

1980

# Jay A. Lembach v. Barbara A. Cox : Brief of Respondent

Utah Supreme Court

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## Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

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JAY A. LEMBACH,

Plaintiff-Appellant,

Docket No. 17095

vs.

BARBARA A. COX,

Defendant-Respondent.

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BRIEF OF RESPONDENT

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Appeal from a Judgment of District Court of  
Salt Lake County

Honorable Kenneth Rigtrup, Judge

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FILED

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

JAY A. LEMBACH,	)	
	)	
Plaintiff/Appellant,	)	
	)	
v.	)	No. 17095
	)	
BARBARA A. COX,	)	
	)	
Defendant/Respondent.	)	
	)	

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is a custody dispute between the natural father and natural mother of a child born out of wedlock.

DISPOSITION OF THE CASE IN  
THE TRIAL COURT

This matter was tried to the Third District Court, Honorable Kenneth Rigtrup presiding. The Court awarded custody to the Defendant. Plaintiff made a variety of post trial motions which resulted in an Amended Judgment (R. 175), still awarding custody of the child to Defendant.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the District Court's Amended Judgment.

## STATEMENT OF FACTS

Respondent adopts the facts as set out in Appellant's Brief with the following exceptions:

As to the care of the child the trial court found that Defendant had primary responsibility for the care of the child between August 15, 1978 and June 6, 1979 (R. 172).

Dr. Cooper testified that joint custody working successfully depends on the willingness of the parties to work out such an arrangement (R. 246) and that joint custody should not be ordered by the court over the objection of the parents (R. 252, 263). Dr. Cooper further testified that it was unlikely that these two parents could negotiate for Thaddeus' care (R. 255).

Dr. Schneiman testified that there were no substantial differences in nurturing or parenting skills between the parties (R. 283-4).

Both Dr. Cooper (R. 256-7) and Dr. Schneiman (R. 286-7) testified that custody should be decided on the totality of factors not giving particular weight to economic resources.

The trial court awarded custody to Defendant, finding that the best interest of the child would be so served (R. 173).

## ARGUMENT

### I.

THE TRIAL COURT BASED ITS DECISION UPON THE BEST INTERESTS OF THE CHILD AND THE DECISION IS SUPPORTED BY AMPLE EVIDENCE IN THE RECORD.

This Court has established a stringent standard of review in cases concerning child custody awards. In the case of Jorgensen v. Jorgensen, 599 P.2d 510, 511-512 (Utah 1979) the court explained:

A determination of the "best interests of the child" frequently turns on numerous factors which the trial court is best suited to assess, given its proximity to the parties and the circumstances.

Only where the trial court action is so flagrantly unjust as to constitute an abuse of discretion should the appellate forum interpose its own judgment.

In the present case, the record shows that the determination by the trial court granting custody to the Defendant was based on ample evidence that such an award would best serve the interests of Thaddeus, the one and one-half year old son of the parties, and should be upheld.

The clearest basis for the court's award was the difference in care furnished the child by the parties. From the time that Thaddeus was born, the Defendant has assumed the primary responsibility in caring for him. While the Defendant was living with the Plaintiff, she nursed the child (R. 327), took care of his medical needs (R. 330), took the child to work with her during the day (R. 327), and even joined with him in swimming classes (R. 329). At night, when the Plaintiff was at home he and the Defendant shared child care responsibility (R. 327). However, the primary obligation to care for Thaddeus was always assumed by the Defendant.

The Defendant testified at trial that, if awarded custody, she would continue to care for Thaddeus personally, rather than placing him in day care (R. 336, 337).

Conversely, there is much evidence which shows that the Plaintiff has been unwilling or unable practically to spend as much time with Thaddeus. In June of 1979, the Plaintiff and Defendant separated. It was agreed that



Thaddeus would spend June and July with the Defendant and August with the Plaintiff. During August, while in his father's custody, Thaddeus spent most of his days in day care (R. 318). During January and February 1980, the parties stipulated that Plaintiff would have sole custody of Thaddeus for approximately two weeks. The Plaintiff testified at trial that during that two week period, Thaddeus was again placed in day care during the daytime (R. 319). Further, there is nothing in the record which would indicate that the Plaintiff would not similarly place Thaddeus in day care if given custody of the boy (R. 241).

Clearly, a single parent often is forced to choose between full time employment outside of the home and personally caring for his or her child during the day. The choice is not an easy one. It is understandable that the Plaintiff, if given custody, would be forced to place Thaddeus in day care as long as he continued at his present employment. However, for a child as young as Thaddeus, the trade-off between the Plaintiff's earning power and the Defendant's willingness to be a full-time parent is best resolved in favor of the party who will care for the child at home. The Washington Supreme Court was faced with a similar issue in In re Guardianship of Palmer, 81 Wash. 2d 604, 503 P.2d 464 (1972). The court stated that the issue of the relative wealth of the parties was immaterial and that the significant focus was on which party could provide the child with the greatest degree of affection and discriminating care. In



the present case, the Defendant is that person and the Court, correctly recognizing this, awarded her custody.

