

1980

Larry Dean Tuckey v. Debra A. Tuckey (Trevizo) And Frank Tuckey And Mary Tuckey, Husband And Wife : Appellants' Brief

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

LARRY DEAN TUCKEY,	:	
Plaintiff,	:	APPELLANTS' BRIEF
vs.	:	
DEBRA A. TUCKEY (TREVIZO),	:	
Defendant-	:	Case No. 17189
Appellee.	:	
* * * *	:	
FRANK TUCKEY and MARY TUCKEY,	:	
husband and wife,	:	
Intervenors-	:	
Appellants.	:	

Appeal from the final Order of the Third Judicial District Court of Salt Lake County, State of Utah, the Honorable Kenneth Rigtrup presiding.

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FILED

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IN THE SUPREME COURT OF THE STATE OF UTAH

LARRY DEAN TUCKEY, :
Plaintiff, :

APPELLANTS' BRIEF

vs. :

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Defendant-
Appellee. :

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I.

NATURE OF THE CASE

Petition by Intervenor Frank Tuckey and Mary Tuckey to gain custody of their grandchildren Larry Dean Tuckey, Jr., and Christopher Lee Tuckey.

II.

DISPOSITION IN THE LOWER COURT

Petition denied on April 24, 1980. Motion for new trial or in the alternative to open judgment and take additional testimony denied on June 4, 1980.

III.

RELIEF SOUGHT ON APPEAL

A reversal of the lower court's decision and entry of an order of the Supreme Court granting custody of the minor children to Intervenor.

IV.

STATEMENT OF FACTS

The underlying action is one for divorce brought by Plaintiff Larry Dean Tuckey against Debra A. Tuckey. Plaintiff and Defendant were and are parents of two (2) children, to wit, Larry Dean Tuckey, Jr., a male, born March 22, 1975 and Christopher Lee Tuckey, a male, born July 30, 1976. Permanent care, custody and control of the said minor children was vested in Defendant

Debra A. Tuckey under the terms of the original Decree of Divorce. The petition of Frank Tuckey and Mary Tuckey to intervene in this matter was granted on the 15th day of February, 1979, as was Intervenor's Motion for Temporary custody of the minor children pending a final resolution of the issue of permanent custody. In connection with the granting of the two motions as set forth above, the Court ordered that a family evaluation be conducted prior to the consideration of permanent custody by the Court. An evaluation of Intervenor's was performed on August 30, 1979 by Denise Taft pursuant to the Court's order, wherein it was recommended that the minor children remain under the permanent care, custody and control of Intervenor's. Ms. Taft was unable to locate the natural mother, Debra A. Tuckey, to perform any evaluation of her at that time. The trial, originally set for January 28, 1980, was continued at the behest of Defendant until February 29, 1980. During the approximately one year period from February of 1979 through February of 1980, the minor children resided with Intervenor's while Defendant lived in various places, including Randolph, Utah, Salt Lake City, Utah and La Pointe, Utah. During the year the minor children lived with their grandparents they had limited contact with their natural mother by telephone and by personal contact. During the time the minor children stayed with Intervenor's, they were well taken care of, received a great deal of love as well as discipline and enjoyed the structured environment. Intervenor's made substantial economic

outlays for the benefit of the minor children and spent a great deal of time with the children in family-related activities. Intervenor received no support or help of any kind from either the father of the minor children or the mother, Defendant Debra A. Tuckey, although Intervenor did receive a small amount of help from the State of Utah.

Just prior to the trial in this matter, on February 26, 1980, Ms. Taft of the Department of Social Services did a followup evaluation of Intervenor as well as an evaluation of Defendant Debra A. Tuckey as this Court had previously ordered. Ms. Taft reiterated in the report on this second evaluation what she had provided in the earlier one, to wit: that the interests of the minor children would be best served by allowing them to remain under the permanent care, custody and control of Intervenor.

