

1990

Jensen v. Jensen : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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900372-CA

IN THE UTAH COURT OF APPEALS

LARAE JENSEN nka LARAE THORPE, :

Plaintiff-Appellant, :

vs. :

RAYMOND JENSEN, :

Defendant-Appellee. :

Case No. 900372-CA

Priority No. 4

BRIEF OF APPELLANT

APPEAL FROM A SUPPLEMENTAL ORDER OF THE SIXTH JUDICIAL
DISTRICT COURT FOR SEVIER COUNTY, HONORABLE DON V. TIBBS,
DENYING AND REAFFIRMING PLAINTIFF'S PETITION
TO MODIFY DECREE OF DIVORCE AS TO JAMIE CHRISTINA JENSEN
AND JOSIE MCKELE JENSEN AND THE SUPPLEMENTAL
FINDINGS OF FACT AND CONCLUSIONS OF LAW

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UTAH COURT OF APPEALS

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	:	Case No. 900372-CA
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BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS BELOW

This Court has jurisdiction to hear the appeal in this matter pursuant to § 78-2a-3(h) Utah Code Ann. (1990).

ISSUES PRESENTED FOR REVIEW

A. Whether the trial court's findings and conclusions are based on appropriate factors. This issue presents a question of law and requires the appellate court to review the lower court's decision without according deference thereto. Marchant v. Marchant, 743 P.2d 199 (Utah App. 1977).

B. Whether the trial court's findings and conclusions supporting the initial custody award are supported by the evidence. This issue presents a question of fact and requires the appellate court to review the lower court's decision applying the clearly erroneous standard of review. Marchant v. Marchant, 743 P.2d 199 (Utah App. 1987).

C. Whether the trial court improperly failed to consider the changed circumstances of the noncustodial parent as well as the custodial parent. This issue presents a question of law and requires the appellate court to review the lower court's decision without according deference thereto. Elmer v. Elmer, 776 P.2d 599 (Utah 1989).

D. Whether the petitioner established substantial change of circumstances to allow the trial court to reconsider the issue of custody. This issue requires the appellate court to uphold the lower court's decision absent a showing of an abuse of discretion or manifest injustice. Maughan v. Maughan, 770 P.2d 156 (Utah App. 1989).

STATEMENT OF THE CASE

Nature of the Case

This is an appeal from a Supplemental Order of the Sixth Judicial District Court for Sevier County, Honorable Don V. Tibbs, Denying and Reaffirming Plaintiff's Petition to Modify Decree of Divorce as to Jamie Christina Jensen and Josie McKele Jensen and the Supplemental Findings of Fact and Conclusions of Law. This matter was originally appealed to this Court under Case No. 870513-CA. This Court remanded the case, and the actions of the District Court after the remand are the subject of this appeal.

Statement of Facts

A. Plaintiff LaRae Jensen and Defendant Raymond Jensen, were married on September 27, 1979. Three children

were born to the parties during the course of the marriage and Raymond adopted LaRae's two children from a previous marriage. (R, T-3, p. 11, 19-20; R, T-2, p. 7).

B. The parties filed for divorce and a Decree of Divorce was entered on February 10, 1987. (R, T-2, p. 15). The Decree awarded Raymond custody of all five children subject to LaRae's right to reasonable visitation. The Decree also contained a provision that the District Court would review the custody order after 90 days in the event that the two older children filed written elections requesting that LaRae assume custody of them. (R, 60-62). The District Court failed to enter Findings and Conclusions supporting the custody award.

C. After the Decree was signed, LaRae took all five children to visit their grandparents. During the visit, one of the children was struck and killed by an automobile. From February until June of 1987, Raymond allowed LaRae to take physical custody of the youngest child. During this same period of time, the two older children went to live with LaRae and filed elections to remain in her custody. (R, p. 241-242).

D. In June of 1987, LaRae filed an affidavit seeking custody of all four children, and child support. She argued in her affidavit that the following factors established a change of circumstances:

(1) she had physical custody of three of the four children;

(2) the children in her custody had established ties to their new community;

(3) she had remarried, was working part-time, and was financially secure;

(4) the child in Raymond's custody was separated from her siblings, was unhappy, and lacked parental supervision;

(5) Raymond failed to arrange visitation with the children in her custody;

(6) Raymond had failed to assist her financially with the support of the children in her custody; and

(7) Raymond was using the children to manipulate her.

(R, p. 71-76).

E. Both parties presented evidence at a hearing on September 30, 1987. The District Court ruled from the bench that LaRae had failed to establish a material change of circumstances. (R, T-2).

F. An Order was entered on October 19, 1987, amending the decree to award LaRae custody of the two older children. The Order also denied LaRae's petition to gain custody of the other children. (R, p. 117-118). Once again, the District Court failed to enter findings to support its decision. LaRae appealed the District Court's decision.

G. On June 1, 1989, the Utah Court of Appeals issued a decision vacating the Order Denying Plaintiff's Petition to Modify and remanding the case for entry of appropriate findings for both the initial award of custody and the Order Denying Modification. (Addendum, A-1).

H. On or about March 14, 1990, Supplemental Findings of Fact and Conclusions of Law were filed with the District Court by defendant's attorney. Plaintiff filed an objection to the Supplemental Findings of Fact and Conclusions of Law and a hearing was held on May 16, 1990 for the purpose of settling the Findings of Fact. Supplemental Findings were executed and entered by the District Court on June 5, 1990 and the Supplemental Order was entered on July 11, 1990. (R, p. 235-244; 247-248). It is from this Order that plaintiff appeals.

