2001

Geri Pasquin v. Candace M. Souter : Brief of Appellee

Utah Court of Appeals

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Court of Appeals Case No. 20010717-CA

IN THE UTAH COURT OF APPEALS

GERI PASQUIN,

Petitioner/Appellant,

vs.

CANDANCE M. SOUTER,

Respondent/Appellee.

BRIEF OF APPELLEE

Appeal From Final Judgment Denying Petition for Visitation
Third District Court, Salt Lake County
Judge Ronald E. Nehring, Presiding

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PARTIES IN THE DISTRICT COURT

GERI PASQUIN: Petitioner - Appellant
CANDANCE M. SOUTER: Respondent Number One - Appellee
KORY PASQUIN: Respondent Number Two - Deceased

Although Geri Pasquin named Kory Pasquin, deceased, as one of two respondents, she did not separately serve his personal representative with process prior to trial. Geri Pasquin lost at trial and filed a notice of appeal. Candance M. Souter filed a motion for summary disposition in the Court of Appeals that tested whether or not the decision below was a final, appealable, order. Because Geri Pasquin elected to oppose that motion for summary disposition, she has waived and abandoned all claims against Kory Pasquin, deceased, and the decision appealed from was the District Court's final order as to all parties and all claims pled.

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JURISDICTION

The Court of Appeals has jurisdiction under UCA 78-2a-3(2)(h).

STATEMENT OF THE CASE

After the bench trial, the District Court entered a finding that court-ordered visitation would not be in the child's best interests and denied Geri Pasquin's petition for court-ordered grandparent visitation.

SUMMARY OF ARGUMENT

Geri Pasquin has failed to marshal the evidence as to the findings of fact she seeks to challenge on appeal. She also failed to preserve the issues she now seeks to raise on appeal. The novel legal theories she now proposes on appeal are not provided for in the law.

ARGUMENT

Point One

Geri Pasquin has failed to marshal the evidence and properly challenge the District Court's finding that grandparent visitation would not be in the child's best interests. The District Court correctly denied her petition based on this finding of fact.

There is no contention that the court below did not give Geri Pasquin adequate notice of the place, time, and date of the bench trial.

Nor is there any contention that the court below did not give Geri Pasquin an opportunity to present all the evidence and argument in support of her position at the bench trial that she saw fit to present.

Geri Pasquin based her case at trial upon her own testimony and upon the testimony of one other witness she produced (her daughter).

Thus, under Utah R. Civ. P. 52(a), on this appeal from that trial, "findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Where an appellant challenges the trial court's findings, that appellant must "marshal all the evidence in support of the trial court's findings and then demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the findings." Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985). Where the appellant fails to so marshal the evidence, the appellate court need not consider the challenge to the findings of fact. Geri Pasquin raises numerous issues in a scatter-shot fashion. And she never directly challenges the trial court's finding of fact that visitation would not be in the child's best interests. Instead, her challenges on appeal are all directed at the district court's factual

resolution of tangential evidentiary conflicts, and, even as to those, she makes no attempt to marshal the evidence. Moreover, her brief on appeal is confusing and incomplete. Although she presents selected facts, those facts are poorly organized. She does not provide the coherent background picture that is necessary to an understanding of the arguments that she attempts to raise on appeal and she completely ignores the fundamental factual finding that court-ordered visitation is not in the child's best interests. Her approach to this case illustrates an all too common problem. Although Geri Pasquin's lawsuit against Candance M. Souter turned into a high profile case that was featured on local television news and given front page coverage in the *Salt Lake Tribune*, split page coverage in the *Deseret News*, and a house editorial in the *Salt Lake Tribune* applauding the trial court's denial of visitation, this high profile nature demands even more attentiveness on appeal to presenting a very clear picture of facts and argument to the appellate court, which, of course, does not have the benefit of having previously reviewed the evidence and cannot observe the demeanor of witnesses.

In particular, appellate advocates must never assume that it is somehow the appellate court's burden to comb through the record for

evidence supporting poorly framed arguments. Appellate courts have stated this principle on multiple occasions. See, e.g., MacKay v. Hardy, 973 P.2d 941, 947-48 & n.9 (Utah 1998); Walker v. U.S. Gen., Inc., 916 P.2d 903, 908 (Utah 1996). Thus, the challenge to the finding of fact as to the child's best interests should not be entertained on appeal.

