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Dora Varela Ryan v. Douglas P. Ryan : Respondents Brief

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IN THE SUPREME COURT
of the
STATE OF UTAH

DORA VARELA RYAN,
Plaintiff-Appellant

vs.

DOUGLAS F. RYAN,
Defendant-Respondent

Case No.
10271

FILED

RESPONDENT'S BRIEF MAY 6 - 1965

Appeal from the Judgment of the ^{The Supreme Court, Utah} Third District
Court for Salt Lake County, Utah
Hon. Merrill C. Faux, Judge

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RESPONDENT'S BRIEF

STATEMENT OF FACT

It is necessary for defendant to set forth additional facts, since the appellant's statement does not set forth completely the facts as the Trial Court found them and upon which the Trial Court based its decision.

The parties were married to each other in Los Angeles, California on October 12, 1955. During the marriage there have been born as issue three children, to-wit: Mitchell Allen Ryan, age 7; Darrel Lynn Ryan, age 5, and Gregory Phillip Ryan, age 1.

During the marriage defendant was convicted of a felony on two occasions (R 39, 2-26) for which he served time in California prisons. Upon his re-

lease the parties moved to Salt Lake City, Utah where the defendant has been gainfully employed and has rehabilitated himself.

Since their residence in Utah both plaintiff and defendant have been employed and plaintiff was employed until July 31, 1964, at which time she quit, advising defendant that she intended to obtain welfare in order to "hang" him. (R 36)

Defendant testified that during the marriage plaintiff bragged about her men friends and referred to them as her common-law husbands. (R 24, 23-25). She also advised defendant that she never loved defendant and loved other men. (R 26, 1-3). She also stated to defendant that she had had many husbands of all races and colors (R 25, 9-30).

Defendant further testified that the plaintiff kicked him (R 27), scratched him (R 27, 28, 40), and called him names (R 27, 29), screaming at him in the middle of the street (R 40).

Plaintiff had advised defendant that she would take the children where defendant would never see them (R 26), or was going to remove them from the State (R 36).

Defendant has always been very close to the children (R 29) and had the children with him during a great deal of the period of separation, having moved into an apartment near the home occupied by plaintiff in order to be near the children. Many times the children would stay with the defendant

overnight and on weekends (R 29, 30, 31, 53). During these periods the defendant observed that the youngest child had blisters and a rash (R 30). Often the children would come over to defendant's apartment, stating that plaintiff had sent them over for defendant to take care of.

Defendant testified that plaintiff told him she intended to give him the children after her divorce but changed her mind (R 37).

Testimony was introduced showing that plaintiff would leave at late hours of the evening and return in early morning hours (R 31), and that she left the children a great deal and sometimes alone (R 51, 52). Also that the children would be up late at night and plaintiff would be gone.

The record contains considerable testimony, unrebutted by the plaintiff, that clearly shows plaintiff's lack of interest in the welfare of the children. It is equally full of evidence of defendant's sincere and honest concern over the children.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERROR IN GRANTING THE DEFENDANT A DIVORCE AND AWARDING THE CUSTODY OF THE MINOR CHILDREN TO HIM, TOGETHER WITH THE HOUSEHOLD EFFECTS, FURNITURE AND APPLIANCES ACCUMULATED DURING THE MARRIAGE.

The Trial Court, having heard the testimony,

observed the demeanor of the witnesses and determined the facts as presented, found from the evidence that the plaintiff was an immoral and incompetent and improper person and awarded custody of the children to defendant. This was not an abuse of his discretion but was within the bounds of his judicial experience and was done for the best interests of the children. This Court has often stated its reluctance to overturn the decision of the court which heard the testimony and observed the demeanor of the witnesses. *Lawlor vs. Lawlor*, Utah, 240, P2d 271; *Stewart vs. Stewart*, Utah, 242 P2d 947; *Steiger vs. Steiger*, Utah, 293 P2d 418; *Whitehead vs. Whitehead*, Utah, 397 P2d 987.

This Court has further stated that a divorced mother has no absolute right to the custody of minor children under U.C.A. 1953, 30-3-10, and that the paramount consideration in determining custody should be the best interests and welfare of the children. *Sampsell vs. Holt*, Utah, 202 P2d 550.

In the case at bar it appears uncontroverted that the plaintiff enjoyed her night life away from the children and that she wanted the defendant to care for them so that her social life would not be burdened by the children.

All of the evidence — plaintiff's late dates, her late hour returns, her consistency in sending the children to spend nights with the defendant, her failure to properly care for and feed the children.

her leaving them unattended — indicates that plaintiff's real interests were in her own life and not the lives of her children.

On the other hand, defendant's interest was in the care and welfare of the children. He cared for them, accepted them at all times, even though he had made other arrangements for his time, and showed a constant interest in having them attend school and church.

While plaintiff would have the Court believe that defendant's past criminal convictions would prevent his being able to properly provide the love, care and proper direction of the children, it is clear that he has led the life of a good, hard working citizen and father since he paid his price to society for his earlier errors. However, the record shows that the plaintiff did not let the defendant forget his past and, in fact, kept his past before neighbors, friends, and the children. This could not be considered in the interest of the children and only shows the true attitude of plaintiff.

The record shows the many instances where the plaintiff, considering only her own desires and ego, was willing to sacrifice the interests, feelings and welfare of the children.

It is thus clear that the Court did not error in placing the children where their interests and welfare will be best served.

POINT II

THE TRIAL COURT DID NOT ERROR IN REFUSING TO GRANT THE PLAINTIFF A DIVORCE AND AWARDING HER THE CUSTODY OF THE MINOR CHILDREN, THE FURNITURE, FIXTURES AND APPLIANCES, CHILD SUPPORT, ALIMONY AND ATTORNEYS FEES.

The testimony contained in the record shows that the plaintiff bragged of her immoral conduct and while it came from the testimony of the defendant, it was not denied by the plaintiff. This together with the testimony of her late dates, parties, late hour returns and constant absence from the home during the period when she was unemployed, strongly substantiates the Court's findings. Further, plaintiff's attitude, as observed by the Court, both in the testimony and appearance of the plaintiff, showed plaintiff's attitude that she was entitled to the custody of the children regardless of her activities. True there was no evidence of immoral conduct in the presence of the children; however, the facts still were present showing her lack of principles as to morality and her lack of interest in the conditions under which the children would be required to live.

Plaintiff's statement, as revealed by defendant, and not denied by plaintiff, that she intended to give him the children after the divorce, again shows the true attitude of plaintiff as concerns the children, and only gives additional reasons for the Trial Court's decision.

It appears that plaintiff's conduct and apparent dislike for the confining duties of motherhood served as a guide to the Trial Court. Thus, there is support for the conclusion that the decisions below were prompted by the best interests of the children.

CONCLUSION

It is respectfully submitted that the Trial Court was in a position to fully observe all witnesses, weigh all evidence, and reach that decision that was most apparent. The facts support defendant's counterclaim for divorce and certainly provided adequate grounds for the Court to award defendant the divorce.

As to the matter of the custody of the minor children, the Trial Court was in a most advantageous position to separate the superficial, outward claim of the plaintiff concerning the interests of the children, from the real, sincere interest of the defendant in the children. The Court can easily see the comparative acts of the plaintiff and defendant showing love and affection for the children and a parental interest in their welfare.

The defendant respectfully requests this Honorable Court to affirm the decision of the Trial Court.

Respectfully submitted,
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