

2002

John William Cox v. Brenda Lyn Krammer [formerly Cox]: Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOHN WILLIAM COX,)	<u>BRIEF OF APPELLEE</u>
)	
Petitioner/Appellee,)	
)	
vs.)	Case No. 20020696 CA
)	
BRENDA LYN KRAMMER,)	
[formerly COX],)	Priority No. 15
)	
Respondent/Appellee.)	[Oral Argument Requested]

BRIEF OF APPELLEE

An Appeal From the Final Judgment
Of The Second Judicial District Court Of Weber County
Ogden Department, State Of Utah
The Honorable Ernie M. Jones, Presiding

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FILED
Utah Court of Appeals
DEC 27 2002
Paulette Stagg
Clerk of the Court

LIST OF ALL PARTIES IN THE DISTRICT COURT

The following parties and attorneys appeared in the proceeding in the trial court:

1. John William Cox, Petitioner/Appellee, represented by Laura M.

Rasmussen, attorney at law of Dan Wilson & Associates and F. Kim Walpole of Law Offices of Vlahos & Walpole.

2. Brenda Lyn Krammer, formerly known as Cox, Respondent/Appellant, represented by George M. Handy and Raymond B. Rounds, attorneys at Law.

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IN THE UTAH COURT OF APPEALS

JOHN WILLIAM COX,)	
Petitioner/Appellant,)	Case No. 20020696 CA
vs.)	Trial Court No. 984901378 DA
BRENDA LYN KRAMMER,)	
formerly COX,)	
Respondent/Appellee.)	Priority No. 15

BRIEF OF APPELLEE

JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to the Constitution of the State of Utah, Article VIII, Section 1 et. seq., Utah Code Ann. § 78-2a-3 (2) (h) and Rules 3 and 4 of the Utah Rules of Appellant Procedure as this is an appeal from a final judgment issued from the Second Judicial District Court of Weber County, Ogden Department, State of Utah, by the Honorable District Court Judge Ernie W. Jones, presiding, denying Petitioner's Petition to Modify the Decree of Divorce of the parties in his request for an award of custody of the minor child of the parties to Petitioner.

ISSUES PRESENTED FOR REVIEW

1. Did the Trial Court err in determining that Petitioner's Motion to Modify Custody did have serious merit and was brought in good faith and, therefore, was justified in not awarding Respondent's attorney's fees, pursuant to the Utah Code Annotated §30-3-5(5)?
2. Did the Trial Court err in ordering Respondent to pay one-half of the costs of the home evaluation?

APPLICABLE STATUTES

Utah Code Annotated §30-3-5(5):

(5) If a petition for modification of child custody or visitation provisions of a court order is made and denied, the court shall order the petitioner to pay the reasonable attorney's fees expended by the prevailing party in that action if the court determines that the petition was without merit and not asserted or defended against in good faith.

Utah Code Annotated §78-27-56:

Attorney's fees - Award where action or defense in bad faith - Exceptions.

(1) In civil action, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) Finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

Rule 6-401(4), Code of Judicial Administration - Domestic Relations Commissioners:

(4) *Objections.* With the exception of pre-trial orders, the commissioner's recommendation is the order of the court until modified by the court. Any party objection to the recommended order shall file a written objection to the recommendation with the clerk of the court and serve copies on the commissioner's office and opposing counsel. Objections shall be filed within ten days after the date of the subsequent written recommendation made by the commissioner. Objections shall be to specific recommendations and shall set forth reasons for each objection.

STATEMENT OF THE CASE

A. Nature of the Case. This case involves Petitioner's Motion to Modify the child custody of the parties' minor child from "joint custody" of Brittany, with Respondent being designated the custodial parent and Petitioner standard visitation rights, to an award of custody of Brittany to Petitioner as detailed and set forth in Petitioner's Motion to Modify Custody, due to a substantial and material change of circumstances in Respondent's lifestyle, as being in the best interests of Brittany.

B. Course of Proceedings. Petitioner and Respondent were husband and wife, with their daughter, Brittany, born on the 18th day of June, 1996. Petitioner filed a divorce action against Respondent and the matter was heard as an uncontested default divorce on the 12th day of January, 1999. The Decree of Divorce was signed by the

Honorable Roger S. Dutson on the 9th day of February, 1999. The Decree of Divorce provided, among other things, that “the parties were awarded joint custody of Brittany, with Respondent, being designated the custodial parent and Petitioner awarded standard visitation rights, as outlined in Utah Code Annotated §30-3-33, *et. seq.*, as amended.”

On the 23rd of June, 2000, Petitioner filed his Motion to Modify Custody and plead therein that “since the entry of the Divorce Decree on February 9, 1999, the circumstances have materially changed, as set forth in the Memorandum of Points and Authorities, Affidavits and other evidence, which is attached as Exhibits to the Memorandum.”

