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Brigette Jeanne Cook v. Lon Arden Cook : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

BRIGETTE JEANNE COOK,	)	
Petitioner/Appellee,	)	
vs.	)	
LON ARDEN COOK,	)	Appellate Case No. 20120035
Respondent/Appellant.	)	Trial Court No. 084100428 DA

REPLY BRIEF OF APPELLANT

Appeal from Findings of Fact, Conclusions of Law and Decree of Divorce
of the First Judicial District Court of Box Elder County,
State of Utah,
The Honorable Ben Hadfield, Judge Presiding

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REPLY BRIEF OF APPELLANT

ARGUMENTS

The trial court's failure to make findings as to its award of custody of the parties' minor children constitutes an abuse of discretion and requires a remand for further consideration and for additional findings. The lack of findings regarding the award of parent-time contrary to the recommendations of the child custody evaluator constitutes an abuse of discretion and prevents appellate review without a remand and further consideration and additional findings. Child support should be recalculated to the extent custody or parent-time are modified on remand. Finally, no award of attorney's fees on appeal should be ordered and on remand the trial court needs to make findings regarding the Appellee's inability to pay her attorney's fees, the reasonableness of the fees, and the Appellant's ability to pay.

I. THE STANDARDS OF REVIEW FOR THE TRIAL COURT'S DECISION PERMIT REVIEW AND A REMAND IN THIS MATTER.

Appellant's standards of review set out in the Brief of Appellant in this matter were essentially correct but did not cite authority. Cases regarding the standard of appellate review for the issues follow.

For Appellant's first issue, whether the trial court's decision to award the unusual sole physical custody to Appellee with joint legal custody for a limited purpose must be remanded for further review and additional findings and the following appellant standards apply:

1. Utah appellate courts will not overturn trial court factual determinations where they are supported by adequate findings. *See e.g. Chandler v. Mathews*, 734 P.2d 907 (Utah 1987).

2. The lack of adequate findings of fact "is a fundamental defect that makes it impossible to review the issues that were briefed without invading the trial court's fact-finding domain." *Armed Forces Ins. Exchange v. Harrison*, 2003 UT 14, ¶ 37, 70 P.3d 35 (quotation omitted).

For Appellant's second issue, whether awarding standard parent-time contrary to the recommendation of the child custody evaluator, without specific findings about why the evaluator's report was not being followed, was an abuse of discretion and the following appellant standards apply:

1. Utah appellate courts will not overturn a trial court factual determinations where they are supported by adequate findings. *See e.g. Chandler v. Mathews*, 734 P.2d 907 (Utah 1987).

2. The lack of adequate findings of fact "is a fundamental defect that makes it impossible to review the issues that were briefed without invading the trial court's fact-finding domain." *Armed Forces Ins. Exchange v. Harrison*, 2003 UT 14, ¶ 37, 70 P.3d 35 (quotation omitted).

For appellant's sixth issue, that the trial court's award of attorney's fees absent sufficient findings was an abuse of discretion, the following standards of review apply:

1. "In a divorce proceeding, '[b]oth the decision to award attorney fees and the amount of such fees are within the trial court's sound discretion.'" *Stonehocker v. Stonehocker*, 2008 UT App 11, ¶ 10, 176 P.3d 476 (quoting *Oliekan v. Oliekan*, 2006 UT App 405, ¶ 30, 147 P.3d 464).

2. "[W]hether the trial court's findings of fact in support of an award of attorney fees are sufficient is ... a question of law, reviewed for correctness." *Selvage v. J.J. Johnson & Assocs.*, 910 P.2d 1252, 1257 (Utah App.1996).

II. DEVIATION FROM THE EVALUATOR'S RECOMMENDATION FOR CUSTODY AND ADDITIONAL PARENT-TIME TO FATHER WAS NOT JUSTIFIED BY SUFFICIENT FINDINGS BY THE TRIAL COURT.

