

1982

Patricia Boals v. Jack Michael Boals : Brief of Respondent and Cross-Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

PATRICIA BOALS,)	
)	
Plaintiff-Appellant,)	
)	BRIEF OF RESPONDENT
vs.)	AND CROSS-APPELLANT
)	
JACK MICHAEL BOALS,)	Case No. 18172
)	
Defendant-Respondent)	
and Cross-Appellant.)	

* * * * *

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Clerk, Supreme Court, Utah

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TABLE OF CONTENTS

	<u>Page</u>
NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
FACTS	2
ARGUMENT	11
POINT I. THE TRIAL COURT SHOULD HAVE AWARDED PERMANENT CARE, CUSTODY AND CONTROL OF THE MINOR CHILD OF THE PARTIES TO THE RESPONDENT	11
POINT II. THE TRIAL COURT ERRED IN AWARDING ALIMONY TO THE APPELLANT	17
CONCLUSION	19

CITATIONS

STATUTES

	<u>Page</u>
UTAH CODE ANNOTATED (1953) § 30-3-5	12

CASES

<u>English v. English</u> , 555 P.2d 409, 411 (Utah 1977) .	18
<u>Hogge v. Hogge</u> , ____ P.2d ____ (Utah 1982)	15, 20
<u>Jorgensen v. Jorgensen</u> , 599 P.2d 510 (Utah 1979)	13, 15, 16, 17
<u>Lembach v. Cox</u> , 639 P.2d 197 (Utah 1981)	12, 15
<u>Mecham v. Mecham</u> , 544 P.2d 479 (Utah 1975)	12
<u>Nilson v. Nilson</u> , ____ P.2d ____ (Utah 1982)	12
<u>Rice v. Rice</u> , 564 P.2d 305 (Utah 1977)	13
<u>Stuber v. Stuber</u> , 121 Utah 632, 244 P.2d 650 (1952)	13

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* * * * *

NATURE OF THE CASE

This is a cross appeal by respondent of those portions of a decree of divorce which awarded only temporary custody of the minor child of the parties to respondent and alimony to the appellant.

DISPOSITION IN LOWER COURT

This matter was tried in the Third Judicial District Court for Summit County, State of Utah, the Honorable Bryant H. Croft presiding, on Wednesday, September 9, 1981, and Friday, October 2, 1981. The court filed its memorandum decision on October 26, 1981, awarding temporary custody of the minor child of the parties to respondent and alimony during a temporary pendency period to the appellant. Shortly thereafter, proposed

findings of fact, conclusions of law and decree of divorce were submitted to the court. Trial counsel for the appellant withdrew and present counsel appeared in her behalf. Motions to modify the ruling and objections to the proposed findings, conclusions and decree were heard by the court who then issued a supplemental memorandum opinion on December 8, 1981, in which the motions of each of the parties for an immediate award of permanent custody were rejected. The findings, conclusions and decree were then executed and entered on December 21, 1981. The appeals (now consolidated) to this Court were filed.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of that portion of the decision of the trial court which granted him temporary custody of the minor child of the parties but seeks to have that award modified by this Court to make it permanent and seeks reversal of the award of alimony to the appellant.

FACTS

Respondent does not accept the statement of facts submitted by appellant as he believes they are not a statement of facts, they are an argument of appellant's case. Accordingly, respondent would submit the following as a statement of facts.

The parties were married at Steelton, Pennsylvania, on November 21, 1973. (R. 1.) During the course of their marriage, they adopted a child, Nicole Marie Boals, who, at the time this matter came on for trial, was two years old. (R. 1.)

After this action was filed, it came before Judge Leary for hearing on January 26, 1981, and the court accepted the stipulation of the parties that temporary care, custody and control of the minor child should be awarded to the plaintiff subject to liberal rights of visitation in the defendant which included daily contact and week-end custodial visits. The court ordered neither of the parties to take the child from the state of Utah during the pendency of this matter. (R. 30.) As the case progressed through two further hearings, the court, in subsequent minute entry orders, affirmed its direction that both parties were enjoined from leaving the state of Utah with the minor child during the pendency of the action. (R. 183, 188.) These orders were then formalized by an order executed by Judge Leary on April 20, 1981. (R. 189-190.)