Several Motions were filed by the parties, through their respective attorneys, prior to the trial date of April 8, 2002, including a Motion in Limine filed by Petitioner to include evidence of Respondent’s current husband’s criminal arrest, conviction, and/or court documents relating thereto, which Motion was denied as to any evidence or testimony relating to the matter entitled “State of Utah, Plaintiff, vs. Jeremy Wade Krammer, Defendant, Case No. 961700432. Respondent’s filed a Motion for Summary Judgment under Rule 56 of the Utah Rules of Civil Procedure on the basis that Petitioner had failed to meet the test of a substantial and material change in circumstances sufficient to review a modification of the current custody situation, which was denied by the trial court. Neither of these Motions were appealed.

Trial was commenced on the 8th day of April, 2002. The trial court issued its Memorandum Decision on the 10th day of June, 2002 (*See* Exhibit “A” to Respondent’s Addendum) and the trial court ultimately signed the Findings of Fact, Conclusions of Law (*See* Exhibit “B” to Respondent’s Addendum) and Judgment (*See* Exhibit “C” to Respondent’s Addendum) on the 12th day of July, 2002, which were entered on the 19th day of July, 2002.

C. Disposition in the Trial Court: Judgment was entered in favor of Respondent, the Court holding, among other things, “that there is not a material change in circumstances to justify a change in custody” and that “[E]ach party will pay their own attorney fees. [T]he petition of John Cox did have serious merit and was brought in good faith.” (*See* page 7 of 9 of the trial court’s Memorandum Decision, in particular, paragraphs 1 and 9, attached as Exhibit “A” to Respondent’s Brief.)

D. Statement of Facts Relevant to the Issues Presented for Review:

1. The trial court found and ruled that “[E]ach party will pay their own attorney fees. The petition of John Cox did have serious merit and was brought in good faith. See 30-3-5(5), U.C.A.” *See* page 7 of 9, paragraph 9 of trial Judge’s Memorandum Decision, attached as Exhibit “A” to Respondent’s Brief.

2. The trial court found and ruled that [T]he Court concludes, however, that Brenda Krammer should pay one-half of the cost incurred to have Phil Johnson conduct the custody evaluation in this case.” *See* page 7 of 9, paragraph 8 of trial Judge’s Memorandum Decision, attached as Exhibit “A” to Respondent’s Brief.

SUMMARY OF ARGUMENTS

1. The trial court did not commit error in determining that Petitioner’s Motion to Modify the Decree of Divorce for a change of custody did have serious merit and was brought in good faith and the Trial court was justified in denying Respondent’s request for an award of attorney’s fees and costs, pursuant to Utah Code Annotated §30-3-5(5) as, given the trial court’s discretion in the matter, which was not abused, the trial, and the detailed Findings and Conclusions of the court, the Petitioner’s Motion had serious merit and was brought in good faith.

2. The trial court did not abuse its discretion in making its Finding and Order that the parties share in the costs of the custody evaluation as the court found that Petitioner’s Motion had serious merit and was brought in good faith, having found that even with the denial of Petitioner’s requested change in custody, the trial Court concluded, that Respondent should share in the costs in changing the Commissioner’s Pre-Trial Order, as it was not binding on the Trial court.

ARGUMENTS

POINT 1

THE TRIAL COURT DID NOT ERR IN DETERMINING THAT PETITIONER'S MOTION TO MODIFY THE CUSTODY AWARD DID HAVE SERIOUS MERIT AND WAS BROUGHT IN GOOD FAITH AND IN DENYING RESPONDENT'S REQUEST FOR AN AWARD OF ATTORNEY'S FEES PURSUANT TO UTAH CODE ANNOTATED SECTION 30-3-5(5).

The Appellant Courts accord the Trial Court's Findings great deference and will not disturb those findings unless they are against the clear weight of the evidence and will set aside factual findings only if they are clearly erroneous. *See Anderson v. Brinkerhoff*, 756 P.2d 95, at 98 (Utah App. 1988). In *Anderson*, after reviewing the trial court's Findings, the Court of Appeals affirmed the decision of the trial court as its Findings were supported by ample evidence as they are here in this immediate case.

Respondent in its Brief refers this court to the two-part procedure for obtaining a change of custody post divorce through a requested modification of the Decree by detailing the standard as set forth in *Hogge v. Hogge*, 649 P.2d (Utah 1982), *Kramer v. Kramer*, 738 P.2d 624 (Utah 1987), as amply cited and detailed in Respondent's Motion for Summary Judgment, filed, heard and denied with the trial court. The trial court found sufficient basis in its denial of Respondent's Motion for Summary Judgment and as did the Domestic Relations Commissioner, in his Pretrial Order to submit the question of a change

of custody of the minor child of the parties to an evidentiary hearing before the trial judge, which was done. Neither party appealed the denial of Respondent's Motion for Summary Judgment. Also, Petitioner, in his Motion and Memorandum for Change of Custody, detailed the same cases and standards for a post divorce change of custody.