The threshold consideration on review is whether the trial court's findings are adequate to support its custody award to the parties. See *Roberts v. Roberts*, 835 P.2d

193, 195 (Utah App.1992). If the findings are legally inadequate, the exercise of marshalling the evidence in support of the findings becomes futile and the appellant is under no obligation to marshal. *Woodward v. Fazzio*, 823 P.2d 474, 477 (Utah App.1991). "[A] trial court must set forth written findings of fact and conclusions of law which specify the reasons for its custody decision." *Tucker v. Tucker*, 910 P.2d 1209, 1215 (Utah 1996) (citing *Smith v. Smith*, 726 P.2d 423, 425 (Utah 1986)).

Appellee's response suggests that there is sufficient evidence in the record upon which the trial court might have based its decision and the trial court's decision should be affirmed, but a review of the Findings prepared by the Appellee do not reflect this. In divorce matters, the failure to make sufficient findings requires a remand to permit the trial court to make the necessary findings to allow appellate review of the trial court's decision. *See e.g. Barnes v. Barnes*, 857 P.2d 257 (Utah App. 1993); compare *Tucker v. Tucker*, 910 P.2d 1209, 1215 (Utah 1996) (trial court's detailed findings supported its end determination even though some findings were disregarded because they were not sufficiently linked to the child's welfare), *Rosendahl v. Rosendahl*, 876 P.2d 870 (Utah App. 1994) (trial court decision upheld where court made detailed findings, both on the record and in its formal findings addressing factors regarding custody), *Grindstaff v. Grindstaff*, 2010 UT App 261, 241 P.3d 365 (trial court made extensive findings regarding the best interests of the children in assigning custody and decision therefore affirmed). Where a trial court makes no findings as to its ruling, the appellate courts are

unable to exercise their appellate functions and the appellate courts remand the matter for findings sufficient to permit review. *See Barnes v. Barnes*, 857 P.2d 257, 260-262 (Utah App. 1993).

To argue that such a remand is unnecessary here, Appellee relies on the 1985 decision in *Pennington v. Pennington* which determined that where "findings are terse but still suggest the weight accorded to the testimony of the witnesses by the trial court and outline the basis of the custody award," appellate courts can find that there was competent evidence to support the judgment. 711 P.2d 254 (Utah 1985). In *Pennington*, the trial court declined to follow an expert's custody evaluation after finding that the expert's bases were mistaken:

> [T]he state sociologist who conducted the test admitted that [the father's town's] size and isolation were the main reasons for his recommendation. He further testified that he had no objection to [the father's] parenting ability and felt that no harm would result by leaving [the child] in [the father's] custody. The record discloses that the evaluator was unfamiliar with the extent of the recreational facilities and medical attention available to [the town's] residents. The trial judge also pointed out that appellant similarly resided in a rural part of the state.

Id. at 256 (footnote added). In other words, in the trial record the trial court indicated specific factual reasons for refusing to follow the expert's recommendation.

Here, no such matter appears in the trial transcript or findings. If such information was in the record, Appellee would have provided it. Appellee, searching for any support in the record, points to two items, one of which was cited in the Brief of Appellant:

1. The trial judge's comments regarding the evaluator "miss[ing] the mark" and the parties inability to work together (*Trial Transcript* at 263, R. At 393) and

2. Appellant's testimony that the parties will not "be able to get along." (*Trial Transcript* at 212-213, R. at 393).

These matters are, at best, minimally relevant to the custody determination and standing alone cannot support the ruling by the trial judge as a whole. The ability of the parties to cooperate, although a possible factor, is not the keystone of a custody determination. Where parents cannot work together, courts can spell out the terms of parent-time with specificity. *See Hudema v. Carpenter*, 1999 UT 290, ¶ 7, 989 P.2d 491 (inability of parties to cooperate requires a "structured visitation schedule"). *Pennington* does not mandate that the trial court's actions here be affirmed.

Utah law requires a case-by-case determination of the best interests of the child when determining parent-time. *See* Utah Code Ann. § 30-3-34(1) ("If the parties are unable to agree on a parent-time schedule, the court may establish a parent-time schedule consistent with the best interests of the child."). Nonetheless,

> The court shall enter the reasons underlying its order for parent-time that:
> (a) incorporates a parent-time schedule provided in Section 30-3-35 or 30-3-35.5; or
> (b) provides more or less parent-time than a parent-time schedule provided in Section 30-3-35 or 30-3-35.5.