As both parties placed custody in issue, the motion of respondent for a custody evaluation was granted. It was performed by G. Blaine Webster of the Utah State Division of Family Services. (R. 344-347, T. 35-36.) Mr. Webster had worked for the Division of Family Services for 22 years and had performed 15 to 20 custody evaluations at the time he carried

out the directions of the court (T. 95-97). He did so, despite the fact that he knew Mrs. Boals, had worked with her and had a high opinion of her and her work. (R. 346.)

The report stated that the child was loved by and loved both parents. Mr. Webster determined, after watching both of the parties interact with the child, discussing the issues with both parties as well as exploring with collateral sources named by the parties, that the child was more attached to respondent, her father, Jack Boals, with whom she had an open, loving, spontaneous and warm relationship than to her mother, who was more distant and less spontaneous or affectionate. (R. 344-347, Tr. 93-94.) In his own observations, Mr. Webster was not able to detect the same warmth and spontaneity between the mother and daughter as existed between the father and daughter which confirmed the information he had received. (R. 346-347, Tr. 93-94.) As Mrs. Boals left Utah with Nicole in late May of 1981 and did not return until just prior to trial, Mr. Webster had trouble contacting her though she knew he was conducting an evaluation for the court (Tr. 101.)

All of the babysitters who had taken care of Nicole were called to testify by the parties. Rowena White, the babysitter for the first month of the child's life, testified that both parents had good relationships with her, (Tr. 221-224.) which information was confirmed by Beatrice Snow, her babysitter for the second through sixth months of her life. (Tr.

224-225.) Victoria Eckland, the babysitter for Nicole from the time she was six months old through May of 1981 when appellant removed Nicole from Utah, testified that Nicole was very close to her father. (Tr. 153-155). Mrs. Eckland related that when both parents would come home at the end of a working day, while Mrs. Boals would go upstairs to take care of her own needs, Mr. Boals would come to take care of and interact with Nicole. (Tr. 155-167.) Respondent would change her, play with her, focus his attention upon her while appellant took care of herself. (Tr. 155-56.) It was Mrs. Eckland's opinion that while Nicole loved both her parents, she received more attention from her father, interacted more often with him and was closer to him than to Mrs. Boals. (Tr. 156.)

Merleen Houston who, with her daughters, also babysat Nicole, testified that she had watched both Mr. and Mrs. Boals with their daughter and she was interested not so much in the reaction of the parents to the child as the child to the parents. She said that when Jack Boals would come in to pick up Nicole, the baby would light up and sparkle (Tr. 201), but her response was much less animated and much less enthusiastic when Mrs. Boals appeared. (Tr. 201.)

Friends, who have known the parties for, in one case, eight years and in another case, 10 years, and had seen each of them with Mrs. Boals' children from a prior marriage, voluntarily came from Pennsylvania to Utah to testify in favor of the

placing of custody with respondent for the best interest of Nicole. Ms. Peggy Shapiro, who had known appellant and respondent for 10 years (Tr. 187-188) and had seen them many times with Mrs. Boals' children by a former marriage (Tr. 188-190) found herself noting and surprised by how much attention, care and loving was shown to these children by respondent (their stepfather). (Tr. 188-190.) She described for the court that when Nicole was adopted, both Mr. and Mrs. Boals shared equally in the infant care of Nicole which, Mrs. Shapiro testified, she found surprising. (Tr. 190.) She related that Mr. Boals was spontaneous, loving, caring and comforting in his care of Nicole. From his care, cuddling and confident interaction with Nicole, a very close bond had grown up between Mr. Boals and Nicole. (Tr. 190-191.)

Mrs. Shapiro testified that she felt it was important for her to come and advise the court that, based on her 10-year observation period, that it was in Nicole's best interest that she be placed in the custody of her father, Jack Boals, because Nicole would be primary in his attention and he would sustain a long-term commitment to Nicole while she doubted that Mrs. Boals could or would sustain such a relationship. (Tr. 191-193.)