SUMMARY OF ARGUMENTS

The District Court's Supplemental Findings of Facts and Conclusions of Law do not comply with the directives of this Court on remand of this matter nor do they comply with the requirements of well-established Utah case law. They fail to address the specific factors pertinent to the District Court's decision and do not address the particular needs of each child or the ability of each parent to meet those needs. The Findings are not sufficiently detailed, do not indicate that the District Court's process in reaching its custody determination was logical and properly supported and, in many instances, are clearly erroneous. The failure of the trial court to make findings on all material issues is reversible error because the facts in the record are not "clear, uncontroverted, and capable of supporting only a finding in

favor of the [District Court's] judgment." Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987). The Court's Findings of Fact and Conclusions of Law are colored by bias towards women pursuing other than the traditional role of homemaker and rely, almost exclusively, on factors which this Court has held are improper for consideration in a custody dispute.

The District Court's Supplemental Findings relating to the modification hearing of September 30, 1987 do not compare the evidence presented at the modification hearing with the factors underlying the District Court's original award and, therefore, ignore this Court's directive on remand. The modification hearing findings fail to address the best interests of the children or the changed circumstances asserted by the appellant. The Supplemental Findings and Conclusions, instead, appear to be based on the District Court's concept that the appellant was at fault for the failure of the marriage and that she was not entitled to custody because of her past moral indiscretions.

An examination of the factors set forth in Hutchison v. Hutchison, 649 P.2d 38 (Utah 1982), establishes that appellant met both parts of the test as set forth in Elmer v. Elmer, 776 P.2d 599 (Utah 1989), and that the District Court's denial of appellant's Petition for Modification constitutes an abuse of discretion.

ARGUMENT

POINT I

THE DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE NOT PROPERLY BASED UPON APPROPRIATE FACTORS AND ARE NOT SUPPORTED BY THE EVIDENCE

A. Findings of Fact: Original Custody Determination.

On remand, this Court instructed the District Court to enter appropriate findings and that:

Those findings should articulate the considerations behind the initial award of custody and the order denying modification, and should reflect the current legal standard for modification of custody.

(Page 5 of the Court's Opinion, Item 1 in the Addendum). An examination of the District Court's Supplemental Findings of Fact and Conclusions of Law (hereafter "Findings and Conclusions") reveals that it failed to comply with the appellate court directive on remand.

The Findings and Conclusions eventually entered by the District Court fall far short of the standard set by the Utah Supreme Court and this Court. The Utah Supreme Court has held:

. . . a custody decision must be supported by written findings and conclusions. These findings should refer to the specific factors pertinent to the decision of what placement is in the best interests of the child, "including the particular needs of [each] child and the ability of each parent to meet those needs." (citation omitted)

Sanderson v. Tryon, 739 P.2d 623, 626 (Utah 1987). This Court has held that:

A custody award must be firmly anchored on findings of fact that (1) are sufficiently detailed, (2) include enough facts to disclose the process through which the ultimate conclusion is reached, (3) indicate the process is logical and properly supported, and (4) are not clearly erroneous. (citations omitted) If this is not accomplished by the trial court, the issue of custody must be reversed unless the record itself supports the award to the standard reiterated in Acton.

Marchant v. Marchant, 743 P.2d 199, 203 (Utah App. 1987). In Marchant, this court cited the standard reiterated in Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987):

Failure of the trial court to make findings on all material issues is reversible error unless the facts in the record are "clear, uncontroverted, and capable of supporting only a finding in favor of the judgment."

A review of the District Court's Findings and Conclusions reveals that they do not meet the standards which the appellate courts of this state have held are applicable to findings and conclusions in child custody disputes. The Findings and Conclusions are not sufficiently detailed and do not include enough facts to disclose a legitimate process through which the District Court reached its ultimate conclusion. To the contrary, the Findings and ultimate Conclusions in this matter are the result of the District Court's concentration on factors which this Court has held are improper. The Findings and Conclusions are not the product of a process which is logical and properly supported.

The Findings of Fact are subject to the "clearly erroneous" standard of review. The conclusions derived therefrom, however, and the determination of whether the Findings and Conclusions are based on appropriate factors is a question of law and requires the appellate court to review the lower court's decision without granting deference thereto.

Marchant, supra, at 203.

The record reflects that the trial court had difficulty with its task on remand. Addressing the appellant's attorney, the District Court inquired:

What I'd like to know is do you feel that the court of appeals meant for me to go back and rehear this case? Or do you feel they just meant for me to make some findings, based upon my original order?

(R, T-4, p. 5). The trial court was at a loss as to how to proceed and clearly relied heavily upon the input and assistance of respondent's attorney in completing the Findings which were eventually entered. (R, T-4, p. 5). In determining how to proceed in the hearing on appellant's Objections to the respondent's Proposed Supplemental Findings ("Findings Hearing"), the District Court stated:

Well, why don't we just go by paragraph by paragraph [of the respondent's proposed supplemental findings] and let's just go that way and you show me where, in the finding, upon what you based it.

I think I remember the case because it was an unusual case. It will probably come back

to me. Right now I'm having a little hard time remembering it, but I do remember it was quite an unusual case.

So why don't we just start and we'll go step by step through this supplemental findings and then I'll refer to your objection and then we'll see where he basis [sic] it in the record; All right?

(R, T-4, p. 6). The Findings and Conclusions which were eventually entered are a product of the bias of the respondent's attorney and the District Court's fading memory of the original custody hearing. The hearing transcript contains virtually no specific reference by either the District Court or respondent's attorney to the trial record.

In the Findings Hearing, appellant's counsel objected to respondent's proposed Finding No. 5 because the Finding failed to define which parent was the primary caretaker. Appellant's counsel argued that the factors set forth in Pusey v. Pusey, 728 P.2d 117 (Utah 1986), needed to be considered. The Pusey factors were never addressed and apparently never considered by the District Court. Finding No. 5 was, pursuant to appellant's objection, modified to state that Mr. Jensen:

Was the primary caretaker of the children after plaintiff (LaRae) became actively involved in the ambulance program; that defendant was working in his own business, but was also taking care of the children; that the plaintiff found interests outside of the home and defendant had become the primary caretaker of the children.

