1982

Cathy Jean Terry Jensen v. David Knight Jensen : Brief of Appellant

Utah Supreme Court

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Bert L. Dart; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

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CATHY JEAN TERRY JENSEN, :

Plaintiff-Appellant, :

Case No. 18,312

v. :

DAVID KNIGHT JENSEN, :

Defendant-Respondent. :

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RESPONDENT'S BRIEF

Appeal from the Judgment of the Third District Court
in and for Davis County
The Honorable Douglas L. Cornaby, Presiding

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RESPONDENT'S BRIEF

NATURE OF THE CASE

This is a divorce action in which the appellant wife challenges only the custody arrangements entered by the trial judge.

DISPOSITION IN LOWER COURT

On November 10, 1980, a short trial was held before the District Court, the Honorable Thornley K. Swan presiding. A Decree of Divorce was entered reserving all issues, including custody, for later determination. (R. at 28-29.) On August 3, 1981, a trial was held before the District Court, the Honorable Douglas L. Cornaby presiding. Support, property distribution, and custody and visitation arrangements were entered. (R. at 77-80.) Thereafter, the appellant wife moved the

trial court to reconsider the custody and visitation arrangements, which the court did, modifying its original visitation schedule. (R. at 75-76.) Custody of the youngest child, Alisha, was awarded to the appellant mother; whereas, custody of the older child, Amber, was awarded to respondent father. (Id.)

RELIEF SOUGHT ON APPEAL

Defendant-respondent David K. Jensen, respectfully requests that this Court affirm the custody and visitation arrangements fashioned by the trial court.

STATEMENT OF FACTS

Defendant-respondent David K. Jensen (hereinafter "Mr. Jensen") deems it necessary to present a concise statement of the facts of this case since the statement presented by plaintiff-appellant Cathy Jean Terry Jensen (hereinafter "Mrs. Jensen") fails to reflect accurately all of the relevant facts and circumstances at issue.

Mr. and Mrs. Jensen were married on December 17, 1976. (Tr. at 58.) The parties have two daughters, Amber Nichole Jensen (hereinafter "Amber") and Alisha Dawn Jensen (hereinafter "Alisha"). Amber is now approximately five years of age and Alisha is now approximately is now approximately three and one-half years of age. During the pendency of the action, custody of both Amber and Alisha was temporarily

with Mrs. Jensen by the stipulation of the parties and their original counsel. (R. at 6-8.)

A divergence of personal values between the parties led to the deterioration of the marriage. Mrs. Jensen liked to "socialize" (Tr. at 93-97); occasionally drank alcoholic beverages (Tr. at 81 and 94-95); and formed a close relationship with a male neighbor (Tr. at 101-01). Mr. Jensen disapproved of these activities; was perhaps overly protective of Mrs. Jensen (Tr. at 14); and placed a higher degree of importance on religion and family values than did she (Tr. at 99).

Called as a witness for Mr. Jensen, the Honorable J. Duffy Palmer testified that he had known Mr. Jensen for all of his life (Tr. at 3); that Mr. Jensen had a great deal of love for his children (Tr. at 6); and that Mr. Jensen was a very fit parent (Id.). Judge Palmer also testified that he had observed that, on occasion, when Mr. Jensen had picked up the children from Mrs. Jensen for visitation during the pendency of the action (while they were in her custody), the children were bruised and not in an acceptable state of cleanliness. (Tr. at 6.) Judge Palmer noted that the condition of the children when picked up from Mrs. Jesnen was "really pretty bad". (Tr. at 8.)

At trial, a neighbor testified that Mrs. Jensen's care of the children while they were in her custody was less than exemplary. It was noted that the two young girls (then approximately one- and two-years of

age) were left home alone at night, with Mrs. Jensen not returning until as late as 2:00 a.m. (Tr. at 79.) On occasion, Mrs. Jensen also left the children in soiled diapers for as long as two hours. (Tr. at 80.) An incident during a boating trip was noted in which Mrs. Jensen had lowered the pants of her swimsuit so as to display her derriere to a male neighbor within viewing distance of her daughters. (Tr. at 76-77.) There was also testimony that Mrs. Jensen used vile and obscene language in front of the children (Tr. at 101) and that she had, in fact, made efforts to teach Amber to use such language in referring to her father (Tr. at 102). The neighbor also testified without contradiction that Mrs. Jensen had spoken with her shortly before the trial had commenced and stated that if her testimony were to be unfavorable, facts that the witness had earlier disclosed to Mrs. Jensen in confidence would be related to the witness's husband. (Tr. at 77.)