There was some confusion prior to the trial on the merits of this matter as to the actual standard to be applied by the Court to the facts. Counsel for Intervenor argued that the "best interests of the minor children" should be the controlling factor whereas counsel for Defendant Debra A. Tuckey argued that to prevail, Intervenor would be required to prove Defendant unfit. After a trial on the merits, the Court, the Honorable Kenneth Rigtrup presiding, denied Intervenor's petition and by order dated April 24, 1980 awarded full care, custody and control of the minor

children of the parties to Defendant Debra A. Tuckey, the children's natural mother.

V.

ARGUMENT

1. The Trial Court Utilized An Incorrect Standard in Deciding This Matter and Must Therefore, be Reversed.

The approach taken by various courts to the issue of contested custody between a natural parent and a grandparent may be divided into two specific categories, i.e., the "parental right" doctrine and the "best interests of the child". The former requires a showing on the part of the moving party that the natural parent is unfit or that other extraordinary circumstances exist which overcome the presumption that a natural parent is entitled to custody over the grandparent. In the latter case the child's welfare and best interests are presumed to be more important than any parental right. See, generally, 29 ALR 3d 366, 390-395. It is Intervenor's contention that the Court here should have applied the "best interests" doctrine in accordance with Utah law and most jurisdictions and by failing so to do committed reversible error.

A general survey of cases on this particular point reveals that the modern tendency is toward the "best interests" of the child and away from the "parental right" approach. As between parents

ving for custody of a child, there can be little argument that the "best interest" of the child is the appropriate standard in most, if not all jurisdictions. The apparent justification for arguing that a different standard should apply when a non-parent is seeking custody from a natural parent stems of course from a "natural law" theory that there is some innate right on the part of the natural parent to the society of the child during the child's minority. However, the following survey will reflect that the courts are quite consistent in applying the "best interests" approach in cases of this kind:

a. Florida. In the the case of Brandon v. Faulk, 326 So.2d 76 (Fla., 1976), the Court upheld the trial Court's decision to vest custody of a nine year old girl in the paternal grandparents and in so doing stated at 80:

. . . in such [custody] situations the best interest of the minor child is of paramount consideration and is the guiding pole star.

b. Nebraska. Another state which has recently rejected the application of the "parental right" doctrine is the State of Nebraska. In the case of State v. Blanco, 128 NW2d 615 (Neb., 1964) the Court stated at 619:

The courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right.

In the Blanco case the Court overturned the lower decision granting custody of the child to the natural mother, and gave custody of the child to the grandmother under the theory that the natural mother was not fit and proper and that therefore she had forfeited her right to custody of the child. In any event, this approach was not utilized in the later cases of Contreras v. Alsidez, 265 NW2d 452 (Neb., 1978) wherein the Court recognized the "best interest" test as superior to the rights of any parties, including the natural parents, although the latter were, of course, to be considered.

c. Minnesota. In the case of Hemman v. Markson, 244 NW 687 (Minn., 1932) although the court sustained a change of custody of a twelve year old boy from the maternal grandparents to the mother, the Court recognized the best interest standard at 687:

The superior right of a parent to the custody of a child is recognized by the law; but this right yields to the best interests of the child.

That standard was followed in the later case of Wallin v. Wallin, 187 NW2d 687 (Minn., 1971) wherein the Court, on an inconclusive evidentiary record, remanded a case wherein a natural mother's petition to wrest custody of a six year old girl from the maternal grandparents was denied by the trial court. This action was explained at 630 as follows:

The principle that the custody of young children is ordinarily best vested in the mother, vital

and established as it may be, is distinctly subordinate to the controlling principle that the overriding consideration in custody proceedings is the child's welfare.

d. Oklahoma. In ex parte Wallacs, 241 P.2d 192 (Okla., 1952) the maternal grandmother sought custody of a thirteen year old girl. At trial, neither the grandmother nor the natural mother was shown to be unfit. The Court indicated its obligation to be to review the whole record and determine which custody was in the best interest of the minor child under all the facts and circumstances shown, and indicated at 193 as follows:

She [the natural mother] has not by abandonment or by any improper conduct on her part or by contract surrendered the right to its control and custody to petitioner. In these circumstances the law will presume that she is a fit and proper person to have its care and custody and that the best interest of the child require that custody be awarded her and this presumption will prevail until overcome by clear and convincing evidence showing that its best interest requires that custody be placed elsewhere.

e. Pennsylvania. In the relative early case of In Re Beaver's Estate, 182 A. 744 (Penn., 1936) a six year old girl who had lived for a time with her paternal grandparents was returned to the custody of her mother. The Court agreed at 745 with the trial court's opinion:

. . . that the proper criteria in a case of this nature is the best interest and permanent wellbeing of the child.