(R, 238).

Finding No. 5 reveals the District Court's basic, underlying motive and grounds for awarding custody of the children to respondent: the appellant had found interests outside of the home. On that basis, the District Court determined that the defendant had become the primary caretaker of the children despite its recognition that defendant, too, was working outside of the home. This Court has stated that it will not:

Condone any finding of fact which might be interpreted as penalizing a woman for acquiring skills in other than the most fundamental and traditional areas necessary for functioning as a wife and mother.

Marchant, supra, at 204.

This bias towards women pursuing other than the traditional role of homemaker permeates the District Court's findings. Finding No. 6, for example, states that appellant placed her personal interests ahead of those of the family to the extent that she neglected the family "undermined the home, caused turmoil and dissention, . . ." (R, 238). Finding No. 6 shows that the District Court, to a great extent, "based its conclusion that defendant was the proper custodial parent on the outmoded concept of fault on the part of plaintiff."

Marchant, supra, at 203. At the conclusion of the divorce trial, after the District Court had granted custody of the children to respondent, the District Court made this statement: "The plaintiff, I realize this is not what she

contemplated. That I can't help, because she brought it upon herself." (R, T-3, p. 205).

Finding No. 6 is objectionable on other grounds as well. The District Court's conclusion is contrary to the testimony heard by the District Court, in particular as the testimony relates to the Findings in the subparts of Finding No. 6. For example, in subparagraph (A) the District Court held that: "LaRae developed a pre-occupying interest in a Sevier County ambulance program" (R, 238). While the evidence established that LaRae volunteered on a regular basis for the Sevier County Ambulance Program, there was no evidence before the District Court to establish that her commitment to the program was "pre-occupying."

Additionally, the evidence before the District Court was uncontroverted that while LaRae may have been experiencing difficulty in her marriage, she was at all times a loving, caring mother who spent time with all of her children and provided for their needs. (R, T-3, p. 21-29; 56-58; 80, 83; 87-88).

In Finding No. 6(B), the District Court found that LaRae's interest in the ambulance program was to the exclusion of her family welfare and that she "was gone for periods of time on most days" and that "she did not make adequate provision for the children while she was gone." (R, 238). Again, the District Court's bias against women pursuing

interests outside of the home is evident. Furthermore, LaRae's work with the ambulance program was not to the exclusion of her family's welfare. The fact that both the District Court and the defendant deemed it LaRae's responsibility to make provisions for the care of the children in her absence contradicts the District Court's finding that defendant was the primary caretaker and establishes that, during the course of their marriage, both parties looked upon LaRae as the primary caretaker. The responsibility for the children's care ultimately fell to her.

In Pusey, supra, at 120 , the Supreme Court wrote that the choice in "competing child custody claims" should be based on "function-related factors." One of the most prominent factors which must be considered is "the identity of the primary caretaker during the marriage." While the evidence tended to establish that respondent assisted in the care of the children, it is apparent that, at least as far as the parties were concerned, appellant had the identity of primary caretaker. There is never any mention by the District Court that, during the term of his marriage to appellant, respondent shared in the responsibility of arranging babysitters or child care for the children. Instead, any reference to respondent's care of the children is in terms of Raymond doing LaRae's job. Conspicuously absent from the District Court's Findings and Conclusions is any reference to the evidence that the

respondent was often at his place of business from before 7:00 a.m. until past 10:00 p.m. and that, on most days, he was at work until at least after 5:00 or 6:00 in the evening. (R, T-2, p. 58). There is no evidence that the respondent ever concerned himself with arranging for babysitters for the children because of his daily absence from the home.

In Finding 6(c), the District Court found, among other things, that "while working in the ambulance program [LaRae] took extended trips with male members of the ambulance crew. She had an intimate affair with Randy Thorpe. . . ." (R, 239). At the time this Finding was entered, there was no evidence before the District Court that LaRae took extended trips with male members of the ambulance crew. While the District Court heard some evidence that LaRae spent some time at the home of Randy Thorpe, there was absolutely no evidence supporting the District Court's finding that she had an "intimate affair" with him. Both LaRae Jensen and Randy Thorpe testified that their relationship was not an "intimate affair." (R, T-3, p. 42-43; 190-191).

In the same Finding, the District Court found that LaRae had "elected" to have a baby by an individual named John Bergin. (R, 239). This Finding is particularly interesting in light of the Order and Findings which the District Court made from the bench. Regarding that child, the District Court stated that:

It is the order of this court that this court so finds that this is a child of this marriage period. This child was born under the marriage contract while these parties were married. This is the child of the defendant, as well as the child of the plaintiff. That is the order of the court. There will be no more discussion concerning it not being the child. If it's brought to my attention that there's any discussion, from either of the parties, to these children, contrary, I will consider that a contempt to this court and will use my authority to punish by jail.

(R, T-3, p. 205).

It is evident from the tenor of the District Court's findings that it placed an improperly high emphasis on appellant's moral character in reaching its custody determination. The Utah Supreme Court has held:

[A] determination of the children's best interest turns on numerous factors, each of which may vary in importance according to the facts in a particular case. Moral character is only one of a myriad of factors the court may properly consider in determining a child's best interests. In this regard we have previously held that a parent's extra-marital sexual relationship alone is insufficient to justify a change in custody.

Sanderson v. Tryon, supra, at 627.