There was much testimony during the course of the trial as to the extent and propriety of a relationship which had developed between Mrs. Jensen and a male neighbor. The district court found this testimony credible, noting in his ruling from the bench that she had engaged in "some inappropriate relationships". (Ruling at 3.) There was also testimony that Mr. Jensen questioned whether the younger child, Alisha, was in fact his. (Tr. at 107.)

The court was presented with two expert custody evaluations. The first was an independent evaluation prepared for the court by

D. Steven Clark, a professional social worker with Social Services. (R. at 24.) The second was offered by William McVaugh, who was hired by Mrs. Jensen after she learned that the report prepared by Social Services was adverse to her. (Plaintiff's Exhibit "G", R. at 43.)

The Social Services evaluation unqualifiedly recommended that custody of both children be placed with Mr. Jensen in the event that the court should find that "an illicit relationship" had existed between Mrs. Jensen and the male neighbor. Moreover, it was noted that even if the trial court were to be "unsure of her relationship with other males", the evaluator "would still be very concerned about having the children placed in her custody." (R. at 24.) Steven Clark also noted that Mrs. Jensen tended to place the children's needs "secondary to her own social needs." (Id.) The evaluator even went so far as to recommend that Mrs. Jensen be allowed visitation only during daylight hours as he was "concerned about her social needs in the evening." (Id.) The trial court indicated that he had read and considered the Social Services recommendation. (Tr. at 118.)

The only professional recommendation that custody be placed with Mrs. Jensen was the opinion of William McVaugh. He had been retained by Mrs. Jensen and, more importantly, admitted not only that he had made no evaluation whatsoever of Mr. Jensen (Tr. at 38) but also that an evaluation of Mr. Jensen would have been helpful (Tr. at 43). The basis of his opinion was that, when asked to draw a picture of her

family, Amber had included a character representing her mother and then asked whether her father should be included also, as 'he isn't living with us'. (Tr. at 33.) It appears that no consideration was made of the fact that, at the time of his interview with Amber, she had been in the temporary custody of Mrs. Jensen for several months.

Based upon all of the evidence before him, the trial court ruled that Mrs. Jensen should have custody of the younger child, Alisha; and that Mr. Jensen should have custody of the older child, Amber. The trial court's original visitation schedule provided that the children should be exchanged for one month during the summer and on weekends. Immediately following the trial, Mrs. Jensen moved from Utah and now resides in Carson City, Nevada. (Tr. of 12/8/81 Hearing at 3.) Faced with Mrs. Jensen's decision to separate herself geographically from Utah, and in order to afford the children more time together, the trial court modified the visitation arrangements, providing that both children should be together for two months each summer (one month with each parent) and that visitation be freely granted whenever Mrs. Jensen chose to come within the state of Utah. (Id. at 11-12.)

Both the expert witness hired by Mrs. Jensen and the district court pleaded with the parties to cease their hostilities or at least shield the children from them. (Exhibit G at p. 4 and R. at 63.) Nevertheless, this appeal ensued.

ARGUMENT

POINT I. THE CAREFULLY CONSIDERED CUSTODY AWARD OF THE TRIAL COURT IS PRESUMED PROPER AND SHOULD NOT BE MODIFIED ABSENT A CLEAR SHOWING BY THE APPELLANT THAT THE TRIAL COURT ABUSED HIS DISCRETION OR WAS MISTAKEN AS TO THE APPLICABLE LAW.

