1981

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

Utah Supreme Court

IN THE SUPREME COURT

STATE OF UTAH

LARRY DEAN TUCKEY, Plaintiff, v. DEBRA A. TUCKEY (TREVIZO), Defendant/Respondent, FRANK TUCKEY and MARY TUCKEY, husband and wife, Intervenors/Appellants.	Case No. 17189

BRIEF OF RESPONDENT

Appeal from the Order of the Third Judicial District Court, Judge Kenneth Rigtrup presiding.

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NATURE OF THE CASE

This is a custody dispute between the mother and the paternal grandparents of two children born to Larry Dean Tuckey and Debra A. Tuckey.

DISPOSITION OF THE CASE IN THE TRIAL COURT

This matter was tried to the Third District Court, Honorable Kenneth Rigtrup presiding. The Court maintained custody of the children in the Defendant mother and denied the petition of Intervenor grandparents. Intervenors made

a variety of post-trial motions which resulted in Amended Findings of Fact and Conclusions of Law. The Judgment awarding custody of the children to Defendant was not altered.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the District Court's Judgment.

STATEMENT OF FACTS

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

1. The Petition to Intervene of Frank and Mary Tuckey was granted on February 15, 1979 as was Intervenors' Motion for Temporary Custody of the minor children, the Defendant indicating to the Court that she had no objection since the Intervenors had told her she could have the children back in her custody as soon as she was able to get back on her feet. R. 197.

2. In addition to the evaluation of Intervenors and the evaluation of Defendant performed by Ms. Denise Taft, Mrs. Lela Patteson of the Vernal office of the Utah Division of Family Services filed a report with the court regarding the home conditions in Defendant's residence in

Lapoint, Utah and indicated the house was clean and appropriate for the care of young children. R. 190-191.

3. Defendant has recently remarried and resides in a mobile home at Lapoint, Utah, adjacent to the mobile home of her mother and near other relatives who assist her in the care of her children.

ARGUMENT I

THE TRIAL COURT APPLIED THE CORRECT STANDARD IN AWARDING CUSTODY AND ITS DECISION SHOULD BE AFFIRMED.

This Court has established a stringent standard of review in cases concerning child custody awards:

> [T]he trial court is given particularly broad discretion in the area of child custody incident to separation or divorce proceedings....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.

Jorgensen v. Jorgensen, 599 P.2d 510, 511-512 (Utah 1979). Appellants have made no showing of any such abuse of discretion to justify reversal here.

There are two basic doctrines which courts have used to decide custody disputes between the parent and third parties - the "parental right" doctrine, which ordinarily

awards custody to the parent unless he or she is proven unfit, and the "best interest of the child" doctrine, which looks to the child's welfare regardless of any parental rights. However, in Utah, while the "best interests" doctrine applies to custody disputes between a mother and a father, it is clear that the "parental right" doctrine is controlling in custody disputes between a parent and a third party.

It is incorrect to say that either the parental right or the best interest doctrine is the modern view, as both doctrines are in widespread use. It is also incorrect to call either doctrine a better view, as the doctrines are merely two ways to reach what would normally be the same conclusion. Even courts which apply the best interest doctrine in cases such as this give great weight to the idea that an important factor in determining the child's best interest is the belief the child should normally be with its parent rather than its grandparents. Thus, even without using a presumption, the courts give great weight to parental rights under either theory. See 29 ALR 3rd 366, 390-394.

In Utah the standard is usually expressed as a presumption that the child's welfare will be best served in the custody of its natural parent[s]. This was the basis of

the decision in Walton v. Coffman, 110 Utah 1, 169 P.2d 97 (1946), where this court stated, "we have repeatedly held that there is a presumption that it will be in the best interest and welfare of the child to be raised under the care, custody and control of its natural parent. Such a presumption is recognized by most courts..." and, at 102-103:

> 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 would be for the best interest and welfare of the child to be reared under the care, custody and control of its natural parent; that this presumption is not overcome unless from all the evidence the trier of 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. (emphasis added)

The same presumption is also recognized in Hardcastle v. Hardcastle, 118 Utah 192, 221 P.2d 883 (1950), although it was not applicable there because of a contrary finding made by the divorce court awarding custody to the grandmother on an earlier occasion. This is in contrast to the present case in which the divorce court awarded custody to the mother in the first instance. Hardcastle is also

instructive in connection with the burden of going forward of each of the parties herein:

> The mother is conceded to be a fit and proper person to have the care and custody of her child and unless her past conduct brands her as unfit or forfeits her right to claim her own flesh and blood, there is no good reason why her opportunity to become a real mother to her daughter should be longer delayed.