The District Court's Finding, issued from the bench, illustrates that the appellant's moral character and her interests outside of the home were the primary factors behind the original custody determination. The District Court stated:

After hearing all this evidence, I'm not convinced that it's for the best interest of the children that they be awarded to the plaintiff. I do that with difficulty because she's the mother. But no longer can I just award children to the mother when she can completely sissy [sic] disobeys and goes contrary to the rules of society.

(R, T-3, p. 203).

The extent to which the District Court would deprive appellant of the right to have any interests whatsoever outside of the home is illustrated by its Finding No. 6(D). In that Finding, the District Court found that the appellant "acquired a horse for her personal use which took more time from family." (R, 239). This Finding should not have been a factor in the District Court's custody determination. See, Marchant, supra, at 204. The District Court would condemn appellant for having any interests outside of the home, even though the evidence established that, while LaRae experienced difficulty in her marriage and developed personal interests, she was at all times a loving, caring mother who spent time with all of her children and provided for all of their needs.

The Utah Supreme Court has expressed the standard upon which judicial custody determinations must be based:

[A] judicial determination of custody based on the child's best interests is based on an objective and impartial comparison of the parenting skills, character, and abilities of both parents in light of a realistic and objective appraisal of the needs of a child.

Elmer v. Elmer, 776 P.2d 599 (Utah 1989). The Findings and Conclusions are void of any impartial comparison of parenting skills or objective appraisal of the children's needs. The District Court's focus, instead, is on disciplining the "wayward wife."

B. Supplemental Findings: Modification Hearing 9/30/87.

The District Court's Findings and Conclusions relating to the Modification Hearing, held September 30, 1987, are equally inadequate and flawed. Significantly, while it makes brief reference to the material changes and circumstances alleged by appellant, none of the District Court's Findings address any of those issues or factors. In Finding No. 13 of the Supplemental Findings, the District Court concludes, without indicating the steps by which it reached its ultimate conclusion and without addressing the factors raised by the appellant, that no changed conditions had been shown with regard to either the respondent or with regard to the appellant. (R, p. 243). In its opinion remanding this matter, this Court commented that:

Other than an unsigned statement by the court that Raymond is still the primary caretaker, the trial court's order neither discusses LaRae's evidence in support of her affidavit, nor compares that evidence with the factors underlying the original award.

(Opinion, p. 4).

In addition to failing to address the changed conditions alleged by appellant, the District Court made Findings and Conclusions contrary to and unsupported by the evidence. After the divorce, one of the parties' children, Savannah, was killed when she was struck by a car. In its Finding No. 4, the District Court found that Savannah's death was a factor which caused respondent to "permit" the appellant's parents to assume custody of the minor child, Josie. This Finding is contrary to the evidence which establishes that Raymond gave LaRae custody of Josie in February, before Savannah's death. (R, T-2, p. 16-17). Based on Raymond's own testimony, he was experiencing difficulty with the two older children, Shalauna and Stacey. (R, T-2, p. 68 and 69). Raymond told LaRae to pick the children up, including the baby, because he couldn't cope with them. (R, T-2, p. 16).

The District Court heard uncontroverted testimony that Raymond also asked Mr. and Mrs. Robert Proctor, appellant's parents, to take permanent custody of Josie. (R, T-2, p. 41 and 72). Raymond knew at all times that LaRae actually had custody of Josie. (R, T-2, p. 72-73). The District Court's Finding on this matter does not recognize any of these critical factors which were established by the evidence.

Finding No. 7 of the Supplemental Findings is similarly flawed. In this Finding, the District Court states that "the temporary arrangement was terminated by Raymond. The

grandparents had allowed LaRae to take care of Josie and LaRae refused to return the child to Raymond." This Finding implies that Raymond terminated the arrangement when he learned LaRae had custody of the child. Raymond testified that he knew where the baby was during the four months LaRae had custody of her. (R, T-2, p. 73). The evidence before the District Court established that, following Savannah's death, Raymond was willing to allow the Proctors' to take custody of Josie and attempted to have LaRae sign an agreement to that effect. When LaRae refused to sign the agreement, Raymond demanded that LaRae return Josie to his custody. (R, T-2, p. 73; 38-41; 30). Finding No. 7, therefore, is directly contrary to the evidence, including respondent's own testimony.

In Finding No. 9 of the Supplemental Findings, the District Court found that "since June of 1987 the children have been well cared for and are making a good adjustment." (R, p. 242). Contrary to the requirements established by this Court and the Utah Supreme Court, this Finding contains no detail and absolutely no subsidiary facts to provide any hint of how the District Court reached this Finding. None of the points raised by LaRae were discussed or addressed by the District Court. The Findings even fail to make even the briefest mention of the nature of the circumstances and conditions in the home of the custodial parent. This Finding, while apparently critical to

the District Court's determination, fails to meet the standard required in Smith and Marchant, supra.

The testimony of Hilda Gentry, a witness who refused to testify for the plaintiff except under subpoena, established that the minor child, Jamie, a 7 year old, spent hours every week at a Conoco gas station/mini-store. Ms. Gentry testified that the store is near a busy highway and that Jamie would ride her bike down to the store at night, three to four times a week, although Raymond had never made arrangements with her to watch the child. According to Ms. Gentry, when she began working the day shift, Jamie was still spending substantial amounts of time at the store in the evenings. Jamie was there so much that the owners became upset. (R, T-2, p. 46-55).

Another witness testified that she would see Jamie riding her bike after dark, approximately a mile out of town. (R, T-2, p. 58). The same witness testified that she would see Raymond in his shop working as late as 10:00 p.m. and Saturdays as well. (R, T-2, p. 58, 61).

Additionally, the evidence before the District Court directly controverted the District Court's statement that the children were making a good adjustment. Raymond Jensen's testimony established that Jamie missed her mother and older siblings, and was having problems at school. (R, T-2, p. 85). Josie spent significant amounts of time with babysitters and experienced difficulty in potty training (R, T-2, p. 58, 61;

83-84, 93). The facts illustrate the inaccuracy of Finding No. 10 that, "LaRae did not show a substantial and material change effecting [sic] Raymond's parenting ability which would justify reopening the custody question." (R, 242-243).