The Court of Appeals initially lodged appellant's brief as "unfiled" for her failure to file an appendix and duly instructed appellant to file her appendix. Instead of filing one, appellant stated no appendix was needed. The failure to provide the appellate court with an appendix that contains the memorandum decision of the trial court which appellant seeks to challenge, even after an express request was made by the appellate court to provide an appendix, further renders this appeal one which should be rejected. Not only did Geri Pasquin fail to marshal the evidence in support of the court's finding that grandparent visitation would not be in the child's best interests, but she even failed to submit an appendix that included the memorandum decision within which that finding of fact was set forth in a careful and thoughtful way.

It is not the appellate court's burden to comb through the record and locate the memorandum decision containing this finding of fact.

Point Two

Geri Pasquin has also failed to marshal the evidence in support of the trial court's finding that she made only some token efforts to initiate visitation with her granddaughter and then demonstrate that, viewing it in the light most favorable to the court below, the evidence is insufficient to support the trial court's finding. She has, thus, failed to properly challenge that finding.

Utah R. Civ. P. 52(a), "findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

Where an appellant challenges the trial court's findings, that appellant must "marshal all the evidence in support of the trial court's findings and then demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the findings." Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

Where the appellant fails to marshal the evidence, the appellate court need not consider the appellant's challenge to the findings of fact.

Not only does appellant fail to so marshal the evidence as to the trial court's finding that she made only token efforts at initiating visits,

but, in apparent recognition of how meager those efforts at initiating visits were, she tries to excuse herself by claiming that she "did all she could" based on what she candidly concedes are "the fractious family circumstances" (Appellant's Brief, P. 15) that were of concern to the *guardian ad litem* and to the trial court in assessing best interests.

Thus, she not only fails to marshal the evidence as to the trial court's finding that she made only token efforts at visitation, but she also concedes the very factual basis for the finding it would not be in the child's best interest to put the child in the middle of family conflict.

Point Three

Geri Pasquin failed to preserve the issues she now raises on appeal and the District Court's decision brings finality to the case.

Before the Court of Appeals examines the District Court's denial of the petition for court-ordered grandparent visitation, it "must resolve whether [Geri Pasquin] failed to preserve below the issues [she] now raises on appeal." Sittner v. Schriever, 2000 UT 45,¶15, 2 P.3d 442. If so, the decision below is final and it cannot be reviewed via an appeal.

Geri Pasquin failed to preserve the issues she now raises on appeal concerning two highly unfavorable *guardian ad litem* reports.

She never objected to their admission into evidence at trial.

Later, on appeal, she opposed a motion for summary disposition that would have dismissed this appeal without prejudice. (She should have joined in it so that this case would be brought back before the trial court where she could then attempt to belatedly raise and preserve her objections to both of the highly unfavorable *guardian ad litem* reports).

Thus, Geri Pasquin had ample opportunity to raise objections to the two *guardian ad litem* reports that were highly unfavorable to her, but she declined to do so. Some finality should be brought to this case.

As the renowned Judge Friendly noted in the landmark case of Lummus Co. v. Commonwealth Refining Co., 259 F.2d 80, 89 (2d Cir. 1961), the term "finality" in litigation "may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." In this case the central issue of fact, whether visitation would be in the child's best interests, was resolved within a memorandum decision issued after a bench trial. Geri Pasquin then filed a notice of appeal prior to entry of an order dismissing all claims pled in the petition with prejudice. "[A] judgment which disposes of fewer than all of the

causes of action alleged in the plaintiff's complaint is not a final judgment from which an appeal may be taken." Salt Lake City v. Layton, 600 P.2d 538, 539-40 (Utah 1979), citing J.B. & R.E. Walker, Inc. v. Thayn, 17 Utah 2d 120, 121, 405 P.2d 342, 343 (1965) (per curium). Since this lawsuit was neither dismissed with prejudice by the trial court nor adjudicated at all as to one of the named respondents, Kory Pasquin, deceased, the memorandum decision appealed from did not resolve the controversy between the parties and conclude the case.

