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Patricia Maughan Jeppson v. Saylor Jeppson : Respondent's Brief

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CASES CITED

STATUTES CITED

IN THE SUPREME COURT
of the
STATE OF UTAH

PATRICIA MAUGHAN JEPPSON,
Plaintiff and Appellant,
vs.
SAYLOR JEPPSON,
Defendant and Respondent.

Case No. 10452

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

This appeal concerns the custody and visitation privileges of the parties, with respect to their children.

DISPOSITION IN LOWER COURT

The trial court, pursuant to petition of the defendant, after hearing evidence and interviewing the oldest child, modified the provisions of its prior decree with respect to custody and visiting privileges of the parties.

RELIEF SOUGHT ON APPEAL

Defendant requests this court to affirm the modified Decree entered July 27, 1965, from which appeal was taken.

STATEMENT OF FACTS

The chronology of events as set forth in the Appellant's Brief, except as supplemented or modified in the argument, is accepted by the Respondent.

Because the two points raised by Appellant are closely interrelated, both will be answered by Respondent in the same argument to avoid needless repetition.

The record of the Court will be cited as R., the transcript of the hearing held June 29, 1965, which is not separately numbered, will be cited T. The transcript of the hearing held July 28, 1964 and August 4, 1964, will be cited T. 1964.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DETERMINING THERE HAD BEEN A CHANGE OF CIRCUMSTANCES SUFFICIENT TO JUSTIFY A MODIFICATION OF THE CHILD CUSTODY PORTION OF THE DECREE, WHICH MODIFICATION IS IN THE BEST INTERESTS OF THE CHILDREN OF THE PARTIES.

Section 30-3-5, Utah Code Annotated, (1953), provides:

> "When a decree of divorce is made the court may make such orders in relation to the children, property and parties, and the maintenance of the parties and children, as may be equitable; provided, that if any of the children have attained the age of 10 years and are of sound mind, such children shall have the privilege of selecting the parent to which they will attach themselves. Such sub-

sequent changes or new orders may be made by the court with respect to the disposal of the children and the distribution of the property as shall be reasonable and proper."

This statutory provision is a clear mandate to the trial court authorizing reasonable modifications of decrees previously made concerning the custody and visiting privileges with respect to the children of the parties. The purpose is to do equity between the parties and to protect the well-being of the minor children.

Both parties are required to make every reasonable effort to comply with an existing decree, and a failure ". . . to comply or to make a reasonable effort to comply, is contempt, . . . so long as the decree remains in effect." However, if there has been a change of circumstances, the proper procedure is a petition to modify the decree. *Osmus v. Osmus*, 198 P.2d 233, 114 Utah 216, (1948).

The appellant suggests that because the decree which the defendant sought the court to review had been in effect for a period of approximately nine months, that the defendant's petition for modification must be viewed with suspicion. It is submitted, however, that the petition was not only timely, but necessary if defendant was to avoid being in contempt of court, because of Gary's refusal to spend six weeks of his summer vacation in California, as required by the Decree dated August 21, 1964. He also had the greater responsibility of consider-

ing the welfare of the child. A petition was properly submitted to the court for the purpose of considering the change of circumstances which had occurred since the previous decree was entered. Gary, the eldest of the three children of the parties, was 11 years old at the time of the hearing on June 29, 1965, was in the Fifth Grade and had indicated his unwillingness to make the six weeks visit to the plaintiff's home in California (T. 5, 6, R. 48) as required in the Decree dated August 21, 1964 (R. 40, 41). His father, respondent here, had instructed him that he was required to make the visit (T. 5, 6). Gary indicated that if he was forced to make the contemplated visit, that he would "run away" (T. 6, R. 48). He had hostile feelings toward Mr. Allyn Schroeder, plaintiff's present husband (T. 5, 65), and had become involved in a summer program in Salt Lake City, in which he was much interested. He was very active in the Cub Scout Program, was playing on a Little League Baseball Team, and wished to join the family in a summer activity of swimming instruction (T. 4, R. 48). Additionally some emotional antagonism existed between Gary and the plaintiff and Gary maintained strong feelings about her (T. 20). The court undoubtedly felt that requiring Gary to spend six weeks of his summer vacation in her home would intensify these feelings. Plaintiff made no effort to see her son when she made an unannounced trip to visit her parents in Preston, Idaho, although she passed by Bountiful,

Utah, where Gary and defendant live. She did not attempt to see Gary because she "thought it would upset him" (T. 47, 11).

Mr. Gene Kartchner, one of Gary's school teachers, who had become "quite well" acquainted with him (T. 30), observed that Gary had emotional problems and exhibited an antipathy toward girls (T. 32). He was of the opinion that the contemplated visit to California would be an emotional experience for him (T. 33, 37).

