

1982

Michael J. Cooper v. Walter Deland et al : Brief of Appellant

Utah Supreme Court

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David S. Dolowitz; Attorneys for Appellant;

Phil L> Hansen; Attorneys for Respondent;

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IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

MICHAEL J. COOPER, :
Plaintiff-Appellant, :
-v- : Case No. 18101
WALTER DELAND, et al., :
Defendant-Respondant. :

* * * * *

BRIEF OF APPELLANT

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CASE NO 18101

* * * * *

DAVID S. DOLOWITZ
of and for
PARSONS, BEHLE & LATIMER
79 South State Street
P.O. Box 11898
Salt Lake City, Utah 84147
Telephone: 532-1234

Attorneys for Appellant

PHIL L. HANSEN
of and for
HANSEN & HANSEN
800 Boston Building
Salt Lake City, Utah 84111
Telephone: 322-2467

Attorneys for Respondent

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79 South State Street
P.O. Box 11898
Salt Lake City, Utah 84147
Telephone: 532-1234

Attorneys for Appellant

PHIL L. HANSEN
of and for
HANSEN & HANSEN
800 Boston Building
Salt Lake City, Utah 84111
Telephone: 322-2467

Attorneys for Respondent

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is a custody action between the stepfather and family of the deceased mother of a child against the natural father following the death of the mother.

DISPOSITION IN THE LOWER COURT

After trial, the court ruled that custody which had remained with the stepfather after the death of the mother should be awarded to the natural father subject to rights of visitation in the maternal grandparents.

RELIEF SOUGHT ON APPEAL

Appellant, Richard Vigor, Jeremy Cooper's stepfather, seeks reversal of the ruling of the trial court and remand for reconsideration of this case under the proper legal standard which appellant believes will result in an award of custody to himself.

STATEMENT OF FACTS

Jeremy Cooper, the child whose custody is in issue, was born on July 22, 1973, as the issue of the marriage of respondent and Lisa DeLand Vigor. (R. 2, 6-10) The marriage between respondent and Lisa ended on May 19, 1975 (R. 6-10) and custody of Jeremy was awarded to Lisa. (R. 6-7.) Jeremy resided with Lisa after the divorce and when Lisa married appellant on July 24, 1980, appellant, Jeremy and Lisa resided together as a family. (R. 3). Lisa died on October 13, 1980 (R. 3). After her death respondent initiated an action for custody and appellant initiated an action for guardianship (R. 2-4, 12-25). This was preliminarily considered by Judge Banks on October 30, 1980, and he left temporary custody of Jeremy with the appellant, awarded respondent specific visitation and directed a custody evaluation be performed by Francis Purdie of the Division of Family Services. (R. 35, 36, 52-54).

The custody recommendation of Francis Purdie was for the placement of Jeremy with his stepfather, appellant herein, Richard Vigor, who was thereafter determined to be the psychological parent of Jeremy Cooper by Dr. Janice Sargent. The reports and testimony of both of these witnesses was that it would be in Jeremy's best interest to reside with appellant. (Supplemental Record). There was conflicting testimony about

whether or not respondent had visited with Jeremy after the divorce and what custody action was in Jeremy's best interest.

Defendants (appellant and Deland family members) asserted that appellant very rarely visited with Jeremy until October of 1980 when a regular visitation schedule was established by Judge Banks (R. 6, 52-54) and this was contested by respondent. (R. 5).

After examining the various psychological reports submitted, the trial court specifically determined that neither the appellant nor the natural father were unfit persons to have custody of Jeremy Cooper. (R. 109). The court ruled, however, that under the decisions of this Court in In Re Parental Rights of Consuelo Castillo, Utah, 632 P.2d 855 (1981), appellant could establish a right to custody of Jeremy only by establishing that respondent was unfit by clear and convincing evidence (R. 110). Applying that rationale, the Court determined that evidence of a clear and convincing nature has not been presented and therefore custody would have to be awarded to respondent. (R. 111).

Mr. Cooper responded to this decision by taking Jeremy from school which appellant discovered only when Jeremy did not return home at the end of the day. Mr. Vigor and members of the DeLand family then determined that it would be in Jeremy's best interest not to be pingponged around and appellant filed this appeal rather than pursue the matter further in the District Court. (R. 116.)

ARGUMENT

IN DETERMINING CUSTODY THE TRIAL COURT IS
REQUIRED TO ACT IN THE BEST INTEREST OF
CHILD

When determining custody of children, this Court has repeatedly declared that the trial courts in Utah must act in the best interest of each child whose custody is in issue. Walton v. Koffman, 110 Utah 1, 169 P.2d 97 (1946), Miller v. Miller, 8 Utah 2d 290, 333 P.2d 945 (1959), Baldwin v. Nielsen, 170 P.2d 179 (Utah 1946), Application of Conde, 10 Utah 2d 25, 347 P.2d 859 (1959). This rule was restated as part of the examination of underlying law in In Re Castillo, 632 P.2d 855 at 856. However, that decision was misconstrued and misapplied by the trial court in this matter. In Castillo, this Court articulated tests to be applied in permanent deprivation of parental rights proceedings maintained under the Juvenile Court Act. They were not to be applied to a case invoking custody. That error must be corrected by this Court.