Further, a party seeking to appeal a district judge's memorandum decision that rejects a commissioner's temporary recommendation must first obtain certification of the memorandum decision as a final order under Rule 54(b) of the Utah Rules of Civil Procedure and/or obtain permission from an appellate court to file an interlocutory appeal under Rule 5 of the Utah Rules of Appellate Procedure, as a commissioner's temporary recommendation is inherently interlocutory. See First Security Bank v. Conlin, 817 P.2d 298, 299 (Utah 1991) (per curium); Stumph v. Church, 740 P.2d 820, 822 (Utah Ct. App. 1987). No such URCP 54(b) or URAP 5 orders were sought or obtained. This lack of a final order was raised in the motion for summary disposition filed by

Candance M. Souter. That motion was opposed by Geri Pasquin and denied by the Utah Court of Appeals with leave to raise it again in the consideration of this appeal on the merits. Thus, Geri Pasquin should have raised the matter again in her brief in order to secure a dismissal of this appeal without prejudice so that she could attempt to raise and preserve the issues in the trial court she now attempts to raise here.

Instead, Geri Pasquin did not raise the issue of finality in her brief and has waived it. Candance M. Souter, who has now been forced to file a brief on appeal, expressly declines to raise the issue of finality or to challenge this court's denial of her motion for summary disposition. She consents to subject matter jurisdiction and to the treatment of the memorandum decision in the court below as the final order below, since the factual issue of whether visitation would be in the child's best interests has been fully decided and there is "no really good reason for permitting it to be litigated again." Lummus, *supra*.

Geri Pasquin's stated objective in her brief is to have more trial court litigation take place. She could have achieved this simply by conceding to (instead of opposing) Candance M. Souter's motion for summary disposition, either initially or in her appeal brief on the merits.

Candance M. Souter states her objectives in defending this case as (1) protecting her child from court-ordered visitation, which, like the two *guardians ad litem* and the judge, she finds to be contrary to her child's best interests; and, (2) concluding all trial court litigation prior to any appeal on the merits so that this case is limited to a single appeal on the merits. In pursuit of her second stated objective, she duly filed her motion for summary disposition. Now that this court has denied that motion and she has had to bear the burden of preparing her brief on the merits, she opposes any remand for further trial court litigation, as this case and controversy should be ended, not endlessly litigated.

As Sir Edward Coke put it some four centuries ago, "*interest republicoe ut sit finis litum*," or, it concerns the state that there be an end to litigation. Ferrer's Case, 77 Eng. Rep. 263, 266 (C.P. 1599).

It cannot reasonably be said that the trial court's memorandum decision has left the relations between Geri Pasquin and Candance M. Souter in such an unclear and undefined state that additional litigation is needed to put an acceptably coherent end to the matter. In fact, just the opposite is true, and the decision denying the petition for visitation is a clear, comprehensible, and complete conclusion to this controversy.

Point Four

There is nothing in the Utah Rules of Evidence that requires a District Court to conduct an interview of a child upon demand.

Geri Pasquin's disagreement with the District Court for declining to interview the child has no support in the rules. Candance M. Souter enjoys a parental right to exclude harmfully intrusive relatives from her child's life, and she deems Geri Pasquin's desire to use the judge as a proxy for intrusion to show Geri Pasquin's lack of regard for the child's best interests, her unhealthy desire to let an immature child dictate its own best interests, and her undesirable appetite for family dramatics.

Point Five

The legal standard urged by Geri Pasquin would violate the federal constitutional right enjoyed by fit and law-abiding parents to parent their children free from unwarranted state interference.

The word "parent" is both a noun and a verb, and it is a parent's right and responsibility "to parent" his or her child. The primacy of the parent-child relationship and the right of a fit and law-abiding parent to parent free from state interference has been somewhat eroded in recent decades with higher levels of micromanagement of family matters by

the judiciary that appears to have coincided with societal changes in which the number of children being raised by both of their biological parents in an intact family of origin has decreased in proportion to the number of children being raised in other settings. This appears to have resulted in interaction by judges with a larger proportion of children via divorce and paternity litigation, weakening the role of parents with an increase in the number of judicial forays into decision-making that was previously left to the sound discretion of fit and law-abiding parents.

