

1982

# Ogden Standard Examiner and State Insurance Fund v. Industrial Commission of Utah et al : Brief of Plaintiffs

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

CATHY JEAN TERRY JENSEN, )

Plaintiff and )  
Appellant, )

v. )

DAVID KNIGHT JENSEN, )

Defendant and )  
Respondent. )  
----- )

CASE NO. 18312

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BRIEF OF APPELLANT

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Appeal from the Judgment of the  
District Court of Davis County  
State of Utah

THE HONORABLE DOUGLAS L. CORNABY  
DISTRICT COURT JUDGE  
-----

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FILED

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CATHY JEAN TERRY JENSEN,  
  
Plaintiff and  
Appellant,  
  
v.  
  
DAVID KNIGHT JENSEN,  
  
Defendant and  
Respondent.

BRIEF OF APPELLANT

Plaintiff and Appellant sought a Decree of Divorce, together with custody of the two minor daughters as issue of the marriage and support.

Upon a trial held in the lower court, a Decree of Divorce was issued by the Court to the Plaintiff and Appellant, but dividing the custody of the two minor children with each being awarded the permanent custody of one of the daughters, and no award of child support to Appellant.

### RELIEF SOUGHT ON APPEAL

The Plaintiff and Appellant seeks reversal of the order of the lower court dividing the custody of the two minor daughters as between the Plaintiff and Respondent, and seeking award of both of the children to the Appellant, together with reasonable support.

### STATEMENT OF FACTS

Plaintiff and Appellant will hereinafter be referred to as "Mother" or "Wife", and the Defendant and Respondent will hereinafter be referred to as "Father" or "Husband". The Wife and Husband were intermarried on December 17, 1976, and has issue of the marriage, two (2) children, both daughters, to-wit: Amber Nichole Jensen, age 2 years, born September 17, 1977, and Alisha Dawn Jensen, age 1 year, born April 29, 1979. (R 1)

At the time of the issue of the Decree of Divorce on August 3, 1981, Amber was almost 4 years of age, and Alisha was less than 2 1/2 years of age. (R 1, R 60)

A Stipulation was entered into by and between the Wife and Husband herein, on June 19, 1980, awarding the custody of the two minor daughters to the Mother, and granting substantial and reasonable rights of visitation to the Father. (R 6-8)

By August of 1980, the Wife was compelled to file an Order to Show Cause In Re Contempt (R 1), and that even though a Judge of the District Court had signed an Order approving the temporary Stipulation entered into between the parties, wherein the Mother was awarded the temporary care, custody and control of the two minor children, Amber and Alisha, and although the Husband had been granted the right to visit and have the children every other weekend from 9:00 o'clock p.m. Saturday until 7:00 o'clock p.m. Sunday and alternate Wednesdays from 5:00 o'clock p.m. until 8:00 o'clock p.m., and had agreed to pay \$200.00 per month as and for child support, the Husband on August 2, 1980, took the two daughters for visitation and refused to return them on Sunday at 7:00 o'clock p.m. August 3, 1980, and informed the Mother that the Husband was going to keep the children until the final Decree and hearing in the matter, and had failed and refused to pay any child support whatsoever to the Wife. (R 12-13)

An Order was issued by the Honorable Thornley K. Swan ordering the Husband to bring current his delinquent support and not to interfere with the Mother's custody of the minor daughters, allowing the continuation of the visitations for Husband previously ordered. (R 20-21)

On December 24, 1980, the Honorable Thornley K. Swan subscribed to the Finding of Fact and Conclusions of Law submitted by the Counsel for the Wife, and approved by the Counsel for the Husband, granting a Decree of Divorce to the Wife. The Court reserved the further finalization of custody, support, alimony, disposition of assets, and payments of debts and permanent care, until time of trial. The Decree was subscribed to by the Honorable Thornley K. Swan on December 24, 1980, after approval as to form by counsel for the Husband. (R 28-29)

At the trial of this matter, the Honorable Thornley K. Swan had retired as District Court Judge, and was replaced by the Honorable Douglas L. Cornaby.