This court has previously expressed the policy of the courts in Utah in cases where the custody of children is altered.

> "While the parents are entitled to some consideration, the paramount objective in such proceedings is not therapy for them, nor vindication of asserted parental rights, but it is the welfare of the children.
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> * * *
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> "Parental love must find expression, to some extent at least, in sacrifice for the happiness and welfare of children, rather than in merely insisting upon privileges of parenthood." *Johnson v. Johnson*, 7 Utah 2d 263, 265, 267, 323 P.2d 16 (1958).

Before readjusting the visiting periods of the parents, full opportunity was accorded both to present evidence concerning the request of the natural father to have temporary custody of his two children in Utah for two weeks during their summer vacation, and to restrict the length of the visit of

Gary in California. The August 24, 1964 Decree had limited the father's opportunity to visit the two younger children, ages 10 and 7, to the home of the plaintiff in California. The court also conducted an interview with Gary (T. 70).

Adjusting the rights of natural parents with respect to their children, is a difficult responsibility and the trial court has properly been accorded considerable discretion in making this judgment.

> "Due to the equitable nature of such proceedings, the proper adjudication of which is highly dependent upon personal equations which the trial court is in an advantaged position to appraise, he is allowed considerable lattitude of discretion and his orders will not be disturbed unless it appears there has been a plain abuse thereof." *Johnson v. Johnson*, 7 U.2d 263, 267-268, 323 P.2d 16 (1958).

The court properly found there had been a substantial change in circumstances from the time of the previous hearing in August of 1964, to the date of the hearing at the end of the school year in 1965. Certainly changes, beyond those minimum basic changes cited in the Findings of Fact upon which the Decree of July 27, 1965 was based, existed, as are shown in the Record.

Gary was now nearly 12 years old and he had developed broader interests. He had completed the 5th grade and was doing well in school, with above average performance, making primarily A's and B's (T.. 3). He had become involved in the activi-

ties of the Cub Scout Program (T. 3). Further, he had made the Little League Baseball Team and was scheduled to play through the first week in August, 1965 (T. 3, 4). It is understandable that he anticipated the possibility of playing in the All Star Game (T. 4). He was also planning to engage in swimming instruction during much of the summer (T. 4). The activities in which he was engaged were normal for a boy of his age. It was important for him to engage in these activities with his friends and to succeed in a program which he had begun. When Gary was informed by his father that he was to spend six weeks of his summer vacation in California, beginning the first of July, "he began crying" and said he didn't want to go (T. 6).

During the summer of 1964, the defendant took Gary to California to visit plaintiff and the two younger children. Although not required to take Gary, he did so because he thought he should visit with his brother and sister (T. 9). Although defendant took Gary to the plaintiff's home on four separate occasions during the two days they were there for the purpose of visiting her, she did not see him once (T. 9, 10).

Initially Gary had lived with his mother and step-father in California. Gary later told Mr. Schroeder in a telephone conversation initiated by Mr. Schroeder, to "leave him alone" and that he "wouldn't go anywhere" with him (T. 65). With this background it can be understood that Gary had

some justification for his feelings of disappointment in being required to spend six weeks of his summer vacation in a home where he would be unhappy. Mrs. Schroeder indicated that she could arrange to have Gary attend scout meetings in California (T. 48). However, to a boy of 12 years, the activity itself, without the association of his friends, loses much incentive and purpose. Further, Mrs. Schroeder was of the opinion that if she had Gary for a longer period during the summer that this would "help his emotional feelings toward [her] and toward his step-father." (T. 48). Children are plain-spoken and develop strong feelings. Their affections and loyalties cannot be transferred with the apparent ease of some adults. His antagonism toward Mr. Schroeder, had developed over a period of time. He had seen his home broken and his mother going out on dates with Mr. Schroeder while Mr. Jeppson, his father had tried to put a stop to it (T. 1964, 71, 72). He had previously lived with his mother in her new home with his step-father.

A boy of tender years should not be required to do a particularly distasteful thing, regardless of the consequences to him, if its principal purpose is "therapy" for the parent.

The plaintiff's own attitude with respect to the visiting privileges which had been established by the court in August of 1964, is also indicative of substantial change. In April, 1965, she with Mr. Schroeder and the two younger children, made an

unannounced trip to visit her parents in Preston, Idaho. When defendant learned that Mrs. Schroeder was in Preston, he talked to her at length on the telephone and requested, but was denied, the right to speak to his two children (T. 55). A portion of that testimony follows:

"Q Do you feel he (Mr. Jeppson) should not have the right to speak with these children or visit with them at this time, under the supervision of the Court?

A I don't know.

Q As a matter of fact, in this conversation, this telephone conversation, he asked you to let the children speak with him on the telephone when you were up in Preston, did he not?