The District Court ruled that Utah's grandparental visitation scheme was constitutional on its face. It then conducted a bench trial, and, based on the evidence presented at that bench trial, it entered a finding of fact that visitation would not be in the child's best interests.

Geri Pasquin now urges a novel new legal standard under which the court would infringe upon Candance M. Souter's right to parent her child because Candance M. Souter has chosen not to fully disclose all of her reasons for declining to allow grandparent visits. (Inexplicably, during her deposition, and in other discovery, Candance M. Souter was never subjected to careful questioning by Geri Pasquin that would have required her to disclose all of her reasons for declining to allow visits.)

Thus, having failed to establish (with competent trial evidence) that an order of the court mandating grandparental visitation would be in the best interests of the minor child, Geri Pasquin attempts to now belatedly argue that because, in her view, no good reason has been given to her for not allowing visits, she should be granted visitation.

This attempt to shift the burden to Candance M. Souter and to require her to justify her disallowance of visitation is contrary to the opinions of the United States Supreme Court in the recent landmark case of Troxel v. Granville, 530 U.S. 57 (2000), which, although it gave rise to a number of differing opinions from United States Supreme Court, did somewhat roll-back the recent movement towards judicial forays into the realm of fit and law-abiding parents. The legal standard urged by Geri Pasquin should be rejected because it would result in an unconstitutional order subject to being stricken down in the same way a number of grandparent visitation orders have been stricken down by a number of state appellate courts since the Troxel decision, as it would improperly force a parent to affirmatively justify his or her preference.

See, among others, Punsley v. Ho, 105 Cal Rptr.2d 139 (Call. App. 2001); Brice v. Brice, 754 A.2d1123 (Md. App. 2000): Hertz v.

Hertz, 717N.Y.S.2d (N.Y. 2000; In Re G.P.C., 28 S.W.3rd 357 Mo. App. 2000): Neal v. Lee, 14 P.3rd 547 (Okla. 2000); Department of Social and Rehabilitation Services v. Paillet, 16 P.3rd 962 (Kan. 2001).

This approach by Geri Pasquin is symptomatic of the underlying causes of her failure to secure visitation voluntarily and her need to resort to attempts to obtain it by court order. She views the situation in terms of conflict and argument, and she believes that she has won that argument and should therefore get visitation. She fails to grasp the point that it is not a matter of winning an argument or prevailing in a conflict, but of eliminating the argument itself and solving the conflict.

One viable trial strategy for Geri Pasquin would have been to present evidence tending to show that contention had been eliminated.

Instead, contention oozed into the courtroom from the trial witnesses called by Geri Pasquin, based on their demeanor in court.

One of the witnesses, for no apparent reason, gratuitously called the paternal grandfather of the minor child a workaholic. The paternal grandfather is, indeed, an industrious and productive individual, which has benefited the minor child because it has enabled him to contribute to her mother's financial well being and it has also kept him occupied

enough to keep his grandparent visitation at reasonable levels instead of meddlesome and intrusive levels. Rather than denigrating this kind hearted man via trial witnesses, Geri Pasquin may wish to emulate him.

Point Six

The best interests of the child will be served by having this court give a gentle but firm "no" to Geri Pasquin and by having Geri Pasquin take "no" for an answer with dignity and decorum.

In this, as in most controversies, there are two sides to the coin, neither of which is wholly irrational. Geri Pasquin has a normal desire to have her granddaughter visit with her and she sincerely believes that court-ordered grandparent visits would be in the child's best interests.

On the other hand, the child's mother, two *guardians ad litem*, and a judge of the Third Judicial District Court all find that visitation by court order and mandate would not be in the child's best interests.

The District Court is the forum that is authorized and equipped to decide such controversies. Since the Court of Appeals cannot see or assess the demeanor of live witnesses in a live courtroom setting, both common sense and the rules require this court to give due regard to the

trial court's ability to do so in this fact-laden controversy. Since the District Court has acted within the scope of its authority and discretion in finding that court-ordered grandparental visitation would not serve the best interests of the minor child (whose interests are paramount), and since that finding is not clearly erroneous, this court should not disturb the District Court's denial of the petition for a visitation order.