In Finding No. 11 the District Court states that:

Josie was out of Raymond's care for a period of about three months. A part of the period resulted from LaRae's refusal to return the child. The visitation with the grandparents was intended to help resolve the emotion and traumatic problems facing all the parties because of the death of Savannah.

(R, 243).

Contrary to the District Court's Finding, the evidence established that Josie was out of Raymond's care for at least four months. (R, T-2, p. 16-17; 41; 73-73). Additionally, Raymond testified that when he went to pick up Josie he was able to take her. (R, T-2, p. 86). The District Court also erred in implying in this Finding that the visitation was meant to be with the grandparents when Raymond testified that he knew Josie was with her mother. (R, T-2, p. 73).

Finally, the District Court found in Findings No. 13 and 14 that there were no changed conditions with regard to Raymond or LaRae. It made these Findings without addressing, even superficially, the points raised in LaRae's affidavit alleging the changed circumstances upon which her Petition relied. Nor did the District Court address the testimony of witnesses establishing that Raymond's long working hours, among

other things, resulted in an unstable situation for the children whose desire it has been to be reunited with their mother and older siblings. (R, T-2, p. 72, 85).

The Findings and Conclusions entered by the District Court after remand by this Court lack sufficient detail and facts to disclose the process through which the ultimate conclusion was reached. There is no indication that the District Court's decision process was logical and properly supported. In fact, the evidence establishes that a number of the District Court's Findings and Conclusions are clearly erroneous. They are also contrary to law because they are based on improper factors including the District Court's belief that a woman's place is in the home and that any moral indiscretion makes a parent unfit to have custody of her children.

POINT II

APPELLANT ESTABLISHED MATERIAL CHANGES IN THE CIRCUMSTANCES UPON WHICH THE TRIAL COURT'S ORIGINAL CUSTODY AWARD WAS BASED AND THE DENIAL OF HER PETITION FOR MODIFICATION CONSTITUTES AN ABUSE OF DISCRETION.

A. The Trial Court Did Not Apply the Applicable Legal Standard in Denying Appellant's Petition for Modification.

In the opinion remanding this matter, this Court directed the trial court that its Findings and Conclusions "should articulate the consideration behind the initial award of custody and the Order denying modification, and should reflect the current legal standard for modification of

custody." Opinion, p. 5. The trial court's Findings relevant to the Petition for Modification do not articulate the considerations behind the initial award of custody and the Order denying modification. There is also no indication that the trial court applied the current legal standard as directed by this Court. This Court instructed the trial court that its Findings and Conclusions must reflect the current legal standard as set forth in Elmer v. Elmer, supra.

Elmer sets out a two-part test which must be applied in determining the changed-circumstances issue. In setting forth that two-part test, the court relied on the language of Hogge v. Hogge, 649 P.2d 51 (Utah 1982):

Hogge held that a parent seeking a change in custody of a child must first establish that there has been a substantial and material change in the circumstances upon which the original custody award was based, and second and thereafter, that a change in custody is in the best interests of the child.

Elmer at 602. The Elmer court also held that:

[W]e have held that a change in the circumstances of the noncustodial parent may bear upon the issue of whether a change of custody may be appropriate. (Citation omitted.)

The Findings and Conclusions do not address, even superficially, the material changes asserted by the appellant in her Petition. In her affidavit supporting her Petition for Modification, she attested to the following material changes

having taken place in her life and in the conditions under which her two youngest children, those in Raymond's custody, were living;

- Since the entry of the decree of divorce, LaRae had had physical custody of the minor daughter, Josie, for six months and custody of Shalauna and Stacey for almost the entire period;
- She had obtained full-time employment and her work schedule allowed her to attend to the children's needs in the mornings before school and to be home when they arrive home from school in the afternoon. Her husband and parents were available to assist in the care of the children in LaRae's absence;
- Since the divorce, LaRae had married a man with a stable job with the State of Utah and had built a stable relationship;
- The minor daughter, Jamie, had been separated from her mother, grandparents, and siblings for nearly six months and had indicated a strong desire to be reunited and live with her mother and siblings. Jamie had indicated a dislike of living alone with her father;

- The father's work schedule kept him away from home long hours each day and, as a result, Jamie, then 7 years old, was left without supervision for more than two hours each evening;
- Raymond attempted to obtain LaRae's signature on documents which would have potentially relinquished her parental rights. (R, 100-104).

The District Court did not even address the issues raised by LaRae in her affidavit or the testimony of witnesses that Jamie would spend long periods hanging out at a Conoco gas station/mini-store, including hours after dark. (R, T-2, p. 46-55). Other evidence, discussed in Point I above, that Jamie would be seen riding her bike after dark approximately a mile out-of-town, that Raymond would work in his shop as late as 10:00 p.m. and on Saturdays, and that the youngest child, Josie, spent significant amounts of time with various and sundry babysitters was also not addressed.

The District Court did not discuss or address the crucial factors raised by LaRae, but nevertheless found that she had failed to establish that there had been a material change in the circumstances upon which the original custody award was based. The District Court's Supplemental Findings and Conclusions fail to find or conclude that the best interests of Jamie and Josie would be served by modifying the custody Order. Apparently, the District Court did not look

beyond the improper factors upon which it had based its original Order. In the Order and Findings issued by the District Court from the bench in the Order to Show Cause hearing, that Court stated:

I just frankly am not convinced there's a material change of circumstances and I recognize the fact that there is an advantage for your children being together and that's one reason I made the decision like I did to start with. But I just feel that Mr. Jensen's done all he possibly could do to take care of these children, and I recognize it's all not glorious and there's been problems. It would just seem to me that if I found a material change of circumstances, it's because she now marries the guy that she has the situation develop with and it would just be creating a real problem and I find that Mr. Jensen is still the primary caretaker of these children and that the children should remain with him. (Emphasis added.) (R, T-2, p. 115.)