The Plaintiff makes much of his superior financial capability and states that the trial court judge ignored such considerations in making his decision. The record, however, indicates that the trial court did not refuse to consider the relative wealth of the parties (R. 367, 380, 381). He merely refused to weigh this consideration as heavily as the Plaintiff would have desired. He weighed this factor as one among many, as both expert witnesses suggested. In light of Thaddeus' young age, the Defendant's testimony that her parents were willing to provide some financial support (R. 341) and her testimony that she would seek part-time evening employment in Connecticut (R. 337), the judge's determination that the isolated issue of relative finances had no bearing on the issue of parental fitness (R. 311) was not unreasonable.

Utah case law does not support the Plaintiff's contention that money in and of itself is a sufficient basis upon which to award custody. The Plaintiff cites Jorgensen v. Jorgensen, supra, for the proposition that money is a central issue in a child custody case. But the Plaintiff ignores that in Jorgensen, the trial court based its decision on other factors in addition to the father's relative wealth. This court emphasized that the mother had indiscreetly engaged in two extramarital sexual relationships with different

men, that the child was older, and that, as stated by Chief Justice Crockett, there were "special circumstances...which...the Court's decision advisedly omitted from fuller exposition." 599 P.2d at 512. In the present case there were no such extenuating circumstances. Standing alone, the Plaintiff's superior income is not controlling and is only one factor of many that the trial court evaluated.

Similarly in the recent case of Nielson v. Nielson, (Utah Sup. Ct. filed October 29, 1980), this court considered relative financial situations of the parties only an "additional factor" and considered this only in light of the special circumstances in that case.

Appellant claims that the trial court improperly applied three legal standards, Appellant's Brief at 12; however, only one of these is in fact a legal standard - the tender years presumption which is explored in Point II below. Appellant maintains that the trial court abused his discretion by considering evidence of the Plaintiff's insensitivity to the Defendant and his refusal to marry her so as to allow Thaddeus the advantages of being born in wedlock. However, the record does not indicate that the judge's consideration of such evidence imposed a "greater burden upon the natural father of the child than upon the child's natural mother" as the Plaintiff asserts.

Such evidence was considered as a basis upon which to assess the Plaintiff's character and was indicative of

the Plaintiff's unwillingness to make sacrifices for Thaddeus as compared to the Defendant's (R. 361). The consideration was not gender based and could have been applied just as easily to a natural mother who was unwilling to legitimate a child through marriage.

Appellant makes much of the trial court's discussion of the illegitimate status of the child. However this discussion in no way interfered with the correct legal standard that the court applied - the best interests test (R. 173). In fact the trial court recognized and applied this test which was consistent with Judge Durham's pre-trial order on this issue (R. 88). Since the correct standard was used, the focus on certain attitudes and behaviors of either party which the court chose to focus on are within the sound discretion of the trial court.

Finally, the trial court did not abuse its discretion in refusing to award both parties joint custody of Thaddeus.

Joint custody, or any other custody arrangement, is within the broad equitable powers of the trial court in custody proceedings. While this court has never specifically discussed the standards to be applied in determining whether joint custody is appropriate, the court has approved a variety of custodial arrangements which display some variation from the traditional single custody award. See e.g. Sampsell v. Holt, 202 P.2d 550 (Utah 1949).

While the experts are divided on the general issue of joint custody and its effects on children, there seems to be agreement that this arrangement is not appropriate for parents who cannot cooperate with each other. See Dodd v. Dodd, 93 Misc.2d 641, 403 N.Y.S.2d 401 (Sup. Ct. 1978), and generally, Joint Custody: An Alternative for Divorced Parents, 26 U.C.L.A.L.R. 1084 (1979) at 1110-11.

Testimony from both experts here, Drs. Cooper and Schneiman, was that joint custody, while an ideal, was unlikely to work in the present circumstances (R. 247-8, 286). The Defendant testified she planned to live in Connecticut to be with her family. In his testimony, Dr. Schneiman explained that where the mother and father lived a great distance apart it would be difficult to arrange for a division of time where the child spent relatively short visitation periods with each parent. According to Dr. Schneiman, such short alternating custody periods are necessary to provide a young child with the necessary degree of consistency and predictability in his environment (R. 278).

Here Appellant and Respondent live at opposite ends of the United States making communication expensive and difficult and joint decision-making near impossible. This geographic situation, as well as the difficulties encountered by the parties prior to and during the temporary court-ordered joint custody period (R. 285, 305, 317, 335-6) indicate that joint custody is not appropriate here. Cer-

tainly, this court could, as Appellant seeks, set out appropriate standards to use in resolving joint custody disputes in this case; however, any such standards must include the court's appraisal of the ability of the two parents to work together which both the experts and the trial court here considered and found lacking.