It is important to note that such a "no" answer to Geri Pasquin would simply leave the possibility of any future voluntary visitation to the discretion of the child's mother. If Geri Pasquin now takes "no" for an answer with dignity and decorum, it will most likely help to increase her prospects for future voluntary visits. But protracting this litigation even more or again making herself available for an above-the-fold front page *Tribune* photograph and interview will likely hurt those chances.

In the judgment of the editors of the *Salt Lake Tribune*, this case is important enough that, while the case was still pending in the District Court, they once made it the lead story of the day for the entire paper and ran it on page A-1 at the top of the page so that Geri Pasquin's face peered out from news stands all over the state together with an interview of her in which she related her side of the story. Then, when

the District Court denied her petition for visitation, that same paper ran a house editorial applauding Judge Ronald E. Nehring for denying her petition for grandparent visitation. Meanwhile, Candance M. Souter declined all press requests to photograph her or her child and denied all press requests to interview her or her child, choosing to respond to the press through her counsel, who usually quoted from the public court record. Not content to leave things alone, Geri Pasquin leaked pages from Candance M. Souter's deposition to the press, even though it had not yet been published in court and even though portions thereof were later ruled to be inadmissible at trial by the District Court because they contained a transcript of recorded unsuccessful settlement negotiations.

None of this has fostered a climate conducive to moving things towards a situation where voluntary visits might be in the child's best interests, but has, instead, continuously made the situation even worse.

Occasionally getting "no" for an answer is a part of every life.

But the way one takes "no" for an answer is a matter of choice.

Choosing to now take "no" for an answer with some dignity and decorum would be a way for Geri Pasquin to increase the prospects of getting to a point where her visits would be in the child's best interests.

Rather than taking issue with the trial court's finding that there is conflict between Geri Pasquin and the child's mother, its finding that it would not be in the child's best interests to place her in the middle of that conflict, and the trial court's finding that Geri Pasquin made only token efforts to keep any kind of contact with the child, and rather than trying to get an appellate court to tell her that the District Court was wrong in these findings, she should probably garner the humility and insight necessary to consider whether the District Court's findings are, in fact, correct. Only when she comes to the point where she accepts the findings as correct can she then start taking meaningful steps to acknowledge and solve the underlying problems by improving efforts to initiate contact with the child while also working on ways to reduce the conflict and shield the child from the harmful effects of the conflict.

The good thing about this approach is that it would all be taking place in the private sphere, free from state involvement via the courts.

This approach avoids judicial micromanagement of parental decisions, thereby preserving the liberty and privacy of the people involved here in a manner consistent with our best legal traditions of individual freedom and restraint on the state going back to Runnymede.

Point Seven

Geri Pasquin declined to marshal the evidence because doing so would have demonstrated the frivolity of her appeal.

In light of two separate *guardian ad litem* reports admitted into evidence that formed a basis for finding that visitation would not be in the best interests of the minor child, together with the demeanor of her own witnesses in court, Geri Pasquin was simply not going to be able to marshal the evidence in support of the trial court's findings and then demonstrate that, viewing it in the light most favorable to the court below, the evidence is insufficient to support the trial court's findings.

Thus, she simply ignored this basic tenet of appellate practice.

Point Eight

Damages in the form of attorney's fees and double costs should be awarded to Candance M. Souter under URAP 33.

Geri Pasquin's attorneys should have told her there was no way to successfully challenge the trial court's findings of fact on appeal and she should have taken that "no" for an answer and declined to appeal.

Candance M. Souter is a mother with a young family who now asks to be awarded attorney's fees and double costs under URAP 33.

CONCLUSION

The denial of the petition for visitation should be AFFIRMED.

URAP 33 attorney's fees and double costs should be awarded in favor of Candance M. Souter against Geri Pasquin and/or her counsel.

DATED THIS 7TH DAY OF FEBRUARY, 2002.

ROBERT H. COPIER
Attorney for Candance M. Souter

CERTIFICATE OF SERVICE

True copies of the foregoing were this-day hand-delivered to:

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DATED THIS 7TH DAY OF FEBRUARY, 2002.

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