In Holschuh v. Holland-Moritz, 281 A.2d 729 (Penn., 1971) the Court overturned a lower court's decision taking custody of boys aged ten and eleven from the maternal grandparents and giving them to the natural mother. The Court at 730 specifically did not utilize the "parental right" approach and did not dwell upon the alleged unfitness of the natural mother, who was unconventional in lifestyle and morality, but at 730 recognized the following standard:

Unless compelling reasons appear, it will be deemed that the best interests of children of tender years require that they be committed to the care and custody of their mother.

Thus, although the Court did require a showing of compelling reasons, the primary standard of the best interests of the children was recognized over the presumption in favor of the natural parent.

f. Texas. In the case of In Re Benfield, 468 SW2d 156 (Tex., 1971) the Court recognized "best interests" as the standard in an adoption proceeding and followed this standard in the case of Interest of Barrera, 531 SW2d 908 (Tex., 1975) In the Barrera case, upon the death of the father, the maternal grandparents were named by the trial court as managing conservators under Texas law of two minor children, ages nine and seven, and the natural mother was named only temporary possessory conservator. The mother appealed this decision, which was affirmed on appeal. The Court in this regard at 910 stated:

Although there is a presumption that a surviving parent is the most suitable person to have custody of minor children, the controlling consideration is the best interests of the children . . . Since the welfare of children is the court's paramount concern and guiding consideration in any contest over the right to custody, this concern and consideration will prevail over any asserted claim of legal right in a party to the controversy.

It is also important to note that in the Barrera case, the trial court had even disregarded a Texas statute giving the surviving natural parent entitlement to appointment of guardian of the child's estate.

The foregoing are representative of holdings in the following jurisdictions and cases: Graves v. Graves, 288 So2d 142 (Ala., 1973); Wallace v. Moss, 174 SE2d 197, (Georgia, 1970); Osman v. Osman, 264 NE2d 263 (Ill., 1970); Perdue v. Perdue, 257 NE2d 927 (Indiana, 1970); Wood v. Beard, 280 So.2d 567 (La., 1973); Elm v. Key, 489 P.2d 104 (Wyo., 1971); Carrere v. Prunty, 133 NW2d 692 (Iowa, 1954).

At least two cases directly bearing on the issue before this Court have been decided in the jurisdiction of Utah. In the case of Walton v. Coffman, 169 P.2d 97 (1946), the natural mother by a writ of habeas corpus sought to recover custody of two minor children from the maternal grandparents. The Court at 100 observed as follows:

All of our decisions recognize the general rule that the welfare of the child is controlling.

The Court then engaged in a rather detailed resume of previous cases that had brought this issue before the Court including Harrison v. Harker, 142 P. 716; Jones v. Moore, 213 P. 191; Jensen v. Earley, 228 P. 217; and Sherry v. Doyle, 249 P.250, from which the Court at 102 to 103 distilled the following rule:

We conclude that the determining consideration in cases of this kind is: What will be for the best interest and welfare of the child? That in determining this question there is a presumption that it will be for the best interest and welfare of the child to be reared under the care, custody and control of the natural parent; that this presumption is not overcome unless from all of the evidence the trier of the facts is satisfied that the welfare of the child requires that it be awarded to someone other than its natural parent. Thus, the ultimate burden of proof on this question is always in favor of the parent and against the other person.

.

However, this presumption is one of fact and not of law, and may be overcome by any competent evidence which is sufficient to satisfy a reasonable mind thereon.

We are satisfied that this is the rule which has been followed in this Court in all our cases except Jensen v. Earley, supra. To the extent that Jensen v. Earley holds to the contrary it is expressly overruled. This rule is sustained by the great weight of authority in this country and we think by the better reasoning.