221 P.2d at 889.

The application of the best interest test there is really only a slight variation of the parental right analysis. Given the facts of that case and the ultimate award of custody to the mother, Defendant should certainly prevail herein.

Over the years this court has recognized and given great weight to the parental right presumption, culminating in Coffman. In Alley v. Alley, 67 Utah 316, 247 P. 301, 304 (1926), the court stated that it had "frequently made plain that where the parent is morally a fit person to have the care and custody of his own offspring, his rights are paramount to all others." (emphasis added) In Wallick v. Vance, 76 Utah 209, 289 P. 103, 108 (1930), the court indicated that "the father as the surviving parent starts with a very strong presumption in his favor." This strong parental preference has remained in effect to the present

day. See In Interest of Winger, 558 P.2d 1311, 1313 (Utah 1976). In this entire line of cases, the parental preference was overcome only when the evidence showed that the parent had abandoned or neglected the child, or forfeited or surrendered custody.

Utah is by no means the only state which adopts this view. Although intervenors present a "survey" of decisions purporting to use the best interest test, as many recent cases from the same and other jurisdictions illustrate the continuing vitality of the parental rights doctrine across the nation. For example, Nielsen v. Nielsen, 296 N.W.2d 483 (Neb. 1980) held that the courts may not deprive a parent of its superior custody right unless it is affirmatively shown that such parent is not fit to perform the duties imposed by the relationship, or has forfeited that right. The Supreme Court of Nebraska went on to say that the right of a parent to the custody of a minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties. This shows Nebraska enthusiastically espousing a parental right theory, contrary to what Intervenors' brief would lead the court to believe. In fact, the Blanco v. Blanco case, 128 NW.2d 615 (Neb. 1964) cited by Intervenors in support of a best interest test is incorrectly cited. In that case the mother was found to have forfeited

her parental rights but the court used nearly identical language in expressing the same parental rights doctrine that it more recently recognized in Neilsen. The court in Blanco cited an even earlier case, Raymond v. Cotner, 175 Neb. 158, 120 N.W2d 892 (1963) as follows:

> 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.

Nebraska seems to clearly adopt the parental right position.

In Lewis v. Lewis, 269 So.2d 919 (Ga. App. 1980), the court held that in the contest between one or both parents and a third party, unfitness must be shown by evidence and found to exist before either parent can be deprived of custody. This position is also apparent in Ellerbe v. Hooks, 416 A.2d 512, 513-514 (Penn. 1980), where the court said that the parent-child relationship should be considered of importance in determining a suitable custody arrangement because parents have a "prima facia right to custody" which may be forfeited only if "convincing reasons appear that the child's best interest will be served by an award to the third party. Thus, even before the proceedings start, the evidentiary scale is tipped, and tipped hard to the parent's side." The Holschuh v. Holland-Moritz case, 281 A.2d 129 (Penn. 1971) cited in Intervenors' brief, seems

more an application of a parental right doctrine than a decision based on a strict best interest test in that state as well. Intervenors' complain that requiring them to prove the natural mother unfit is too heavy a burden. It is a heavy burden, but in line with the overwhelming majority of courts, this burden is rightfully on one who would disrupt the family unit.

A New York court has recently added another dimension to establishing the correct parameters of the discussion here. Bennett v. Jeffreys, 356 N.E.2d 277 (NY 1976) recently held:

> Neither decisional rule nor statute can displace a fit parent because someone else could do a 'better job' of raising the child in the view of the court, so long as the parent or parents have not forfeited their rights by surrender, abandonment, unfitness, persisting neglect or other extraordinary circumstance.... [E]xcept when disqualified or displaced by extraordinary circumstances, parents are generally best qualified to care for their own children and therefore entitled to do so. Indeed the courts and the law would, under existing constitutional principles, be powerless to supplant parents except for grievous cause or necessity.

See Stanley v. Illinois, 405 U.S. 645, 651 (1972). Over and over again, our courts have emphasized the existence and constitutional dimension of the parents' primary legal rights to their child. A number of United States Supreme

Court cases, including Stanley, have discussed such rights as marriage, establishing a home, and rearing children as fundamental rights to be accorded the greatest sanctity.