It is apparent both from her Brief and from her ex parte letter to Judge Cornaby (R. at 59) that Mrs. Jensen is not pleased with the custody award. However, the fact that one of the parties to a divorce proceeding is dissatisfied with the trial court's ruling is not indicative either of the propriety or of the merit of the ruling. Such remonstrances are not unusual in the aftermath of the inherently emotional and psychologically traumatic divorce process. Being dissatisfied of the outcome of the trial and hearings, Mrs. Jensen now seeks to commence anew those proceedings.

This Court has, on innumerable occasions, held that while a divorce action is equitable in nature, the ruling of the trial judge is favored with a presumption of propriety and accuracy. It is only in those few instances in which the appellant can clearly demonstrate a manifest abuse of discretion or misapplication of law that the decree fashioned by the trial judge will be disturbed. Such a position is logically grounded upon the advantaged position of the trial court, who has observed the witnesses, heard the testimony, and become acquainted

at least to a limited degree with the parties, their problems, and their properties.

In a tacit recognition of the fact that the custody award fashioned by Judge Cornaby is supported by substantial credible evidence, Mrs. Jensen appears to rely upon the equitable nature of divorce proceedings in her invitation to this Court to revamp the original custody award. A similar invitation was refused in Eastman v. Eastman, 558 P.2d 514 (Utah 1976), with the observation that:

> We have many times stated that even though proceedings in divorce cases are equitable, in which this Court may review the evidence, due to the prerogatives and advantaged position of the trial court, we give considerable deference to his findings and judgment; and we do not disturb them unless the evidence clearly preponderates to the contrary, or he has abused his discretion, or misapplied principles of law.

558 P.2d at 516 (footnote citations omitted). It is, therefore, incumbent upon the appellant in a divorce case to demonstrate some clear abuse of discretion or misapplication of law before this Court will act to revise any aspect of the original decree.

This Court has long held that its inherent power to supplant the trial judge's discretion is to be exercised only judiciously and infrequently. For example, in Wilson v. Wilson, 5 Utah 2d 79, 296 P.2d 977 (1956), it was held that:

> The more recent pronouncements of this court, and the policy to which we adhere, are to the effect that the trial judge has considerable latitude of discretion in such matters and that his judgment should not be changed lightly, and in fact, not at all, unless it works such a manifest injustice or inequity as to indicate a clear abuse of discretion.

296 P.2d at 981 (footnote omitted).

In view of the amount of discretion accorded to the trial judge and this Court's requirement that a clear abuse of that discretion or misapplication of law be demonstrated as a condition precedent to any modification of the trial judge's ruling, the cases have frequently noted that the mere fact that a majority of the members of the reviewing court might, themselves, have reached a different ruling than did the trial court is insufficient to justify any modification of the original decree. This Court emphasized this principle in Christensen v. Christensen, 21 Utah 2d 263, 444 P.2d 511 (1968), noting:

> Whether we as individual judges would or would not have arrived at the same exact formula as to what [might be] the most practical and just treatment . . . of this situation is not the question on this appeal. Even though it is the established rule that divorce cases being in equity, it is the duty of this court to review and weigh the evidence, it is equally true that we have invariably recognized the advantaged position of the trial judge and given deference to his findings and judgment, declaring that they should not be upset unless the evidence clearly preponderates

> against them, or unless the decree works such an injustice that equity and good conscience demand that it be revised. An important consideration in this regard is "the elimination or minimization of frictions or difficulties in the future" . . . .

444 P.2d at 512-13 (emphasis added, footnote omitted).

These sound principles of review in divorce cases were recently reaffirmed by this Court in Fletcher v. Fletcher, 615 P.2d 1218 (Utah 1980). In that case, this Court reiterated:

> In a divorce case, even though the proceedings are equitable and this Court may review the evidence, this Court accords considerable deference to the findings and judgment of the trial court due to its advantageous position. On appeal this Court will not disturb the action of the trial court unless the evidence clearly preponderates to the contrary, or the trial court has abused its discretion or misapplied principles of law. In application of these precepts to the record herein there is no basis to interfere with the decision of the trial court.