The Court in the subsequent case of Hardcastle v. Hardcastle, 221 P.2d 883 (Utah, 1950) recognized the rule as set forth in the Coffman case as the applicable rule, but at 887 found that it was not applicable under the facts of the Hardcastle case.

In accord with Coffman are the following: Farmer v. Christensen, 183 P.328 (Utah, 1919); 209 P.340 (Utah, 1922); Wallick v. Vance, 289 P.103 (Utah, 1930); and Flora v. Flora 29 P.2d 498 (Utah, 1934).

Thus, the law of the State of Utah as well as the law of the overwhelming majority of jurisdictions of the United States, is that the best interest and welfare of a minor child will be the controlling factor in determining custody between a natural parent and a grandparent, and although there may be a presumption in favor of the natural parent and this presumption has been recognized in virtually all of the literature cited above, that presumption, at least in the State of Utah, is a presumption of fact which may be overcome by clear and convincing evidence to the contrary. Nowhere in Utah decisions cited above or in any of the authorities that have been cited by Intervenor in support of this petition, is there found a standard which requires that Intervenor prove the natural mother unfit. To do so requires that Intervenor overcome a virtually insurmountable burden and to impose such a burden on Intervenor is under the great weight of authority incorrect and must constitute reversible error.

2. Certain Findings of Fact and Conclusions of Law Entered by the Court are not Supported by the Evidence.

a. Finding of Fact No. 6. (R, 94) After a hearing on objections of Intervenorors to the proposed Findings of Fact and Conclusions of Law submitted by counsel for Defendant Debra A. Tuckey, counsel for Intervenorors submitted Findings of Fact and Conclusions of Law. As to Finding of Fact No. 6, the Court crossed out the following proposed Finding of Fact in its entirety:

A home study was performed by Denise Taft, a social service worker, prior to August 30, 1979 wherein Ms. Taft recommended that permanent custody of the two (2) minor children be vested in Intervenorors.

In place of the foregoing Finding of Fact the Court substituted "Plaintiff is not seeking custody of the children at this time" and added, apparently referring to the second portion, the following:

The Court makes no finding thereon, as there was no evaluation made of Defendant Debra A. Tuckey.

In the first place, Ms. Taft testified under oath that she was assigned by the Department of Family Services to perform a home study on Intervenorors on approximately August 1, 1979 (R, 168, line 24 - R, 169, line 8) and further testified that although reasonable efforts were made to find Debra A. Tuckey,

she was not able to do so and therefore Ms. Taft did not evaluate Defendant Debra A. Tuckey at that time. (R, 169, line 10-17) In any event, the home study was finally accomplished, and the difference between how the children acted on August 1, 1979 and in February, 1980 when the home study and evaluation of Debra A. Tuckey was performed was remarkable to Ms. Taft. (R, 172, lines 1-13) She stated (R, 172, lines 10-13):

They seemed not threatened and much more relaxed and more secure in this interaction than they had been the previous one.

The point of the matter is that Ms. Taft recommended as a result of the home study performed in August, 1979 that the children be allowed to remain with their grandparents, and the followup study that was done wherein Ms. Taft was able to observe Defendant Debra A. Tuckey did not change that opinion. If anything, the previous contact in August of 1980 should have made Ms. Taft's testimony more valid and should have been given more weight by the Court inasmuch as Ms. Taft had more of an opportunity to observe the grandparents and the children with the grandparents than she otherwise would have had. Furthermore, the study performed in February of 1980 was nothing more than an extension of the study previously commenced in August of 1979,

and the Court should not have arbitrarily disregarded those conclusions reached in August of 1979 for the mere reason that the natural mother was not part of the evaluation. Whether or not the mother was a party to the investigation has nothing to do with the observations that Ms. Taft made in the grandparents' home and it is erroneous not to have considered the same.

b. Finding of Fact No. 7. (R, 94) The Court crossed out of proposed Finding of Fact No. 7 the following:

Wherein it was further recommended that Defendant not have permanent custody of them.