In its Memorandum Opinion the trial court stated:

In addressing appellant's contentions, we note our agreement with certain propositions essayed in her behalf. The first is that we have no reservation in agreeing that a child is not a mere pawn of the state to be dealt with solely on the basis of what public officials, or even the court, may believe to be in a child's best interest, without giving most serious consideration to the rights of the natural parent in his child. High among the ideals of individual liberty which we consider essential in our free society are those which protect the sanctity of one's home and family.

It is true that in controversies involving the well-being of children, this Court and others have frequently said that the best interest of children is of paramount importance. We can see no useful purpose here in rediscussing our various cases dealing with the problem. It is deemed sufficient to say in summary that we are not aware that this Court has ever espoused the view, and it is not our view, that the termination of parental rights can be decreed without giving serious consideration to the prior and fundamental right of a parent to rear his child; and concomitantly, of the right of the child to be reared by his natural parent.

It is a matter of such common knowledge as to hardly require expression that it is in accordance with the natural instincts and customs of mankind that in most instances the interests of a child are best served by being in the custody of his natural parents. As was long ago aptly stated by the much-respected Chancellor Kent: ". . . the voice of nature has pointed out the natural parent as the most fit and proper person" to rear his own child.

The law therefore indulges a strong presumption to that effect, and therefore, whatever may have heretofore been said about the burden of proof in such matters, due to the nature of that presumption, we think it should be overcome only by clear and convincing evidence. In this case, that standard is met because the facts recited herein are established without any substantial dispute. (Emphasis added)

(R. 110.) In this pronouncement the trial court correctly examined the language of this Court without properly understanding the Castillo decision, 632 P.2d at 856-67.

In Castillo the issue was not an award of custody, it was whether or not there was a sufficient basis for the trial court to permanently deprive Mrs. Castillo of care, custody and

control of her children under Section 78-3a-48, Utah Code Annotated, 1953. This is the most extreme action that can be taken by the state. It was not the issue that was before the trial court in the instant matter and the trial court erred in applying the strict standards articulated by this Court to protect the parent-child relationship in a simple custody dispute.

In the instant matter the trial court was being asked to determine custody between the stepfather who, it was asserted, had become the psychological parent of the child because the natural parent had forfeited his rights to act as the custodial parent of this child through neglect of his parental responsibilities and the natural father who wanted to resume physical custody of the child. The trial court did not view the situation in that light, but instead turned to this Court's decision in Castillo and applied its standards to this case. This was clear error.

The relief sought in the instant matter was not that of parental deprivation. It was custody through guardianship by appellant who sought to be the primary custodial parent of Jeremy Cooper based on the emotional relationship that had grown up between them. There was no attempt to terminate respondent's interest in Jeremy. This would have continued as they had existed prior to the death of the natural mother. Respondent would have continued to have visitation rights, his residual parental rights and such rights of contact with his child as he wished to assert.

This was argued by appellant to the trial court who acknowledged the argument, but rejected it. (R. 110). Appellant would assert to this Court that there is no reasonable basis on which the trial court could mistake a permanent deprivation of parental rights case for a custody case where the issue of permanent deprivation of parental rights was not even involved. Nonetheless, after stating that this was the argument of appellant (R. 110) the trial court rejected it and applied the wrong standard.

This Court must now reverse that ruling and remand the matter to the trial court for an appropriate ruling under the correct legal standard. The trial court should also be directed to examine the actions that have been taken by each of the parties since the entry of the trial court's order to evaluate the actions of the parties since October 27, 1981.

CONCLUSION

The trial court in this matter applied an improper legal standard to decide the case before it. It utilized the standards articulated by this Court for testing a permanent deprivation of parental rights by the Juvenile Court under the Juvenile Court Act in a custody dispute between a stepparent and a natural parent. In doing so the trial court committed obvious legal error as no permanent deprivation of natural parental rights was ever requested.

This Court should reverse the ruling of the trial court, remand the matter for decision under the proper legal

standard and specifically direct the court to examine what has transpired since the entry of the court's order so as to be able to gain a full picture of who is acting in the best interests of the child.

RESPECTFULLY submitted this 21 day of January, 1982.

A handwritten signature in cursive script, reading "David S. Dolowitz", is written over a horizontal line.

DAVID S. DOLOWITZ

of and for

PARSONS, BEHLE & LATIMER

79 South State Street

P.O. Box 11898

Salt Lake City, Utah 84147


Telephone: 532-1234

Attorneys for Appellant

MAILING CERTIFICATE

I hereby certify that I caused to be mailed, postage prepaid, two true and accurate copies of the foregoing BRIEF OF APPELLANT to the following parties of record on this 21 day of January, 1982:

Phil L. Hansen
HANSEN & HANSEN
800 Boston Building
Salt Lake City, Utah 84111



DAVID S. DOLOWITZ