Mrs. Boals asserted throughout the divorce proceeding that Mr. Boals had a violent temper while Mr. Boals testified

he did not. Mrs. Shapiro testified that in the ten years she had known the respondent, she had not seen him have trouble with his temper though she had seen him in extreme emotional distress when he had learned of Mrs. Boals' extramarital affairs. (Tr. 194-195.)

Mr. Richard Snyder, holder of a Master's Degree in psychology who worked in the Pennsylvania criminal justice system as a psychologist and who had known the parties for eight years described the relationship of the parties with Mrs. Boals' children from her prior marriage and with Nicole. (Tr. 204-212.) He, too, testified that Mr. Boals was emotional and related readily to people while Mrs. Boals was more reticent. (Tr. 206-208.) He related that respondent set behavioral limits, was concerned with behavior and disciplined well while Mrs. Boals did not function as well. (Tr. 206-208.) He, too, testified that he had voluntarily come to Utah to testify because he had been involved in the adoption process, felt that he owed an obligation to Nicole to act in her best interest and that this concern required that she be placed with her father. (Tr. 208-211.)

On the issue of temper control, Mr. Snyder testified that he had never seen Mr. Boals lose his temper though he had seen him exasperated and distraught. (Tr. 211.) On cross-examination he stated that all the opinions he had related were

based very carefully on his own observations and not what other people might have or did tell him. (Tr. 212.)

Mr. William Isham, who works with Mr. Boals, testified that he had seen him two to three times a week for several years and had seen both of the parties with their child and knew from his observations that Mr. Boals cared deeply for his child and the relationship of both parents with Nicole was good. (Tr. 196-199.) He testified that he had seen Mr. Boals under extreme pressure several times and had seen no temper problems. (Tr. 198.) In fact, he stated that Mr. Boals kept very cool under pressure. (Tr. 198.)

Mr. Boals testified that he had worked for Sylvania for fourteen years, (Tr. 185) and intended to continue that work and stay where he was living as his work as a salesman gave him a very flexible schedule allowing substantial time with Nicole and which would allow him to be at home every night with the exception of once every six weeks when he had to go to Rock Springs, Wyoming. (Tr. 54, 55.) He related that while he had to go out some evenings to entertain, it did not happen often. (Tr. 55.)

Mr. Boals testified that he felt that Mrs. Boals was not as warm and loving with Nicole as he was, that Nicole does not run to hug her mother as she does him, does not have as

close and warm a physical relationship and emotional relationship with appellant as he wished that Nicole would have because Mrs. Boals was simply not as demonstrative, open and warm as she should be. (Tr. 54.)

Mr. Boals related that Mrs. Boals had a series of extramarital affairs during the marriage which finally caused its disintegration. (Tr. 163.) He admitted to having had a "one night stand" after Mrs. Boals had told him close to two years before this trial that the marriage was over and she had gone through an extramarital affair. (Tr. 82.) Mrs. Boals admitted the extramarital affairs (Tr. 135), that she had attempted suicide (Tr. 135), and had used Mr. Boals' company credit card to make long distance calls after they had separated. (Tr. 134-135.) She also testified that while the parties had agreed and that it was important that an educational fund be set up for their daughter, she believed that money should be divided between them at the time of the divorce rather than retained for their daughter. (Tr. 232-233.)

Respondent testified that he provided continual primary care for his child, changing her, feeding her, entertaining her and that their relationship grew from that contact. (Tr. 164.) He said appellant played a much smaller role in those activities (Tr. 164-165), as normally on the weekend, Mrs. Boals slept until 11:00 o'clock while Mr. Boals got up and cared for Nicole. (Tr. 183.)