In fact, the followup visit in February of 1980 did bear the recommendation that Defendant, the natural mother of the children, not have permanent custody of the children. (R, 179, lines 14-19). The point seems important and it appears that the Court in this instance had moved from its position as a dispassionate forum and has apparently specifically disregarded certain evidence because it does not comport with its own predilections as to where children should be placed in custody battles. While it is within the Court's discretion to give or not give certain weight or credibility to expert testimony, nevertheless it cannot be within the Court's power to completely disregard as a finding of fact a conclusion reached by an employee of the Department of Social Services who became

involved in the matter in the first place at the Court's own order.

c. Finding of Fact No. 9. (R, 94) The Court added to the proposed Finding of Fact that:

[t]he job market in Vernal appears to be very good.

Debra A. Tuckey testified that her husband would "probably" get a job Monday, (R, 125, line 20) but that it was not promised. (R, 125, line 22) A search of the transcript has revealed no other testimony relative to the job market in Vernal and therefore there is no basis for the finding of fact as indicated by the Court. Further, Defendant Debra A. Tuckey (R, 126, line 11) testified that she was buying land from her mother, but made no further indications in this regard can be found, indicating no basis for such finding.

d. Conclusion of Law No. 2. (R, 95) By this interlineation the Court has muddled the water as to the actual standard applied. At the hearing of Intervenor's objections to the Findings of Fact and Conclusions of Law and other motions before the Court, counsel for Intervenor sought a clarification of the standard utilized by the Court at trial: (R, 244, lines 1-11)

MR. GUYON: As long as it's clear that the Court actually used the standard that I had a burden to show that the mother was unfit. But that doesn't seem clear to me, your honor.

THE COURT: It's less than clear from the cases, but I think that's what the cases are saying.

MR. GUYON: I would also argue, your Honor, that the actual standard the Court is bound to utilize is that of the best interests of the children.

THE COURT: As to that, I would clearly reject that. I don't think that's consistent with Utah law.

Thus, while the Court admitted in that hearing that it had actually utilized the standard of requiring Intervenorors to show the mother unfit in order to prevail, the conclusion of law as indicated by the Court reflects a different standard.

3. The Clear Weight of Evidence in this Matter Supports Intervenorors' Position.

It is submitted that the testimony on record taken as a whole, and the record itself, empower and even require this Court, upon application of the correct standard, to find that Intervenorors should receive custody of the minor children of the initial parties to this action.

In the first place, Defendant Debra A. Tuckey voluntarily relinquished custody and control of the children to Intervenorors. The minute entry made on February 8, 1979 (R, 37) indicates "No objection from the mother, Debra Tuckey." As indicated in

the subsequent order (R, 38) the Court heard Debra A. Tuckey's sworn testimony relative to the issue of temporary custody and granted the same to Intervenor. In that same order (R, 39) the Court ordered a custody evaluation, the result of which Judge Rigtrup refused to make finding of fact (R, 94) as discussed above. It is true that Debra A. Tuckey moved the Court to set aside the order (R, 42), but when that motion was denied (R, 49, 50) it is significant to note that Defendant did not have sufficient interest to renote the matter before the Honorable Dean Conder as provided for in the order (R, 49).

The year following the February, 1979 hearing was indicative of Defendant's lack of interest in her children as well as the circumstances of their being with Intervenor: Avis (the maternal grandmother) had the children and allowed Intervenor to take them (R, 136, lines 2-4, testimony of Intervenor Mary Tuckey).

No support, including money, clothing and toys, was ever given to Intervenor by Defendant or members of Defendant's family even though promises were made both by Defendant and Defendant's mother. (R, 136, lines 12-20, testimony of Intervenor Mary Tuckey).

Contacts between the mother and the children were very sparse, short telephone contacts having occurred on February 7th

and 26th, 1979 (R, 148, lines 12, 13); March 4, 11, 22 and 26, 1979 (R, 148, lines 21; 22); April 8, 17, 27, 1979 (R, 148, lines 1-3); and July 3, 1979 (R, 148, line 4). Between July 3, 1979 and January 7, 1980 there was absolutely no telephone contact between Defendant and her children (R, 149, line 5-9). All the telephone contacts were short and Mary Tuckey testified (R, 148, lines 15, 16) she would ask Defendant if Defendant wanted to talk with her own children and in several cases Defendant had not communicated with the boys during the telephone contacts. Defendant testified she lived in La Pointe, Utah during this period (R, 195, lines 1-2) and that she had access to her mother's phone (R, 199, lines 9-10). Defendant's testimony relative to the availability of a telephone is unclear in view of her earlier statement (R, 196, lines 12-16) that she had to travel miles to a pay telephone.