615 P.2d at 1222 (footnotes omitted).

Under the standards of review traditionally applied by this Court, the custody award entered in this case is presumed valid and will be affirmed unless Mrs. Jensen has demonstrated that Judge Cornaby has so clearly abused his discretion as to result in substantial prejudice or has misapplied the relevant law in this case to such a degree that the decree entered is manifestly unfair and inequitable.

POINT II. APPELLANT HAS ENTIRELY FAILED TO MEET HER BURDEN OF DEMONSTRATING SOME ABUSE OF DISCRETION OR MISAPPLICATION OF LAW; THEREFORE, THE CUSTODY AWARD SHOULD BE AFFIRMED.

Although appellant's Brief makes clear Mrs. Jensen's subjective dissatisfaction with the custody award entered by Judge Cornaby, it wholly fails to delineate a single instance in which the trial court either abused its discretion or misapplied the relevant law of this state.

Mrs. Jensen first claims that "the only professional evaluation" with respect to custody recommended that custody of both Amber and Alisha be awarded to her. (App. Br. at 6.) That is not true. Although William MacVaugh recommended that Mrs. Jensen--by whom he had been hired--be awarded custody of the children, the independent custody evaluation of D. Steven Clark strongly recommended that custody of both children be placed with Mr. Jensen. (R. at 24.) As noted in the Statement of Facts, the evidence adduced at the trial supports the concern of the Social Services evaluator that Mrs. Jensen places the welfare of the children second to her "social needs".

Appellant next relies in her Brief upon this Court's decision in Wiese v. Wiese, 24 Utah 2d 236, 469 P.2d 504 (1970). She presents a "quotation" from that decision (App. Br. at 8); however, the only language in that "quotation" helpful to her position is not found within

the actual text of the opinion. (Compare 469 P.2d at 505 with App. Br. at 8.) In Wiese, which was a modification proceeding, this Court did reverse the trial court's refusal to modify custody arrangements. That decision, however, was based upon the uncontroverted testimony of two psychologists (one hired by each party) that the children were developing serious problems under the existing custody arrangements and would be benefited by a change. 469 P.2d at 507. The case has little, if any, applicability to the facts of the present situation.

Similiarly devoid of merit are appellant's references to "the ancient story of Solomon". (App. Br. at 9.) Moreover, Mrs. Jensen has apparently failed to read the district court's order (prepared by her own counsel) modifying the visitation schedules (R. at 75-76) since she claims (App. Br. at 9-10) that Amber and Alisha will not be together even during visitation. As modified, the district Court's visitation schedule clearly provides for Amber and Alisha to spend two months together during the summer, one-half with Mrs. Jensen and one-half with Mr. Jensen. Had Mrs. Jensen not chosen to remove herself to Carson City, Nevada, Amber and Alisha could similarly have enjoyed each other's company every weekend.

In short, while Mrs. Jensen makes clear her dissatisfaction with the ruling of the district court, she has entirely failed to demonstrate any abuse of discretion or misapplication of law. Absent the demonstration of such errors, the trial court's custody award must be affirmed. Moreover, by the time a ruling is entered in this appeal,

Amber will have lived with her father for almost two years. As recognized by this Court in Hogge v. Hogge, --P.2d-- (Utah June 17, 1982), "the advantage of stability in custody arrangements . . . weigh[s] against changes in the party awarded custody." -- P.2d at --.

Having failed to demonstrate any abuse of discretion or misapplication of law by the district court, Mrs. Jensen's request that the custody award fashioned by the trial court be modified must be rejected.

POINT III. THE MERE FACT THAT CUSTODY OF THE TWO CHILDREN WAS SPLIT DOES NOT CONSTITUTE ERROR.

In her Brief, Mrs. Jensen complains not that the trial court erred in awarding custody of either child to Mr. Jensen, but that custody of the two children was split. This Court has recognized that the custody of siblings may, on occasion, have to be split.

