1992

Tori K. Evans v. Robert L. Evans : Reply Brief

Utah Court of Appeals

Randy S. Ludlow; attorney for appellee.
Richard S. Nemelka; attorney for appellant.

IN THE UTAH COURT OF APPEALS

TORI K. EVANS,	)	
	)	
Plaintiff/Appellant,	)	Appellate Case No. 920631-CA
	)	
v.	)	
	)	
ROBERT L. EVANS,	)	Priority No. 4
	)	
Defendant/Appellee.	)	

APPELLANT'S REPLY BRIEF

Appeal from a Decree of Divorce and Order Denying Motion for a New Trial entered in the Third Judicial District Court, Salt Lake County, State of Utah, Honorable J. Dennis Frederick.

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SUMMARY OF ARGUMENT

Appellee's Statement of Facts contains errors and misstates the evidence that was presented to the Court.

Dr. Stewart's evaluation and subsequent recommendation was done 8-9 months before the Trial and was not updated and the Court did not adequately consider the stability of the minor child during said period of time and the child's relationship with her sister, Brandi.

The visitation awarded to the plaintiff by the Court was restrictive and was not as liberal as the visitation that was allowed to the defendant during the pendency of the action and, further, was not based upon the evidence before the Court. Said restrictive award of visitation was clearly inequitable to the plaintiff and manifested an abuse of discretion.

The Court misinterpreted the evidence represented in regards to the evaluation costs of Dr. Stewart and it was clearly inequitable to order the plaintiff to pay $1,500.00 to the defendant for Dr. Stewart and manifested an abuse of discretion.

ARGUMENT

I

APPELLEE'S STATEMENT OF FACTS CONTAINED ERRORS AND MISSTATES THE EVIDENCE PRESENTED

In paragraph 2 of Appellee's Statement of Facts he insinuates that he did not know the child was born until four

days after the birth. However, the defendant, in his own admission, indicated that he was told about the birth of the child the day after the child's birth. (Vol. II, T. 158-159)

In paragraph 5 of Appellee's Statement of Facts he indicates that Dr. Stewart talked with Paige's day care provider which is inaccurate. Dr. Stewart only talked to the day care provider for the half-sister, Brandi, at the time Dr. Stewart did her evaluation since the minor child, Paige, was not in day care at that time.

In paragraph 8 of Appellee's Statement of Facts is an over-generalization since the witnesses that testified did not substantiate the observations made by Dr. Stewart and said statement of facts does not refer to any specific transcript citations.

In paragraph 9 of Appellee's Statement of Facts, Appellee refers to conflicting evidence; however, the citations made do not indicate conflicting evidence as to plaintiff's testimony regarding the checks that she presented to her mother for day care costs.

II

DR. STEWART'S RECOMMENDATION WAS NOT UPDATED AND THE COURT DID NOT ADEQUATELY CONSIDER THE FACTORS OF STABILITY FOR THE MINOR CHILD AND THE RELATIONSHIP WITH HER SISTER, BRANDI

First of all, in Appellee's Argument relating to the Court giving greater weight to Dr. Stewart's evaluation than Dr. Swaner

or Dr. McManemin's testimony, the Appellee stated at page 11 of his Brief that Dr. Stewart interviewed Paige's day care provider and performed an MMPI and Rotter sentence completion test on Paige. Both representations are in error. At the time Dr. Stewart did her evaluation, Paige did not have a day care provider since she was only 10 months old and, further, there were no tests performed on Paige due to her age.

Again, the Court seemed to ignore the evidence presented by Dr. Swaner and Dr. McManemin in regards to the relationship of the minor child with her sister, Brandi, as well as the stability of the environment that the minor child was in. Specifically, the Court did not consider the fact that Dr. Stewart's evaluation was done 8-9 months before the Trial and that Dr. McManemin's and the day care provider, Myra Brodale's observations of the minor child during the 8-9 months prior to the Trial specifically indicated that the minor child was a happy, healthy and emotionally well-adjusted child and that her environment and present circumstances were extremely stable and emotionally rewarding to Paige. (Vol. II, T.24-29, Vol. II, T.58-59)

Stability of the present custodial arrangements and circumstances for the minor child is a dominant factor as not only mentioned in the various cases dealing with custody of children but also in factors to be considered by an evaluator pursuant to Rule 4-903 of the Utah Code of Judicial