While joint custody may be desirable in certain circumstances, its application in the present case would not be in the best interest of Thaddeus, and the trial court so found.

## II.

### THE TRIAL COURT PROPERLY APPLIED THE TENDER YEARS PRESUMPTION AS AN ALTERNATE BASIS FOR ITS CUSTODY AWARD.

This court has had a number of occasions in recent years to discuss the tender years presumption and its application in resolving child custody disputes in Utah. While the presumption was once traced to U.C.A. §30-3-10, the 1977 amendments to that section removed any such presumption. Previous cases had split on the issue of whether that section applied only to separations or to divorce cases as well. It is now clear that there is no "statutory" tender years presumption. Smith v. Smith, 564 P.2d 307 (Utah 1977); Jorgensen v. Jorgensen, supra. There remains however the "invariably declared policy stated in our decisions ... that 'all things else being equal, preference should be given to the mother in awarding custody of children of tender years' ...." Smith v. Smith, supra.



The problem has arisen in reconciling the "best interests" test with the "tender years presumption." The clearest analysis seems to be that "the presumption is subordinate to the higher rule that the paramount concern in such cases is the best interest and welfare of the child." (emphasis added). Bingham v. Bingham, 575 P.2d 703 (Utah 1978). The best interest standard has also been referred to as "the controlling factor," Henderson v. Henderson, 576 P.2d 1289 (Utah 1978), or the "primary consideration," Jorgensen v. Jorgensen, supra. In each of these cases the court found that the best interest test predominated over the presumption. In both Jorgensen and Henderson, the appellant mother sought to have the court overturn a custody award to the children's father. Both cases were affirmed, this court stating that the trial court's findings that the evidence predominated in favor of the father and thus he was awarded custody were based on the best interest test, rather than some sort of automatic award to the mother under the guise of the tender years presumption.

As discussed previously, the evidence in the present case supports the trial court's finding that the best interest of the child are served by awarding custody to the mother (R. 257-8). But assuming arguendo, that the "best interest" test alone does not preponderate in favor of the Defendant, at the least the evidence shows that the parties would make equally good parents and the tender years



presumption was properly applied as a separate and alternative basis for the custody award (R. 173 paragraph 2).

The trial court found that the Defendant and the Plaintiff were equally fit (R. 367), and that both parents love the child equally (R. 360). Such a finding was supported by the testimony of Dr. Cooper and of Dr. Schneiman. The parties were found to have similar parenting skills by both experts (R. 245, 268).

A determination that "all things are equal" does not require that all things be the same. That the Plaintiff makes more money than the Defendant does not necessarily mean that circumstances preponderate in favor of him, since other factors may well balance this fact. The Defendant's willingness to personally care for Thaddeus and to be at home with him during the day should be given great weight. It is such a willingness to personally nurture and care for a child which is at the heart of a tender years presumption in favor of a mother. This idea is aptly expressed in State v. Watts, 350 N.Y.S.2d 285, 289, 77 Misc. 2d. 178 (1973):

The rule giving the mother preferential right to custody is considerably softened by the realization that 'all things never are exactly equal' and it is predicated upon the acts of motherhood - not the fact of motherhood. Likewise, the rule will yield if the welfare of the child demands it, because this is not a presumption of law but a simple fact of life gleaned from human experience, and the courts are not timid in entrusting children into their fathers care and custody when their best interests will be served thereby. (citations omitted and emphasis added)

Utah courts have applied a similar rationale to the tender years presumption. In Cox v. Cox, 532 P.2d 994, 996 (Utah 1975) this Court noted that

there is wisdom in the traditional patterns of thought that the roles of mother and father are such that all other things being comparatively equal, the children should be in the care of their mothers, especially so children of younger years. (emphasis added)

When viewed in light of the evidence, the maternal preference in the present case operated as a function or role-based distinction, not a gender-based distinction. And the presumption, if applied at all by the trial court, did not result in a decision which was contrary to the best interests of Thaddeus.

### III.

APPLICATION OF THE TENDER YEARS PRESUMPTION ACCORDING TO UTAH CASE LAW IS VALID UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION.

In the case of Stanley v. Illinois, 405 U.S. 645 (1972), the United States Supreme Court held that an Illinois statute containing an irrebuttable presumption that unmarried fathers are incompetent to raise their children violated the due process clause. The Court found that due process required a more individualized determination. In U.S. Department of Agriculture v. Murry, 413 U.S. 508 (1973), Justice Marshall's concurring opinion explained:

The Due Process clause requires the government to act on an individualized basis, with general propositions serving

only as rebuttable presumptions or other burden shifting devices. That I think is the import of Stanley v. Illinois.