Utah Code Annotated § 30-3-34(3). Although the section establishes a presumption that the minimum parent-time schedule is in the best interests of the child, findings are still

required. Utah Code Annotated § 30-3-34(2) and (3). A presumption can be overcome by presenting evidence which contradicts and rebuts the presumption. *See e.g. Bennett v. Huish*, 2007 UT App 19, ¶¶ 15-16, 155 P.3d 917. After a presumption is rebutted, the trial court must consider the matter without regard to the presumption. *See id.*

The record developed in this appeal overcomes the presumption regarding standard parent-time and suggests that the evaluator's recommendation should be followed as to parent-time. Case law indicates that a specific and structured award of parent-time should be made in the best interests of the children. Unfortunately, were this Court to remand with such a mandate, it would invade the trial court's fact-finding domain. Appellant, therefore respectfully requests, that this matter be remanded for further consideration and additional findings as to the factors set out in Utah statutes and case law as to custody and parent-time.

III. MODIFICATION OF THE PARENT-TIME AWARD OR THE CUSTODY ARRANGEMENT WILL REQUIRE MODIFICATION OF THE CHILD SUPPORT AWARD.

Here, Appellant does not dispute the trial court's child support award. Appellant merely requests that to the extent the trial court modifies its custody or parent-time determinations on remand that child support be recalculated. A change in parent-time requires an appropriate modification of child support. *See Thronson v. Thronson*, 810 P.2d 428, 434 (Utah App. 1991) (child support to be reconsidered in connection with remand regarding custody). Appellant respectfully requests that the mandate indicate that

to the extent the custody or parent-time is modified on remand that the trial court recalculate child support.

IV. WHEN REMANDING FOR FINDINGS REGARDING AN AWARD OF ATTORNEY'S FEES, NO AWARD OF ATTORNEY'S FEES IS GRANTED ON APPEAL.

Appellee unsuccessfully attempts to distinguish *Chambers v. Chambers*, 840 P.2d 841 (Utah App. 1992) on the basis of its facts but the case law on this issue is quite clear and does not favor Appellee's position. "[T]he trial court's award or denial of attorney fees must be based on evidence of the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees." *Oliekan v. Oliekan*, 2006 UT App 405, ¶ 10, 147 P.3d 464 (second alteration in original) (quotations omitted), *see also Stonehocker v. Stonehocker*, 2008 UT App 11, ¶¶ 10, 51, 176 P.3d 476 (insufficient findings regarding financial need of receiving party, the ability to pay of paying party, and the reasonableness of the fees required remand).

These findings were not made and this matter needs remanded. Where a matter is remanded as a result of inadequate findings, neither party prevails on appeal and no award of attorney's fees is granted. *Stonehocker*, 2008 UT App 11, ¶¶ 51-52. Appellant respectfully requests that this matter be remanded for findings regarding the award of attorney's fees and that no attorney's fees be awarded herein.

CONCLUSION

The trial court's failure to make findings as to its award of custody of the parties' minor children requires a remand for further consideration and for additional findings. The lack of findings regarding the award of parent-time contrary to the recommendations of the child custody evaluator requires a remand and further consideration and additional findings. Child support should be recalculated to the extent custody or parent-time are modified on remand. Finally, no award of attorney's fees on appeal should be ordered and on remand the trial court should be instructed to make findings regarding the Appellee's inability to pay her attorney's fees, the reasonableness of the fees, and the Appellant's ability to pay.

DATED this 15 day of October, 2012.

LAW OFFICE OF F. KIM WALPOLE, P.C.

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Original Signature

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because this brief contains less than 3,000 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).

DATED this 15 day of October, 2012.

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT was mailed, postage prepaid, to Kirk M. Morgan, Attorney for Petitioner/Appellee, at Mann, Hadfield & Thorne, at P.O. Box 876, Brigham City, Utah 84302, this 16 day of October, 2012.

F. Kim Walpole