child's proper development. The two-part *Hogge* test is founded upon that premise.... 'The rationale is that custody placements, once made, should be as stable as possible unless the factual basis for them has completely changed.'"); *Hogge*, 649 P.2d at 54 (same); *Cummings v. Cummings*,

821 P.2d 472, 475 (Utah. Ct. App. 1991) (same); *Crouse v. Crouse*, 817 P.2d 836, 839 (Utah Ct. App. 1991) (same); *Kishpaugh v. Kishpaugh*, 745 P.2d 1248, 1251 (Utah 1987) ("the existing-placement presumption is based on the assumption that it will normally serve the best interests of the child.").

"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." *Wright*, 941 P.2d at 651. "As such, in consideration of the strong public policy to safeguard the interests of children, we hold that before a trial court may enter a judgment by default that transfers custody of a child, the trial court must take evidence and then make findings that a substantial change of circumstances has occurred and that transferring custody of the child is in the child's best interests." *Id.* at 652. This is not only a mandate by Utah courts, but by the legislature as well. *See* Utah Code Ann. § 30-3-10(1)(a) (stating that "any" determination regarding the form of custody "shall" include consideration of the childrens' best interests); § 30-3-10.4 (best interests determination must be made before modification of custody order).

In *Wright*, the district court failed to make the two required findings set forth above before modifying an existing custody order. As a result, this Court concluded that "the trial court abused its discretion by modifying the child custody order because it failed to first take evidence and make the necessary findings," *Wright*, 941 P.2d at 652, vacated the district

court's judgment, and remanded for further proceedings. *See id.*

The same error occurred in this case. The district court did not make a determination regarding the children's best interests before modifying the existing custody order. Instead, the district court simply noted that a best interests determination had been made *at the time the Decree was entered into* some four years earlier, and treated this case as if it were a basic contract matter:

> The court, by the Decree, has already ordered that custody would change if the Petitioner moved outside of Utah or the Las Vegas area.
>
> The court already determined that it would be in the best interests of the children for that to be the order and primarily because the parties stipulated to it; so that is what the parties' rights are at this point in time.

March 23, 2010 Order, p. 3 (R.346, a copy of which is attached hereto as Addendum A-2). These findings are further explained by the district court in its oral ruling:

> [T]he decree specifically provided that a change in custody would occur if one of the parties moved, particularly in this instance and in this sentence, if petitioner moves from the State of Utah....
> ****
> Petitioner's testimony indicated, as one would expect, that she understood that provision and what the consequences of her move would be. Consequently, as a matter of law, a change of custody from the petitioner to the respondent is not a modification of the decree. A temporary order is not required. The Court has already ordered that custody would change. Upon the stipulation of the party the Court -- the parties, the Court made that order. The Court already determined that it would be in the best interests of the children for that to be the order and primarily because the parties stipulated to it. So that's what the parties' rights are at this point in time.

9/8/09 Hearing Transcript (R.381), p. 125, lines 19-23; p.126, lines 1-13. The district court continued:

> But in any event, I don't find any basis for the Court to grant temporary orders which are at variance with the existing decree. And so the petitioner's motion for temporary orders is denied. The Court is granting the respondent's motion for temporary orders, but not as such. Because of the dispute between the parties, because of the nature of the dispute, because of the need for this hearing to determine the children's location, and particularly to determine which parent will have primary custody, I find it necessary to make this order: First of all, that the petitioner's move from the State of Utah triggered the change of custody. Pursuant to paragraph 7, the respondent is designated the primary custodian of the children. And the Court will order that that decree and that portion of the decree remain effective. Number 2, the petitioner's parent time is specified in paragraph 7. In sentences 4 and 5, the first sentence, first of those, number 4, provides certain things if the respondent were to move from the State of Utah. And paragraph -- or sentence 5 says, petitioner shall have the same parent time schedule if she is one that moves. I don't see any need for the Court to order anything otherwise. The parties contemplated this, the parties planned for it, the parties asked the Court to order, and that's the former order of the Court and it's the current order of the Court....
>
> *****
>
> And again, I emphasize that this order is made pursuant to the decree itself and in enforcement of the decree, and as such, it is not a temporary order. Whether this changes in future will depend on the outcome of the petitioner's petition to modify. But in the meantime, the Court intends to enforce the terms of the decree itself and -- and with that and with the guidance of Rule 106, make this order regarding change of custody.

Id., p. 128, line 25; p. 129, 1-24; 130, lines 18-25

There is no question that the district court failed to consider whether the change in custody it was ordering was in the best interests of the children at the time the decision was made. Instead, the district court relied solely on a stipulation of the parties made years earlier pursuant to a default divorce decree. This ruling failed to comply with Utah law and

constitutes an abuse of discretion. *See Wright*, 941 P.2d at 651-52; *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 v. Smith*, 793 P.2d 407, 410 (Utah Ct. App. 1990) ("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."). As a consequence, the district court's order should be vacated and this case remanded for appropriate proceedings to determine the best interests of the children. *See Wright*, 941 P.2d at 652.[1]

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 so that this determination can be made.

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[1]The district court's transfer of custody, and the district court's refusal to set aside the order effectuating this transfer, are tainted by the same error - an abuse of discretion. Accordingly, each order is subject to reversal for the very same reasons - the district court failed to consider the best interests of the children.

DATED this _____ day of September, 2010.

COHNE, RAPPAPORT & SEGAL, P.C.

_____

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CERTIFICATE OF SERVICE

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

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