The only professional evaluation of the two minor children was made by Psychological Associates with Dr. William H. McVaugh doing the evaluation, which also included an evaluation of the Mother. The evaluation having been made on June 8, 1981 by Dr. McVaugh. The evaluation recommended that the children stay with their Mother, and the Father maintaining a regular and consistent relationship with the children, with regular visitations with some limitation due to the tender age of the two daughters. (Plaintiff's Exhibit "G ")



A final Judgment of the Court awarded a Decree of Divorce to the Appellant Mother and awarded her custody of Alisha, who was 2 years of age, and awarded the Husband the custody of Amber, who was 3 1/2 years of age. Each of the parties to be entitled to visitation every other weekend, and each to have visitation for one month in the summer from July 1 to July 31, with the children to be switched on each visitation and during the one month in the summer, and with each of the parties to pay their own support for the child awarded to them as the custodial parent. The Court made additional special allowance for Christmas, allowing the custodial parent of the respective child to have that child on Christmas Eve up to 2:00 o'clock p.m. on Christmas day, and thereafter the children to be exchanged so that the non-custodial parent shall have the other child from 2:00 o'clock p.m. when they shall again exchange the children back. The Court further awarded to the Wife, a Judgment for delinquent child support and divided the equity in the home and division of personal property, and each of the parties paying their own attorney fees and costs. (R 96-99)

## ARGUMENT

### POINT I.

CONSIDERATION OF THE LONG-TERM WELFARE AND ADJUSTMENT OF THE TWO MINOR DAUGHTERS REQUIRE THEIR CUSTODIAL AWARD TO THE MOTHER.

The only professional evaluation made in consideration of the welfare of the 2-year old and 3 1/2-year old daughters, together with an evaluation of the Mother (Appellant), was made by Dr. William H. McVaugh, as set forth in Plaintiff's Exhibit "G", and offers a comprehensive use of tests and findings, both as to the Psychophysiological and emotional findings in relation to the children, together with the consideration of parental friction and results of divorce, resulted in an evaluation and recommendation which states as follows:

First, it is recommended that the children stay with their mother. Second, it is recommended that the father maintain a regular and consistent relationship with the children through regular visitation of every other weekend. This regular visitation is quite important for children. Third, the children should have visitations with the father for extended periods once per year. For these children, who are young, the period should be short with a length of time increasing as they become older. Fourth, neither parent should try to influence the other's child raising while the children are with the other parent, unless the parent asks for advice. Fifth, the children should be left completely out of any arguments, even if one parent criticizes the other.

Returning this vindictiveness simply hurts the children more. It is not even fair to ask the children what the other parent is doing, with whom (s)he is going or where the money is spent.

The main reason for these detailed comments is that current research indicates that perhaps one-fourth of divorced parents fight for years after the separation and often hurt the children severely in the process. There are some indications that this may be one such instance in the making.

As against the professional finding, there were a number of witnesses on both sides who testified from hearsay or with particular bias, as is evidenced in the record before the Court as to the merits or demerits of each of the parties to this action without any evidence of any kind that would warrant not granting the custody of the two minor daughters to the Mother, or disallowing visitation to the Father.

Even though both of the parents were of the same faith, and the records show them both just as diligent in bringing up the children in their joint faith, it is submitted that there exists a possibility of undue importance being attached to the testimony of the Honorable J. Duffy Palmer, who was a volunteer witness for the Husband, testified as to the Husband's good religious character, in that the presiding Judge was a newly appointed District Court Judge in the same district. (T 3)

This Court, in its examination of the record and rendering of Judgment in Wiese v. Wiese, 469 P.2d 504 (May 8, 1970), is a fact situation where at the time of the divorce the court awarded the daughter to the mother and two minor sons to the father, with a reservation of jurisdiction to allow either party to make a showing that the present custody arrangements were not in the best interest of the children.

Upon petition to amend in that case, upon the trial court denying the petition for amending to place all of the children back together with the mother, this court stated:

This is an equitable matter, and upon appeal, the binding effect of the findings made by the trial court differs from that in a law matter. We may here review questions of both law and fact; and after making due allowance for the advantage position of the trial judge to observe the demeanor of witnesses upon the stand, we may be persuaded that a finding is against the preponderance of the evidence to such an extent that we would be justified in disapproving it or even in making a finding of our own. The court made a finding that the sons' association with their mother and with their sister, in an environment of mutual attention and love, would work for the welfare and happiness of the children in the future, and the court reversed the lower court, granting custody of the children to the mother with reasonable rights of the visitation to the father.