Relative to personal contacts, Mary Tuckey testified to several such contacts between Debra and the children during the year starting in February, 1979 (R, 149, line 12 to R, 153, line 1). Debra excused the infrequency of such contacts because of lack of transportation (R, 195, line 17-21), but admitted on cross-examination (R, 207, lines 1-11) that she came to Salt Lake City "often" and "twice" without seeing the children.

Mary Tuckey's testimony (R, 155, line 10-18) that Defendant

told her Defendant's mother wanted the children so they could receive further welfare benefits was totally unrefuted by other testimony.

Other unrefuted testimony of Mary Tuckey bears serious consideration by this Court. She described the children's unruly behavior when first entering her home (R, 136, lines 3-6), but indicates also a close relationship with them (R, 136, line 8). Furthermore, the children received excellent care in the form of clothing and medical health (R, 136, lines 10-11); clothing (R, 136, line 10); and entertainment (R, 141, lines 9-23). Intervenors even cashed in a life insurance policy to pay back bills and buy the children a bed. (R, 142, lines 2-8).

The testimony of Denise Taft, who was stipulated to as to expert testimony (R, 168, line 14), was very much in favor of Intervenors as custodians. Ms. Taft met with Intervenors in their home as well as in her office (R, 169, lines 4-8) and made the following observations and came to the following conclusions in their regard:

They were providing appropriate structuring, disciplining and parenting models. (R, 178, line 17 to R, 179, line 3)

The children should remain in their home. (R, 197, lines 15-19).

Ms. Taft would not retreat from this position even when pressed by the Court. (R, 180, lines 7-9).

On the other hand, Ms. Taft's testimony relative to Debra A. Tuckey was that Debra was more a friend or peer than a parent (R, 177, lines 3-5) and that there was concern about direction, consistency (R, 177, lines 11-15); ability to discipline (R, 178, lines 1-14) and maturity (R, 186, lines 10-17 and R, 189, lines 13-20). Furthermore, inappropriate aggressive behavior by the children occurred only in the presence of their mother. (R, 187, lines 8-25). There was also concern for Defendant's ability to acquire parenting skills through a social services program as suggested by Defendant's counsel (R, 189, lines 8-20) and Ms. Taft unequivocally stated that Defendant did not have appropriate parenting skills (R, 190, lines 5-7).

VI.

CONCLUSION

Thus, it has been shown above that the trial court abused its discretion in utilizing the wrong standard applicable to this case. Clearly, the weight of authority is in favor of the "best interest of the child" approach as opposed to the "parental right" doctrine. The Utah cases cited herein are in accord with that word of authority, and the trial court was bound to apply that standard.

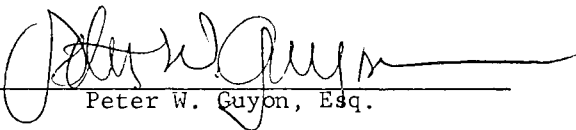
It is also clear that the trial court made Findings of Fact

and Conclusions of Law that were inconsistent with the testimony and other parts of the record, and requires that the trial court's decision be reversed.

Finally, it is Intervenor's contention that upon the weight of the evidence in the record, coupled with the application of the correct standard, Intervenor is entitled to an order of the Court granting permanent care, custody and control of the minor children of Plaintiff and Defendant to them.

DATED this 10 day of December, 1980.

ROBINSON, GUYON, SUMMERHAYS & BARNES

By 
Peter W. Guyon, Esq.

CERTIFICATE OF MAILING

I hereby certify that on this the 10th day of December, 1980, I mailed, postage prepaid, a true and correct copy of the foregoing APPELLANTS' BRIEF to Bruce Plenk, Esq., of Utah Legal Services, Inc., 352 South Denver, Salt Lake City, Utah 84111.