Administration. Specifically, that factor indicated that the evaluator must determine the general interest in continuing the previously determined custodial arrangements where the child is happy and well-adjusted. Not only was the child happy and well-adjusted during the first 18 months of her life wherein the plaintiff had custody but the only evidence presented to the Court regarding the same was that of both Dr. Swaner who found that both Paige and her sister were doing extremely well and there was no reason to disturb the present custody arrangement and the stability of the circumstances. Dr. Stewart only indicated that the child was young enough to make a change but did not present very much evidence in regards to the trauma that would occur with the minor child by changing the custody. More specifically, Dr. Stewart did not do an update in regards to her evaluation and could present no evidence whatsoever to the Court in regards to what occurred during the eight months prior to the Trial when the bonding between Paige and her sister, Brandi, increased dramatically and the stability of the custodial arrangement with the plaintiff became more and more apparent. Dr. McManemin, who observed the minor child Paige a few weeks before the Trial, indicated that there was a very close relationship between Paige and Brandi and that, again, it would not be in Paige's best interest to upset that relationship or the stability which Paige had being in the custody of her mother. (Vol. III, T.59)

Since the Court did not adequately consider those factors and Dr. Stewart did not consider the factors during the previous eight months prior to the Trial the Court abused its discretion in not considering the evidence of Dr. Swaner and Dr. McManemin and Myra Brodale, the day care provider, regards to the stability of the minor child, Paige, and her relationship with her sister, Brandi, during the immediate eight months prior to the Trial.

The Court seemed to ignore the only evidence that was presented to it in regards to the trauma that would occur with the minor child due to her separation from her primary caretaker, the plaintiff. Specifically, Dr. McManemin's testimony (Vol. III, T.55-63) indicated that at the age of the minor child, Paige, that she not be separated from her mother who was the primary caretaker and that it would be traumatic. In fact, it has proven to be traumatic for Paige. Further, Dr. McManemin testified as to the bonding with the minor child, Brandi, that had been observed just prior to the Trial and not 8 or 9 months prior thereto when Dr. Stewart did her evaluation. The evidence was that both Brandi and Paige were happy, well-adjusted children and very closely bonded and, further, that Paige did not want to be with her father.

The Court definitely abused its discretion in not considering the evidence of Dr. McManemin in regards to the minor child at the time of the Trial and should not have given so much

credibility to observations made by Dr. Stewart 8 or 9 months prior thereto.

III

THE VISITATION AWARDED TO THE PLAINTIFF WAS RESTRICTIVE AND NOT BASED UPON THE EVIDENCE BEFORE THE COURT

Appellee, on page 16 of his Brief, makes a statement that the visitation schedule is no more restrictive than the then existing District Court Standard Visitation Schedule and refers to Volume I, T. 152. However, there is nothing in the transcript which would support said statement since the only reference to the same is in a question asked by an attorney and is not evidence that was presented to the Court by any of the witnesses. The fact remains that the visitation awarded by the Court was restrictive and did not give the plaintiff overnight visitation. The Court's standard visitation schedule only deals with school-age children and there was no suggested schedule in regards to children under that age. Further, Appellee, on page 17 of his Brief, states that there was testimony that overnight visitation could be detrimental to Paige. Again, there is no citation to the transcript and said statement is totally inaccurate. There was no evidence presented to the Court that overnight visitation with Paige's mother, plaintiff, would be detrimental to Paige. In fact, the evidence was that the plaintiff had custody of Paige during the first 18 months of her life and the transcript is void of any evidence presented to the Court that continuing any overnight visitation with the plaintiff

would have any detrimental effect whatsoever upon the minor child, Paige. The evidence supported to the contrary since both Dr. McManemin, Dr. Swaner and Myra Brodale testified that the relationship between the plaintiff and the minor child, Paige, was healthy and that said minor child was happy, well-adjusted and doing fine. Again, the testimony of Dr. Swaner was that the defendant, Mr. Evans, should not have overnight visitation because he was not the primary caretaker. Dr. Swaner was never asked about overnight visitation with the plaintiff and, in fact, there was not any evidence presented to the Court whatsoever in regards to the plaintiff being awarded overnight visitation. Further, as was stated in Appellant's initial Brief the findings of the Court are totally void of any finding in regards to why the plaintiff's visitation was restricted so that she could not have any overnight visitation. Denying the plaintiff said liberal visitation, specifically overnight visitation, was totally inequitable under the circumstance of the evidence presented to the Court and manifested a clear abuse of discretion and a bias of the trial court against the plaintiff, and was not in the best interest of the minor child.