Respondent testified that, despite the order entered by Judge Leary directing the parties not to leave Utah with the child, both parties did so, keeping in touch with the other, until May 29, 1981, when, saying that she was travelling to Idaho to stay with her brother, Mrs. Boals left the state of Utah and did not inform Mr. Boals where she was. He tried repeatedly to call her and could not reach her. Finally, when he received his credit card bills, he was able to determine that she was in Houston, Texas. (Tr. 166-169.) After determining that she was in Houston, he attempted to reach her there and finally was able to do so but Mrs. Boals refused to give him either her address or telephone number so that he would be able to reach her and, more importantly to Mr. Boals, reach his child. (Tr. 168-169.) Thus, despite the entry of the trial court's order, Mrs. Boals felt free to take the minor child and hide her all summer (Tr. 175), despite knowing of respondent's concern about Nicole. In addition, she deliberately thwarted his efforts to contact Nicole. (Tr. 175.)

Mrs. Boals testified that through part-time employment she earned \$5,700.00 in 1977, \$6,600.00 in 1978, \$10,400.00 in 1979, \$8,500.00 in 1980 and that she had both a fellowship from Houston University in her graduate program job which paid her \$5,000.00 to \$7,000.00 and a job which paid her \$6.00 to \$8.00 per hour. (Tr. 105-108.) She testified that her classwork ran

only three days a week and she would be free to take care of Nicole or work in the other time. (Tr. 103-105, 108.)

Mrs. Boals produced several witnesses who testified that she had a good relationship with Nicole. (Tr. 8-11, 16, 26-28, 39) However, none of these witnesses had seen Nicole with her father so as to be able or was asked to give a comparative opinion. (Tr. 11, 16, 28, 39) Dr. Stephen Trotter who testified in behalf of appellant (Tr. 22-29) testified that extramarital affairs, suicide attempts and dishonesty would not be inconsistent with his opinions. (Tr. 32-33.)

After the initial decision by the court placing temporary custody of Nicole with respondent, appellant certified to the court that she had withdrawn from graduate school and intended to marry a financially well-off individual by the name of Lawrence O. Corcoran. (R. 384-386.)

ARGUMENT

POINT I

THE TRIAL COURT SHOULD HAVE AWARDED PERMANENT CARE,
CUSTODY AND CONTROL OF THE MINOR CHILD OF THE
PARTIES TO THE RESPONDENT

In the instant matter, the evidence clearly supported the award of custody to respondent and the court acted correctly in making that decision. The evidence revealed that respondent had a warm, close, loving relationship with his

daughter which was much closer than Nicole's relationship to her mother. Under these circumstances, the trial court correctly applied the provisions of Section 30-3-5, Utah Code Annotated (1953), which require that the custody of minor children must be awarded in their best interests.

Our Court has repeatedly emphasized that the objectives stated in the foregoing statute: that in divorce cases, the welfare of minor children is of paramount importance in determining custody; Arends v. Arends, 30 Utah 2d 328, 517 P.2d 1019, that the proceedings are equitable in the highest degree; Sampsel v. Holt, 115 Utah 73, 202 P.2d 550, that neither parent has an absolute right to custody; . . ."

Mecham v. Mecham, 544 P.2d 479 (Utah 1975). This directive was reaffirmed by the Court in Lembach v. Cox, 639 P.2d 197 (Utah 1981) and recently in Nilson v. Nilson, ___ P.2d ___ (Utah 1982). Judge Croft followed the directive to placement of custody in the best interest of the child, however, he did err in not making the award a permanent one.

By making an 18-month award rather than permanent placement, the trial court erred. The recommendation of the custody evaluation given to the court by the Division of Family Services, the testimony of the babysitters regarding the care of and relationship of Nicole to her parents, the testimony of the witnesses whose long-term acquaintanceship with the parties gave them a perspective of how the parties had acted in regard

to Mrs. Boals' children who were born as issue of her first marriage, clearly demonstrated that Nicole's best interest required permanent placement with her father, the respondent. The award of only temporary custody allows the custody question to remain open.

While broad discretion is given a trial court in these matters, Nilson v. Nilson, ___ P.2d ___ (Utah 1982), Rice v. Rice, 564 P.2d 305 (Utah 1977), Stuber v. Stuber, 121 Utah 632, 244 P.2d 650 (1952), the trial court did abuse its discretion by not making the award a permanent one. The failure to do so keeps matters in turmoil and unsettled, not resolved, as is required for Nicole's best interests. The award of custody to respondent should have been permanent.