The District Court, inexplicably, does not address any of the factors raised by LaRae, and yet considers pre-divorce conditions (LaRae's alleged "relationship" with Randy Thorpe), which has substantially changed due to LaRae's marriage. The District Court also based its determination on its Finding that Mr. Jensen was still the primary caretaker of Jamie and Josie. As the District Court had granted Mr. Jensen sole custody of those two children in the original decree, this Finding is irrelevant to the material issues before the Court on LaRae's Petition.

B. The Material Changes Established by Appellant's Evidence Require a Modification of the Decree of Divorce to Award Custody of All of the Minor Children to Appellant.

A review of the evidence ignored by the District Court, and applicable standards as expressed in the case law of this State, establish that the District Court's denial of appellant's Petition for Modification should be reversed and that this Court should order that appellant's Petition be granted.

In Hutchison v. Hutchison, 649 P.2d 38 (Utah 1982), the Utah Supreme Court set forth certain relevant factors which are relevant in determining a child's best interests.

Some factors the court may consider in determining the child's best interests relate primarily to the child's feelings or special needs: the preference of the child; keeping siblings together; the relative strength of the child's bond with one or both of the prospective custodians, and, in appropriate cases, the general interest in continuing previously determined custody arrangements where the child is happy and well-adjusted. Other factors relate primarily to the prospective custodians' character or status or to their capacity or willingness to function as parents: moral character and emotional stability; duration and depth of desire for custody; ability to provide personal rather than surrogate care; significant impairment of ability to function as a parent through drug abuse, excessive drinking, or other cause; reasons for having relinquished custody in the past; religious compatibility with the child; kinship, including, in extraordinary circumstances, step-parent status; and financial condition.

Hutchison at 41.

A review of these factors reveals that the trial court abused its discretion in denying appellant's Petition for Modification.

There was uncontroverted evidence of the minor daughter Jamie's strong preference to be with her mother and two older siblings. In his own testimony, Raymond Jensen admitted Jamie's strong desire to be with her mother and siblings and her unhappiness at being kept separate from them.

Q. And you also testified, did you not, that at the little luncheon after the funeral that Jamie ran to her mother and said, "I want to be with my mom," or "I want to be with LaRae," or something to that effect?

A. That's correct.

Q. Has [Jamie] ever told you that at any other time?

A. Oh, yeah.

Q. Okay. Did she ever talk to you about wanting to be with Stacey and Shalauna, spend time with them?

A. I'm sure she has. Yeah.

Q. Okay. Now isn't it true that in the month of February you let LaRae take Josie?

A. That's true.

Q. And that she had her for a continuous period of time, from early February until June 19th, when you went with the police and took Josie from her at Pleasant Grove?

A. That's correct.

Q. Okay. Now, you testified that when you called and says [sic], "I'm coming to get her," that she gave you some run around and said, "we might not be here" that sort of thing?

A. Yes.

Q. But when you did go to get her, she was, in fact, in the home and you were able to get the children.

A. She wasn't there that I could see. Shalauna was the only one that I could see there.

Q. But you were able to get the children that day, weren't you?

A. Yes.

Q. And you went home with her, didn't you?

A. Yes.

Q. Now did Jamie put up a fuss at that time and didn't want to go with you?

A. She didn't want to go too bad.

(R, T-2, p. 85-86). Other signs of Jamie's unhappiness and loneliness are evident in the amount of time she spent just hanging around the Conoco station/mini-store.

This Court stated in its Opinion remanding this matter for the entry of Findings and Conclusions that:

The hearing transcript reveals that keeping the children together was one reason for awarding initial custody to the father, but there is nothing to indicate why the court dispensed with that objective in awarding custody of only the older children to LaRae.

(Opinion, p. 4). The District Court addresses the importance of keeping the children together in its Findings of Fact

relating to the original divorce trial. In its Supplemental Findings on the hearing to modify, however, there is no mention by the Court of the importance of keeping the children together. There is still, therefore, "nothing to indicate why the Court dispensed with that objective in awarding custody of only the older children to LaRae." The District Court was concerned with the difficulty Raymond would have in controlling the two older children if they were forced to stay with him against their will, but does not consider the impact which separating the children would have on the children. The District Court fails to acknowledge the ties between the children which may, in fact, be stronger than their ties to their father. Jamie, it was shown, was very unhappy being separated from her siblings.

The testimony, as discussed above, is uncontroverted that the strength of Jamie's bond to her mother is much stronger and compelling than her bond to her father. This conclusion does not ignore the fact that Jamie certainly loves her father and knows that he loves her. That love, however, cannot overcome her sense of loss at being separated from her mother and siblings. Josie, naturally, was too young to voice any kind of preference or signify with which parent she had the strongest bond. Critical to the determination of Josie's custody and best interests is the fact that Raymond is not, in all likelihood, her biological father. The District Court

found that LaRae had "elected to have a baby by [John Bergin]." (R, p. 238.) LaRae testified that, because of Raymond's sexual preference, that she doubted very much that Josie was Raymond's child. (R, T-3, p. 20.) The District Court's Finding and Order that Josie was a child of the marriage and the child of Raymond cannot alter the biological reality.

The final factor set forth in Hutchison relating to the child's feelings or special needs regards the general interest in continuing a custody arrangement where the child is happy and well-adjusted. There was no such interest in this case. The evidence, as discussed above, was uncontroverted that Jamie was not happy or well-adjusted. There was also testimony to the effect that the youngest child, Josie, was experiencing adjustment problems because of the significant amounts of time which she was spending with babysitters. (R, T-2, p. 58, 61; 83-84, 93).