A number of neighbors testified as to the relation of the Mother with the children and as to the love and affection and care offered to the children by the Mother, as well as the maintenance of the home, with all of them unable to find any instance to indicate there was not a great love and affection as between the Mother and her two daughters, as well as concern for their health, eating and care, and the maintenance of a proper home for their environment. (T 9, T 83)

Whereas in the ancient story of Solomon, the wise judge had to cut a child in half in order to give each of the combating parties a token of victory, the Court in the instant matter had an easier out, in that there were two minor sisters of 2 and 3 1/2 years of age, who could be split up as an appeasement to the family and friends on both sides, with one going to the Mother and one going to the Father.

The relationship to the story of Solomon would end there, in that taking the ingredient of two baby sisters who would never know what it would have meant to grow up as a family and be able to enjoy each other's company and confide in each other, by reason of being separated in two different households, and who even on visitations would be exchanged like pet animals without having an opportunity to enjoy each

other's company and grow up together, and who would also be exchanged even in summer vacations for thirty (30) days, as well as on Christmas, is a monstrosity and a horror without necessity of accepting the testimony of the Dr. William McVaugh, who made an unqualified finding that the two minor sisters should be left in the custody of their Mother, in the best interest of the children. (Plaintiff's Exhibit "G")

This Court stated in Steiger v. Steiger, 4 Utah 2d 273, 293 P.2d 418, that determined the custodial parent upon the basis of the welfare of the children, as the primary concern of the Court.

This Court in Cox v. Cox, 532 P.2d 994 (March, 1975), stating that under the modern reasonable trend of law the mother has no absolute or invariable right to be awarded the custody of the children, and that the father's rights and interest are entitled to equal and just consideration and while even referring to Section 1, Article 4 of the Constitution of the State of Utah, concerning equality of the sexes, concluded all such equality of rights and stated:

But this does not mean that the law must pretend to be unaware of and blindly ignore obvious and essential biological differences.

In the instant matter before the Court, we are talking of 2-year old and a 3 1/2-year old baby sisters, who even



without the wise analysis of Dr. McVaugh would not want to separate and bring up in two separate households, two sisters who are only a year and one-half apart in age and separate them from a devoted Mother, who would surely understand and be a part of the confidences and cares of two daughters in their development phase, than they would be being raised separately in separate homes without ever having the joy of playing and fantasising together as they develop and grow into young womanhood.

This Court further stated in Cox v. Cox, supra:

In addition to, and quite beyond the rights of the parents, there is the important principle that the paramount consideration is the long-term welfare and adjustment of the children. That being so, we think there is wisdom in the traditional patterns of thought that the roles of the mother and father in the family are such that all other things being comparatively equal, the children should be in the care of their mother, especially so children of younger years, and that this may be true even where the divorce is granted to the father.

In the Decree in the instant case at hand, the divorce was granted to the Mother and not to the Father. (R 28)

The stability of the Mother is evidenced by the fact that while she has been employed since the time of their marriage for the Forest Service and in the Office of

Personnel Management within the Forest Service (T 58), the Husband has had nine jobs during the course of marriage from December 17, 1976 to May, 1980 (T 58). The husband was paid \$1,300.00 per month on his last job (R 105), and anticipates that his present operation wherein he has gone into business for himself, that he did so to better himself. (T 106)

### CONCLUSION

It is submitted to this Honorable Court that considering the only professional analysis rendered at time of trial, together with the application of the evidence and record before the Court and with no derogatory evidence as against the Mother, that the best interest and welfare of two little sisters of tender age would best be served by being with their maternal parent and not divided into two separate households, and particularly in such a manner as to deprive the two little children from ever knowing the joy and tribulation of growing up together as a family, with each other, and that justice is best served, as well as the welfare of the two little female children, by placing them under the care and maternal guidance of their loving Mother, with adequate visitation to the Father, and that this Court would do equity and justice by reuniting the two sisters in



their Mother's care, based upon the record before the Court,  
and remand the case for modification of the Decree as to  
support and visitation, based upon a reunited household.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of June, 1982.

VLAHOS, PERKINS & SHARP

BY 


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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17<sup>th</sup> day of June, 1982,  
I mailed a true and correct copy of the above and foregoing  
Brief of Appellant, by placing same in the United States  
Mail, postage prepaid and addressed to the following:

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