The appellant attacks the award of custody to respondent because she is the mother of the child and she asserts that custody should be placed with her. That is not correct as a matter of evidence or law. This Court held in Jorgensen v. Jorgensen, 599 P.2d 510 (Utah 1979), that while there is a judicial preference for the mother of a child in custody matters when all other things are equal, that does not hold true when, as in this case, things are not equal. As the Court stated:

In fact, the preference operates to give custody to the mother all other things being equal. Since the preference is a creature

of judicial policy, however, it must yield to the Legislative mandate that the best interests of the child be given primary consideration. Whenever, pursuant to a consideration of such interests, any circumstance in the case preponderate in favor of the husband, all things are not equal.

599 P.2d at 511.

In the instant matter, the evidence clearly preponderates in favor of the custody award to respondent. The babysitters who had watched the child for most of her life had observed that primary care was provided to her by her father, not her mother. They observed that the primary emotional attachment that the child could express by her conduct was to her father, not her mother. This is not to say that her mother did not love her or does not have a good relationship with her. The evidence was undisputed that she does. But it was equally undisputed that the relationship of Nicole with respondent is better, warmer and more emotionally spontaneous than that with appellant.

The evidence of conduct clearly established that the more stable and consistent environment would be provided by the respondent. The appellant engaged in intra-marital affairs through the marriage while the respondent, in extreme distress, erred in a single instance. Respondent has worked for the same employer for fourteen years. Appellant is terminating her second marriage. Respondent continues not only his care of

Nicole but that of her emotional grandparents, Mr. and Mrs. Eckland. (Tr. 166)

All of the witnesses produced by Mrs. Boals testified to the quality of her relationship with her child but none could or did give a comparative opinion as to the depth or quality of her relationship as opposed to the relationship of her husband with their child. On the other hand, all of Mr. Boals' witnesses, which encompassed the babysitters who had tended Nicole since she was six months old and family friends of eight to ten years' duration, testified that it was with Mr. Boals that Nicole had the better relationship. The testimony established that it was he who provided most of the child care and it was he who possessed the parenting qualities and relationship with the child which made it in her best interests to be placed in his custody. These same factors require the Court to make the custody award permanent and not temporary.

In 1981, shortly after the district court announced its decision in this case, this Court re-examined the question of paternal custody in Lembach v. Cox, 639 P.2d 197 (Utah 1981) and reaffirmed its prior ruling in Jorgensen v. Jorgensen, supra. As the Court stated:

In the Jorgensen case, we confirmed, as section 30-3-10, U.C.A. (1953) mandates, that the best interests of the child be given primary consideration in the award of custody.

639 P.2d at 199-200. The Court then went on to restate that while there is continued vitality in the judicial preference for the mother where all other matters are equal, Jorgensen is the law governing cases such as the instant matter.

In this case all matters are not equal. The demonstrative parenting qualities, parent-child relationship, demonstrated moral standards, stability of employment and interpersonal relationships dictate in favor of respondent. These require that the award of custody made by the trial court be affirmed, but be modified, to make the custody award to Mr. Boals permanent, subject to modification, if justified, based on a change of circumstances should such occur. Hogge v. Hogge, ___ P.2d ___ (Utah 1982). Section 30-3-5, Utah Code Annotated (1953).

Appellant attacks the report and credentials of Mr. Webster. This is done despite the fact that Mr. Webster knew and respected appellant before being assigned to perform the evaluation. It also overlooks the effect of appellant's actions in violating the order of the court and removing Nicole from Utah for the Summer of 1981. Mrs. Boals and Mr. Webster both testified that prior to her departure, appellant knew the evaluation was in progress, yet appellant did not follow through effectively with Mr. Webster. In her zeal to limit contact between respondent and Nicole she demonstrated attitudes and feelings through which this conduct formed a part of the evaluation data.

As this Court stated most applicably in Jorgensen v.