The maternal preference, as applied in the present case and as articulated in Jorgensen v. Jorgensen, supra, is easily distinguished from the constitutionally invalid Illinois law. The Illinois procedure prevented any inquiry into the parental fitness of an unmarried father. Conversely, the maternal presumption in Utah is a rebuttable one which is only triggered when other factors indicate that both the mother's and the father's fitness are comparatively equal. The best interest of the child is always the controlling test. Bingham v. Bingham, supra. The father, married or unmarried, is always permitted to show any circumstances which would preponderate in his favor.

In the present case, a full inquiry was made by the trial court into the comparative fitness of both parties. The court engaged in the individualized determination which is required by Stanley and described in the Department of Agriculture case.

In Caban v. Mohammed, 441 U.S. 380 (1979), the U.S. Supreme Court reviewed a statutory provision whereby an unwed mother was permitted to block the adoption of her child, while the unwed father had no such right. Gender-based distinctions, the court held, must serve governmental objectives and must be substantially related to the achievement of those objectives to be valid under the Fourteenth Amendment

Equal Protection Clause. In Caban the classification was unable to withstand judicial scrutiny because it was not substantially related to the State's interest in facilitating the adoption of illegitimate children.

As discussed in Cox v. Cox, supra, Utah's maternal preference is not based on a gender based distinction as much as a role-based distinction. Certainly, a state has a valid interest in providing children with a parent who will best fulfill the nurturing "mother" function. Where this role would not be served best by the natural mother, the court's review of the child's best interest would most likely result in a custody award in favor of the father.

When a court has considered in depth the relative fitness of the parties and both are equally loving, competent parents, it is not unreasonable for a court to rely on the tender years presumption as a basis for its decision, especially where the woman is willing to fulfill the "mother function" on a fulltime basis, since it is the state's interest in providing children with such a parent which is at the core of the maternal preference. When applied in such a way, the presumption meets the standard announced by the U.S. Supreme Court in Reed v. Reed, 404 U.S. 71 (1971), that "a classification must be reasonable ... so that all persons similarly circumstanced shall be treated alike."

Appellant relies on Arnold v. Arnold, 604 P.2d 109 (Nev. 1979), to undercut the continued validity of the



tender years presumption. But the analysis of Arnold is nearly identical to this Court's language in Bingham, Henderson and Jorgensen discussed above. The Nevada court stated that the "touchstone of all custody determinations is the best interests of the child," 604 P.2d at 110. The court held that custody to the father was in the child's best interest and rejected the mother's appeal. This court has applied an almost identical analysis but has not totally discredited the presumption. However, as applied in Utah and demonstrated in this case, no due process or equal protection problem arises.

#### IV.

#### THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A NEW TRIAL.

Appellant's Motion for a New Trial was denied by the trial court. The case law in Utah is clear that the granting of a U.R.Civ.P. Rule 59 Motion is within the sound discretion of the trial court and that this ruling should not be overturned unless it "clearly transgressed any reasonable bounds of discretion." Hyland v. St. Marks Hospital, 427 P.2d 736, 738 (Utah 1967). Here appellant claims prejudice based on the non-availability of respondent's welfare application at the time of trial. Yet her testimony at trial was not inconsistent with her statement in the welfare application, as she stated in her affidavit (R. 161). Further, appellant never sought to compel production of the document at any time, never moved for a continuance based on the failure to

produce the document or even probed the area during cross-examination. Finally, the form itself in blank was available at any time to appellant or his counsel to seek answers to the questions on the form via interrogatories or cross-examination. This was not attempted either. No surprise or prejudice has occurred, no falsehoods were uttered and no basis for a new trial has been shown. The trial court's decision here should be sustained.

#### CONCLUSION

The trial court considered all the evidence including expert testimony and the testimony of the parties before determining that the child's best interests would be served by awarding custody to Respondent. This decision is well founded and should not be overturned by this Court. The tender years presumption as applied in this case is not violative of any person's constitutional rights, is subordinate to the best interests test, and constitutes an alternate basis for the custody award. No error has occurred in its application. The trial court acted within its discretion and denied Appellant's new trial motion. No basis for reversing this decision has been shown. The trial court's Amended Judgment should be affirmed.

DATED this 18<sup>th</sup> day of December, 1980.

Respectfully submitted,

UTAH LEGAL SERVICES, INC.  
Attorneys for Respondent

By

Bruce Plenk  
BRUCE PLENK



## CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that two true and correct copies of the foregoing Brief of Respondent were mailed, postage prepaid, to David E. Leta, ROE AND FOWLER, Attorneys for Appellant, 340 East Fourth South, Salt Lake City, Utah 84111, this 18 day of December, 1980.

Jackie L. McCann  
Secretary