For example, in Jorgensen v. Jorgensen, 599 P.2d 510 (Utah 1979), two children were born as issue of the marriage and each parent was awarded the custody of one child. As in the present case, the mother appealed, challenging the award and arguing that custody of both children should have been awarded to her. This Court affirmed the split custody award fashioned by the trial court, notwithstanding its recognition of the "judicial preference" for the mother in child custody

matters when all other considerations are balanced. In so holding, this Court observed:

> [The mother] is mistaken . . . in asserting that this preference entitled her to custody of both children in the present case. Pointing to the fact that the trial court made no finding that she was unfit as a mother, plaintiff asserts that the judicial policy entitles her to custody of the children as a matter of law. In fact, the preference operates to give custody to the mother all other things being equal. Such a 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 circumstances in a case preponderate in favor of the husband, all things are not equal.
>
> 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. A determination of the "best interests 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 trial court action is so flagrantly unjust as to constitute an abuse of discretion should the appellate form interpose its own judgment.

599 P.2d at 511-12 (footnote omitted, original emphasis). In language as applicable to the present case as to the matter then under

consideration, this Court went on to inventory and assess the factors justifying the trial court's split custody award:

> Testimony at trial bore out the court's finding that [the mother] was at the time of trial, and had been for a period of a year prior thereto, living with and carrying on an extra-marital relationship with another man, that such was the second such relationship to arise in the course of the five-year marriage; that [the mother's] present income was minimal; that the [father] is responsible, has adequate employment, enjoys a particularly close relationship with his son, and is in all respects competent to care for him. Thus, while the court conceded that "both parties could qualify as proper persons to be awarded custody of [the children], the evidence as a whole preponderates in favor of the [father] for custody of his minor son." As indicated above, the law requires no more than such a preponderance. While it is true that a child custody award which keeps all the children of a marriage united is generally preferred to one which divides them between the parents, that preference is not binding in the face of considerations dictating a contrary course of action.

599 P.2d at 512. In the present case, the trial court's decision to award custody of Amber (who is now approximately five years of age) to the father was well justified. Faced with a particularly difficult and onerous decision, the wisdom of the trial court--who had a first-hand opportunity to observe the parties and their witnesses--should not be disturbed.

Likewise, in Fletcher v. Fletcher, 615 P.2d 1218 (Utah 1980), this Court affirmed the trial court's decision to split custody of the parties' six children, with the three younger children being awarded to the mother and the three older children being awarded to the father. In so holding, this Court noted:

> This Court will not upset the trial court's judgment in custodial matters unless it is persuasively shown to be contrary to the best interests and welfare of the children and family.

615 P.2d at 1224 (footnote omitted). The custody award in the present action should likewise be affirmed even though the trial court found that, in the children's best interests, it was necessary to divide their custody between the parties.

CONCLUSION

The only issue in this appeal relates to the custody of the parties' two daughters, Amber and Alisha. Particularly with respect to matters relating to custody, this Court has consistently adhered to the precept that the trial court's judgment will not be set aside unless the appellant clearly demonstrates that the trial court has abused its discretion or misapplied relevant law. Mrs. Jensen has made no such showing in the present case.

Faced with substantial testimony of less than exemplary and even inappropriate conduct by Mrs. Jensen, an independent custody

evaluation strongly recommending that custody of both children be placed with Mr. Jensen, and the fact that Mr. Jensen himself questioned whether he was the father of Alisha, the trial court displayed exemplary wisdom in awarding custody of Amber to Mr. Jensen and custody of Alisha to Mrs. Jensen.

Faced with Mrs. Jensen's decision to leave the state of Utah immediately after the trial of this action, the trial court has fashioned the most practical visitation schedule possible for the children. They will spend a substantial portion of each summer in each other's company and will be permitted to spend as much time together during the rest of the year as Mrs. Jensen's travel plans will permit.

The carefully considered custody award of the district court should be affirmed.

RESPECTFULLY SUBMITTED this 21st day of July, 1982.

DART & STEGALL

By B. L. DART
B. L. Dart

By
John D. Parken

MAILING CERTIFICATE

I certify that on this 21 day of July, 1982, I mailed two copies of the foregoing Brief with postage prepaid to Pete Vlahos, Vlahos, Perkins & Sharp, Legal Forum Building, 2447 Kiesel Avenue, Ogden, Utah 84401.

"briefs to be filed.

State v Brown
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