Jorgensen:

We should note, also, that the trial court is given particularly broad discretion in the area of child custody incident to separation or divorce proceedings. Rice v. Rice, Utah, 564 P.2d 305 (1977); Stuber v. Stuber, 121 Utah 632, 244 P.2d 650 (1952). A determination of the "best interest of the child" frequently turns on numerous factors which the trial court is best suited to assess, given its proximity to the parties and the circumstances. Only where the trial court action is so flagrantly unjust as to constitute an abuse of discretion should the appellant forum interpose its own judgment.

Jorgensen v. Jorgensen, 599 P.2d at 511-512.

In this case, a mild modification of the trial court decision is appropriate. The evidence clearly supported a permanent award of custody to Mr. Boals. The trial court's temporary custody order should be modified to make the custody award permanent.

POINT II

THE TRIAL COURT ERRED IN AWARDING ALIMONY
TO THE APPELLANT.

The testimony of the appellant indicated that she had adequate skill, education, training and job experience to earn sufficient income to adequately support herself. At the time the Court published its memorandum decision, appellant was in a graduate student program where she was the recipient of a fellowship which would pay her from \$5,000.00 to \$7,000.00 a year

and had available part-time employment that would pay her \$6.00 to \$8.00 per hour. At the time the matter came back before the Court in December of 1981, appellant filed with the Court an affidavit declaring that she had dropped out of that program and she stated her intention to remarry. The record thus clearly demonstrated that she did not have to limit her activities or use of her funds to support the minor child of the parties. She was free to pursue employment on a full-time basis. Based on her employment history and capability no alimony should have been awarded to her.

This Court has declared that:

The purpose of alimony is to provide support for the wife and not to inflict punitive damages on the husband. Alimony is not intended as a penalty against the husband nor award to the wife.

English v. English, 565 P.2d 409, 411 (Utah 1977) and

The amount of alimony is measured by the wife's needs and requirements, considering her station in life, and her husband's ability to pay.

English v. English, 565 P.2d 409, 412. In this case, it is clear that Mrs. Boals was sufficiently capable and free to earn income to fully meet her needs and requirements while Mr. Boals was in need of all of the income that he had, not only to provide for himself and Nicole, but to raise the substantial payments that had to be paid to Mrs. Boals to buy her equity in

the house. (R. 450-451.) This required Mr. Boals to pay Mrs. Boals of the sum of approximately \$15,000.00 in 1982 and similar payments will have to be made in 1983 and 1984. Under those circumstances, the award of alimony was inappropriate and should be reversed by this Court.

CONCLUSION

The evidence in this case indicated that while both of the parties were good parents and cared for their child, the "mothering" for Nicole came primarily from Mr. Boals and as a result, the relationship that grew up between the father and daughter was a very strong, loving, emotional, close one. In the most appropriate words of one of the babysitters, Nicole simply "sparkled" whenever her father came into her presence.

The custody evaluator and long-term friends of the parties confirmed that Mr. Boals had the better relationship with Nicole and a substantial long-term commitment to his daughter which they projected he would maintain. They felt this was not as true of appellant.

Consequently, the trial court correctly awarded custody of Nicole to her father, Jack Boals, but incorrectly made such an award a temporary one. This Court should modify that award to make it a permanent award of custody to Mr. Boals which can be changed only pursuant to the criteria this Court

enunciated in Hogge v. Hogge, ___ P.2d ___ (Utah 1982) if a change is appropriate.


In addition, the Court erred in awarding Mrs. Boals alimony. This award was improper based on Mrs. Boals' history of earnings, her credentials, her professional qualifications and income potential. Standards for an award of alimony laid out by this Court require reversal of that decision and the cancellation of the alimony award.

RESPECTFULLY SUBMITTED this 31 day of August, 1982.


DAVID S. DOLOWITZ
Attorney for Respondent

CERTIFICATE OF MAILING

I hereby declare that I caused to be mailed a true and correct copy of the foregoing document in Civil No. 18172, postage prepaid, this 31 day of August, 1982, to B. L. Dart, Attorney for Appellant, at 430 Ten Broadway Building, Salt Lake City, Utah, 84101.


DAVID S. DOLOWITZ