IV

THE COURT MISINTERPRETED THE EVIDENCE IN ORDERING THE PLAINTIFF TO PAY $1,500.00 TO DR. STEWART

First of all, there was no evidence presented to the Court

that Dr. Stewart's fee was, in fact, $3,000.00. The truth is that Dr. Stewart's fee was $2,500.00 and then after the Trial she charged an additional $500.00 for her appearance in Court. It seems not only inequitable but an abuse of discretion to order the plaintiff to pay for Dr. Stewart's Court appearance when the Court had to pay for the Court appearances of her two expert witnesses, Dr. Swaner and Dr. McManemin, especially when the defendant's income far exceeded the plaintiff's. Plaintiff did suffer inequities and she not only lost custody of the minor child but lost income of child support of $195.00 per month and had to start paying child support of $153.00 per month. She also had to pay all of her own attorney's fees and then was stuck with an additional $1,500.00 payment to the defendant for Dr. Stewart when, in fact, the defendant's income was almost $1,000.00 a month more than the plaintiff's. Further, the Court makes no specific finding as to why the Court felt that the plaintiff should pay one-half of not only Dr. Stewart's fee but one-half of her fee for appearing at the Trial.

V

THE COURT IGNORED THE EVIDENCE PRESENTED BY THE PLAINTIFF AS TO THE DAY CARE COSTS

At the Trial the plaintiff presented to the Court Exhibit "3" (Vol. I, T. 41-42), a copy of which is attached hereto as Exhibit "A". Said Exhibit "3" specifically was not only a

summary of the day care costs incurred but the actual check numbers and copies of the checks indicating the total amount that the plaintiff paid for day care costs.

The only conflicting evidence as suggested by the Appellee in his Reply Brief was that of plaintiff's half-sister who indicated that the money paid to plaintiff's mother was to pay for food. This was not conflicting evidence and did not contradict the evidence presented by the plaintiff that she had, in fact, paid her mother the $100.00 per month for the day care of the minor child, Paige. The Trial Court clearly committed error in not awarding to plaintiff one-half her day care costs since the Court ordered the plaintiff to pay to defendant one-half of any day care costs incurred after the change of custody. The mere fact that plaintiff's mother testified that she told a lending institution that she was not charging the plaintiff day care is not sufficient evidence to indicate that, in fact, the plaintiff had not paid her mother for the day care since the evidence clearly indicated that she has as evidenced by the checks and the notations thereon that they were for day care. Plaintiff should have been awarded judgment against the defendant for one-half of her day care costs.

CONCLUSION

The Court's award of custody to defendant was an abuse of discretion and should be reversed and custody awarded to the plaintiff, the primary caretaker of the minor child.

The visitation awarded to the plaintiff was restrictive in nature and showed a definite lack of concern by the Trial Court as to the effect on the minor child since the plaintiff had been the primary caretaker during the first 18 months of said minor child's life and there was no evidence presented which would support the Court's decision to restrict overnight visitation with the plaintiff.

Both the Court's Order denying plaintiff her day care expenses and ordering her to pay one-half of Dr. Stewart's evaluation were unsupported by the evidence and abuse of discrfetion and should be reversed with a redetermination in regards to the same.

Respectfully submitted this 15th day of November, 1993.

RICHARD S. NEMELKA
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of Appellant's Reply Brief to Randy S. Ludlow, Attorney for Appellee, 311 South State Street, Suite 280, Salt Lake City, Utah 84111, this 15th day of November, 1993, postage prepaid.

Child Care Related Expenses for Paige Evans

		Ck #
March 1991	100.00	2852
April	100.00	2795
May	100.00	2836
June	100.00	2852
July	100.00	2873
August	100.00	2883
September	100.00	2895
"	75.00	Counter ✓
October	100.00	2914
November	100.00	2956
December	100.00	2975
January 1992	100.00	3010