A This is true. He did.

Q And you refused to let them come to the phone and speak to him; isn't that right:

A Yes. This was our vacation.

Q You have answered my question. You refused to let them come to the phone and speak with him, didn't you?

A That's right. I did.

Q Yes. In fact, you gave the reason they were out playing, didn't you?

A That's right. They were.

Q Now, when you went to Preston, did you go through Bountiful?

A No.

Q How did you get to Preston?

A We went through the freeway. This isn't through Bountiful.

Q Well, that's near Bountiful, isn't it?

A Well, you're as familiar with the road as I am. But we did not go through Bountiful.

Q Did you think it might be important to Gary if you had stopped in Bountiful and visit with him just a few minutes on your way back to California?

A No.

Q Did you think it might be important to the other children for them to visit with Gary for a few minutes in Bountiful, or maybe an hour or so, on the way back?

A I thought it was important if Gary could come up there and visit.

Q Did Mr. Jeppson tell you, in the course of the conversation, that you could come down and visit with Gary if you wanted to?

A Yes. I believe that was mentioned, after he told me that Gary had torn up my letters.

Q And that's the reason he said he thought you ought to come down and visit with him, because of Gary's attitude towards you; isn't that so?

A No.

Q Has Mr. Jeppson ever asked you for your telephone number in California so he could call the children?

A Yes, he has.

Q Have you given it to him?

A No, I have not.

Q So that he could not even call them on their birthday if he wanted to; is that right?

A I suppose. (T. 55-57).

* * *

"Q How did you come up here today, for this trip?

A By car.

Q By car?

A that's right.

Q Mr. Schroeder drove?

A This is true.

Q Did you bring the other children with you?

A Yes.

Q And would you have any objection to the defendant visiting them while you are here, under the supervision of the Court?

A I would." (T. 58).

* * *

"Q (By Mr. Rex J. Hanson) In other words, do you think the father should have the right to visit these children privately for a few minutes while they're here?

A If I were sure he wouldn't agitate and upset them.

Q I didn't ask you that. I said, do you think he should have the right to visit them while they're here, without your being there?

A I wish to abide by the Court decree,

which states he can visit them in California. We don't ask any more from Gary." (T. 58-59).

That portion of the August 1964 decree, limiting defendant's rights to visit the younger children, Terry age 10 and Jed age 7, in California only, constituted a severe restriction. When this, is coupled with the fact that Mrs. Schroeder refused to give Mr. Jeppson her telephone number so that he might visit with them occasionally on the telephone, and that she had denied Mr. Jeppson the right to visit with them personally or by telephone when in Utah, is certainly a substantial change in circumstances not contemplated by the earlier decree. As was observed in *Johnson vs. Johnson*, 7 U.2d 263, 265, 232 P.2d 216 (1958), the paramount objective in a child custody proceeding is not "therapy for the parent nor vindication of asserted parental right", but is the welfare of the children. Certainly it is for the benefit of the children that they have reasonable contact with their natural father, and if their mother insists on arbitrarily denying this right, such constitutes a substantial change in circumstances which would itself justify the court's order modifying the visiting privileges of the natural father.

A round trip of some 1400 miles was necessary for defendant to visit his children in California and plaintiff's suggestion that the defendant, having only visited those children in California on two occasions between August 1964, and December 1964, is

no indication of any lack of concern or love for them. At the time of the hearing Terry was ten years old and Jed was seven years old. They were one year older than when the Decree of August 1964 was entered. This would also entitle the Court to reconsider the limitation placed upon the defendant of visiting the children only in California. Further, the modified order permits the defendant to visit the younger children at his home in Utah for two weeks during the summer, and also provides for the continuity of that visit as pertains to the children by requiring Gary to visit his mother in California for two weeks. This affords an opportunity for all of the children to be together for one month each summer. Such an arrangement is certainly in the best interests of the children even though not agreed to by Mrs. Schroeder. The fact that Mr. Schroeder, the plaintiff's present husband, has business interests in Utah and makes three or four trips per year is a new factor the court was entitled to consider (T. 60).

At the time the court entered its modified Decree on July 27, 1965, a further hearing was set for May 24, 1966. It was undoubtedly the court's intention to review the matter for the purpose of determining if the welfare of the children was being best served. In view of the background of this case, it is submitted that this was a proper reservation of the equitable powers of the Court.

CONCLUSION

It is respectfully submitted that the evidence adduced at the hearing was sufficient to support the findings of the court that following entry of the Decree on August 21, 1964, there had been a substantial change of circumstances sufficient to justify a modification in accordance with the provisions of the decree entered July 27, 1965, and that the best interests of the children are served thereby.

Respectfully submittd,

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