Another factor, the moral character and emotional stability of the parties was also not considered by the trial court and favors the awarding of custody to the appellant. The trial court obviously felt that Raymond's activity in the LDS Church was an important factor in determining who should be granted custody of the children in the original decree. (Finding 5C; R, 237). The District Court continued to weigh heavily LaRae's pre-divorce moral indiscretions without considering her change of circumstances.

The facts presented by LaRae showed that she was happily married in a monogamous relationship with a man who apparently provided her much greater support than she had received from Raymond during the course of her marriage to him. Had the trial court been interested in looking at the factors presented by LaRae objectively, it would have seen that her marriage and home life at that time constituted a material and significant change from her situation immediately following the divorce and afforded a much more stable environment to the children than Raymond could offer.

The duration and depth of LaRae's desire for custody of all of her children cannot be disputed. She fought hard for custody during the divorce trial and has been fighting to obtain that custody ever since. LaRae also provided uncontroverted testimony to the Court regarding her ability to provide personal rather than surrogate care for Jamie and Josie. As appellant has discussed above, LaRae testified that she had the ability to be with the children both before and after school and that her work schedule was flexible. The testimony, as discussed above, showed that Raymond, on the other hand, worked very long hours, relied on babysitters

extensively, and left Jamie to seek her own unsupervised diversions.

This Court found, in its Opinion remanding this matter, that Raymond permitted LaRae to assume physical custody of Josie from February 1987 through June 1987. Testimony also showed that Raymond attempted to relinquish custody of Josie permanently to LaRae's parents. This Court stated in its earlier Opinion on this matter that without proper findings "it is difficult to distinguish Raymond's voluntary relinquishment of custody to LaRae from the situation in The District Court's Findings and Conclusions show that there is no distinction between Raymond's relinquishment of custody and the situation in Tuckey v. Tuckey, 649 P.2d 88 (Utah 1982). In Tuckey, the mother left her children in her mother's care. The grandmother, in her daughter's absence, relinquished the children to their paternal grandparents. In that case the court held that:

The conduct of the mother, coupled with the defendant's mother's release of the children to the paternal grandparents, and the events resulting from that act, clearly constitute a sufficient change in circumstance to warrant reconsideration of the custody issue in this instance.

Tuckey at 90. Despite this principle of law, the District Court found that there were no material changes in circumstances to warrant reconsideration of its earlier custody determination.

Finally, there was a substantial change in LaRae's financial condition from the time of the divorce to the time of her Petition. At the time of the divorce, she was unemployed and alone. At the time of the Petition, on the other hand, she was married to a husband who had good, stable employment with the State of Utah and was herself employed.

CONCLUSION

The District Court's Findings and Conclusions are woefully inadequate and fail to comply with this Court's direct instructions given to the District Court on Remand. The Findings and Conclusions are clearly erroneous and the District Court's order denying appellant's petition must be reversed. Marchant, supra, at 203.

The examination of the above factors establish that LaRae met both requirements of the Elmer test and that the trial court abused its discretion by denying her Petition for Modification. The change in circumstances was substantial and real. The best interests of the children require that they be reunited with their mother and siblings. This Court should reverse the District Court's denial of appellant's Petition and Order that custody of all of the children be granted to appellant.

DATED this 3rd day of December, 1990.

PRINCE, YEATES & GELDZAHLER

By Don R. Schow
Don R. Schow
Attorneys for Appellant

MAILING CERTIFICATE

I hereby certify that, on the 3rd day of December, 1990, I caused to be mailed, postage prepaid, four (4) true and correct copies of the foregoing BRIEF OF APPELLANT to the following:

Tex R. Olsen
OLSEN, McIFF & CHAMBERLAIN
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P.O. Box 100
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Don R. Schow

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120390

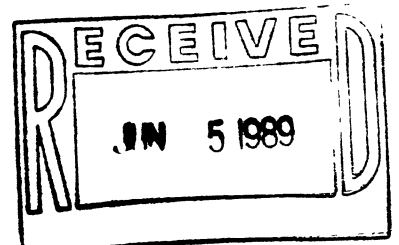
ADDENDUM

COVER SHEET

CASE TITLE:

Larae Jensen,
Plaintiff and Appellant,
v.
Raymond Jensen,
Defendant and Respondent.

870513-CA



PARTIES:

Randy M. Kester (Argued)
YOUNG & KESTER
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101 East 200 South
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Tex R. Olsen (Argued)
Olsen, McIff & Chamberlain
Attorney for Respondent
P.O. Box 100
Richfield, UT 84701

TRIAL JUDGE:

Honorable Don V. Tibbs
Sevier County Court
Sixth District Court
250 No. Main St.
Richfield, UT 84701

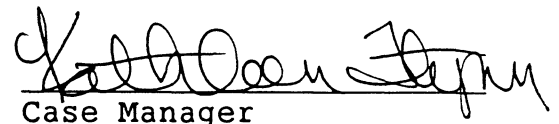
June 1, 1989 OPINION

This cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the District Court herein be, and the same is, vacated and remanded for further proceedings in accordance with the views expressed in the opinion filed herein.

Opinion of the Court by RUSSELL W. BENCH, Judge; REGNAL W. GARFF and GREGORY K. ORME, Judges, concur.

CERTIFICATE OF MAILING

I hereby certify that on the 2nd day of June, 1988, a true and correct copy of the foregoing OPINION was mailed or personally delivered to each of the above parties.