The prevailing rule then, in a custody dispute between a third party and a parent, is that the parent will prevail unless clearly shown to be unfit, and there is a presumption that he or she is fit. A law journal author stated it this way. "Thus, in custody cases between persons with legal rights in the child, the best interests of the child prevail, which ordinarily amounts to a choice between them unless one or both is unfit. In custody disputes between a parent and a third party, it might be said either that the presumption of fitness of the parent is stronger or that the best interest of the child will weigh less heavily, which is the other side of the coin." 39 U of Detroit L.J. 347 at 356-358 (1962). As shown above, this is clearly the position taken by this court in the past. The decision reached by the trial court is a correct application of previous case law and should be upheld.

POINT II

THE TRIAL COURT'S FINDINGS AND CONCLUSIONS ARE SUFFICIENT AND SHOULD BE UPHELD.

Appellants point to four alleged deficiencies in the trial court's findings and conclusions. In their objections Intervenors confuse their position as argued with the court's findings. The two are simply not the same. First, the Court removed a proposed reference to an initial evaluation performed by Ms. Denise Taft. Since the court did not base its conclusions or judgment on Ms. Taft's testimony, the fact that she gave testimony and made a contrary recommendation is not a material factual issue which must be resolved by the findings. The court is obliged to make findings only on such issues. Sorenson v. Beers, 614 P.2d 159, 160 (Utah 1980). While Finding No. 6 is somewhat ambiguous as to what "thereon" refers to, the ambiguity is not a sufficient basis for reversal or remand.

Likewise with Intervenors' second objection, to deleting Ms. Taft's supplemental recommendation. Again the material facts do not include what Ms. Taft recommended, but rather the factual basis for the judge's decision which is supported by other findings. In custody proceedings the trial court has the discretion to disregard the testimony of an expert, since such testimony is in no manner controlling on the court. Mecham v. Mecham, 544 P.2d 479, 481 (Utah 1975).

Intervenors' third objection is to Finding No. 9. The report of Ms. Lela Patteson, DFS worker from Vernal, which was adopted by stipulation and referred to by the court at R.239, contains the source information about both the job market in Vernal and the details of the land purchase.

Finally, Conclusion of Law Nos. 1 and 2 properly state the rule in Utah that parents are entitled to a presumption of fitness for custody of their children as against third parties unless the challenger can present evidence to overcome this rebuttable presumption. This the Intervenors failed to do. The Conclusions correctly reflect the state of the law in this state (See Point I above) and the trial court's conclusions regarding the circumstances before him.

POINT III

THE EVIDENCE SUPPORTS THE TRIAL COURT'S JUDGMENT.

As cited above, in Jorgensen v. Jorgensen, this court recently reaffirmed a long line of cases extending broad discretion to the lower court in child custody cases since any decision in this area of law is, of necessity, based on a difficult and to some extent subjective evaluation of conflicting evidence as to future behavior of adults toward children. In this case there was a great deal of conflicting testimony regarding the behavior of various

adults and even of the children themselves and who was or was not responsible for those behaviors and even whether it was better to live in the city or the country (R. 228) or to use Indian or more traditional Anglo-American child rearing techniques (R. 218).

After hearing from both parents and both grandmothers, the trial court elected to maintain custody with the mother who had been awarded custody in the divorce proceeding some years earlier. The court querried the children's father as to Respondent's ability to care for and discipline the children before the divorce. He testified she was able to properly care for the children (R. 224-5). Similarly a state-employed Social Services worker, Ms. Lela Patteson, visited Respondent's home and found it to be adequately sized and furnished (R. 239) and Respondent and her husband able to meet the financial needs of the children.

Appellants have selected bits and pieces of evidence, primarily self-serving, to claim that the weight of evidence supports a custody award to them. However, the fairer reading of the evidence supports a conclusion that the evidence is split and in conflict and it was within the discretion of the court to find that Respondent should retain custody. If anything the evidence shows that Respondent has had difficulties in her life and has recently

begun to get back on her feet with the assistance of her mother and husband. Certainly receiving assistance from one's family is not a basis for losing custody of one's children.

CONCLUSION

The trial court acted within its discretion in maintaining custody with Respondent. The legal standard used was correct, there is competent evidence among the conflicting evidence to support the court's decision and it should be upheld.

DATED this 12th day of January, 1981.

Respectfully submitted,

UTAH LEGAL SERVICES, INC.
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a copy of the foregoing Brief of Respondent to Peter W. Guyon, Attorney for Appellant, 820 Newhouse Building, #10 Exchange Place, Salt Lake City, Utah 84111, on this _____ day of January, 1981.