Case Manager

TRIAL COURT:

Sevier County Court
Sixth District Court
250 No. Main St.
Richfield, UT 84701
Case No. 9862

EXHIBIT 1

IN THE UTAH COURT OF APPEALS

--oo0oo--

LaRae Jensen,
Plaintiff and Appellant,
v.
Raymond Jensen,
Defendant and Respondent.

OPINION
(For Publication)

Case No. 870513-CA

FILED

JUN 1 1989
Mary V. Noonan
Mary V. Noonan
Clerk of the Court
Utah Court of Appeals

Sixth District, Sevier County
The Honorable Don V. Tibbs

Attorneys: Randy S. Kester, Springville, for Appellant
Tex R. Olsen, Richfield, for Respondent

Before Judges Bench, Garff, and Orme.

BENCH, Judge:

Plaintiff appeals the denial of her petition to modify a divorce decree awarding custody of her minor children to their father. We vacate the order and remand for appropriate findings.

Plaintiff LaRae Jensen and defendant Raymond Jensen were married on September 27, 1979, and divorced on February 10, 1987. During the course of their marriage, the parties had three children, and Raymond adopted two of LaRae's children from a previous marriage. The divorce decree awarded Raymond custody of all five children subject to reasonable visitation by LaRae. The court also determined to review the custody order at the end of ninety days if the two oldest children filed written elections to have Larae assume custody of them.

The day after the divorce decree was signed, LaRae took all five children to visit with her parents. During the visit, the second youngest child was struck and killed by an automobile. Raymond then permitted LaRae to assume physical custody of the youngest child from February until June of 1987. The two older children also went to live with LaRae and timely filed the written elections contemplated by the court in the divorce decree.

decree was amended to award custody of the two older children to LaRae. The court stated that no finding of a change of circumstances was required because the court had previously reserved the option to amend the divorce decree in this manner. In the next paragraph, the court denied LaRae's "petition" to gain custody of all the children. No findings were made regarding this aspect of the trial court's order. LaRae appeals only from that portion of the order.

Trial courts are given broad discretion in making custody determinations, and those decisions will not be upset on appeal absent a showing of an abuse of discretion or manifest injustice. Maughan v. Maughan, 770 P.2d 156, 159 (Utah App. 1989). This discretion must be "exercised within the confines of the legal standards set by appellate courts, and the facts and reasons for the court's decision must be set forth in findings and conclusions." Id. The importance of proper findings was emphasized in Smith v. Smith, 726 P.2d 423, 426 (Utah 1986) (citation omitted):

To ensure that the trial court's custody determination, discretionary as it is, . . . is rationally based, it is essential that the court set forth in its findings of fact not only that it finds one parent to be the better person to care for the child, but also the basic facts which show why that ultimate conclusion is justified. . . . Proper findings of fact ensure that the ultimate custody award follows logically from, and is supported by, the evidence and controlling legal principles. Adequate findings are also necessary for this Court to perform its assigned review function.

See also Shioji v. Shioji, 671 P.2d 135, 136 (Utah 1983) (findings in divorce modification cases permit the aggrieved party to properly challenge the modification and the appellate court to properly review it). Findings may appear in an opinion or memorandum decision, or may be stated orally and recorded in open court. Utah R. Civ. P. 52(a); see also Hansen v. Hansen, 736 P.2d 1055, 1058 (Utah App. 1987), cert. denied, 765 P.2d 1277 (Utah 1989). Adequate findings are those that "(1) are sufficiently detailed, (2) include enough facts to disclose the process through which the ultimate conclusion is reached, (3) indicate the process is logical and properly supported, and (4) are not clearly erroneous." Marchant v. Marchant, 743 P.2d 199, 203 (Utah App. 1987). Unless the record meets this standard, the issue of custody must be reversed. Id.

The trial court in this case made no findings in conjunction with either the amendment of the divorce decree or the denial of LaRae's petition. With respect to the amendment, the court

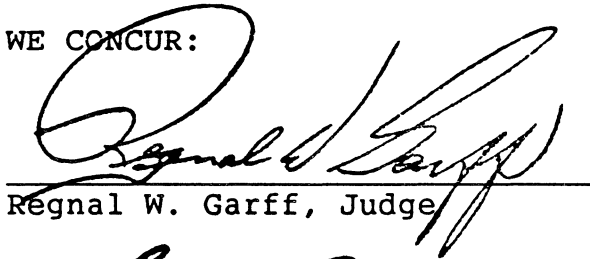
demonstrated, we are compelled to remand the case to the trial court for entry of appropriate findings.³ Those findings should articulate the considerations behind the initial award of custody and the order denying modification, and should reflect the current legal standard for modification of custody.⁴

The order denying LaRae's petition to modify custody of the two youngest children is vacated and the case is remanded for entry of appropriate findings.

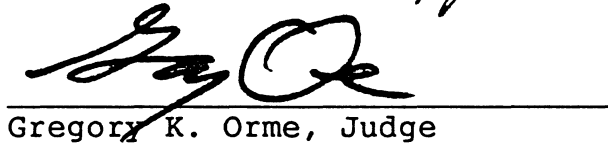


Russell W. Bench, Judge

WE CONCUR:



Regnal W. Garff, Judge



Gregory K. Orme, Judge

3. Without such findings, for example, it is difficult to distinguish Raymond's voluntary relinquishment of custody to LaRae from the situation in Tuckey v. Tuckey, 649 P.2d 88 (Utah 1982) (change of circumstances shown where mother is temporarily absent from state, leaving custody of children with grandparents).

4. LaRae contends on appeal that she has demonstrated a sufficient change of circumstances to justify a modification of custody. Since we do not reach this issue, we have no occasion to consider whether the trial court correctly applied the legal standard as set forth in Elmer v. Elmer, 107 Utah Adv. Rep. 37, 39-41 (1989); see also Maughan, 770 P.2d at 159-61.