The Utah Code Annotated §30-3-5(5) does specifically provide that, if a Petition for Modification of child custody is denied, that the court shall order the Petitioner to pay a reasonable attorney's fees to the prevailing party, if and only if, the court makes two separate findings. Firstly, the trial court must find that the Petition to Modify the custody is without merit and secondly, the trial court must find that the Petition was not asserted in good faith. If the trial court does not make a finding in favor of the non-petitioning party on both requirements, then the trial court does not award the non-petitioning party attorney's fees.

There are no Utah cases directly interpreting this statute, but by analogy, although this statute is more fact specific to change in custody cases, the cases interpreting Utah Code Annotated §78-27-56, can be applied with essentially the same result and application as set forth below, in denying Respondent's request for attorney's fees pursuant to Utah Code Annotated §30-3-5(5), based on the trial court's specific finding that Petitioner's Motion did have serious merit and was brought in good faith.

This court found in *Utah Dep't of Social Servs. V. Adams*, 806 P.2d 1193 (Utah Ct. App. 1991) that an award of attorney's fees premised on a finding of bad faith is, to an extent, a matter within the discretion of the trial court, and appellate deference is owed to the trial judge who actually presided over the proceeding and has first-hand familiarity with the litigation.

This court later found in *Jeschke v. Willis*, 811 P.2d 202 (Utah Ct. App. 1991), that the "without merit" determination is a question of law, and therefore, the appellate court will review it for correctness, but that a finding of bad faith is a question of fact and is reviewed by the appellate court under the "clearly erroneous" standard.

As cited by Respondent, the Utah Supreme Court case of *Watkiss & Campbell v. Foa & Son*, 808 P.2D 1061 (Utah 1991), held that Utah Code Annotated Section 78-27-56, clearly states that the trial court shall award attorney fees to the prevailing party only if it determines (1) that the action is without merit and (2) that the action was brought in bad faith. If the court finds both elements of the statute, then it has no discretion and must award reasonable attorney fees to the prevailing party. This is supported by Respondent's case of *Hermes Associs. V. Park's Sportsman*, 813 P.2d 1221 (Utah Ct. App. 1991).

In the immediate case at hand, the trial court clearly found that Petitioner's Motion to Modify had serious merit and was brought in good faith and denied an award of attorney's fees as it must with no finding of lack of merit or bad faith.

As cited by Respondent in *Wardley Better Homes & Gardens v. Cannon*, 21 P.3d 235 (Utah Ct. App. 2001), Respondent in this case has the obligation of marshaling the evidence regarding bad faith in Petitioner's filing and bringing of his Motion. A review of the record will show that Petitioner filed a detailed Motion and Memorandum for change of Custody, the matter was pre tried before the Commissioner and in the Pretrial Order the Commissioner ruled "[T]hat Petitioner has met the requirements to re-open the issue of custody." Respondent filed a Motion for Summary Judgment to have Petitioner's requested Motion for change of custody dismissed, which Motion was denied, after Petitioner's Motion to bring in criminal activity of Respondent's husband was denied by the trial court. The trial court then found or ruled that Petitioner's Motion did have **"serious merit and was brought in good faith."** and specifically cited the parties and their respective attorneys to Utah Code Annotated §30-3-5(5). (Emphasis added).

Finally, the Utah Supreme Court, in *Canyon Country Store v. Bracey*, 781 P.2d 414 (Utah 1989), found that this statute does not require written findings on the bad faith issue. If a court finds bad faith, but in its discretion limits or awards no attorney's fees, then

Section 2(b) does, however, require written findings. This ruling was clarified by *Jeschke v. Willis*, 811 P.2d 202 (Utah Ct. App. 1991), wherein it held, in considering *Cady v. Johnson*, 671 P.2D 149 (Utah 1983), *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950 (Utah Ct. App. 1989) and *Watkiss & Campbell*, 808 P.2d 1061 (Utah 1991), (all of which were cited by Respondent), that “[A]fter this case was submitted to us, the supreme court decided *Watkiss & Campbell v. v. Foa & Son*, (cites omitted),that the supreme court quoted *Schettler* favorably: ‘the trial court must make specific findings with regard to each element of the statute.’ *Id.* At 24. Therefore it appears that in future cases where attorney’s fees are awarded pursuant to the statute, specific findings are required.”

Under *Jeschke*, the trial court is now required to make written findings if the court finds bad faith and attorneys fees are awarded not where there is not a finding of bad faith. This is further clarified in the case cited by Respondent of *Wardley Better Homes and Gardens v. Cannon*, 21 P.3d 235 (Utah App. Ct. 2001). A careful review of Utah Code Annotated Section 78-27-56, reveals two subsections. The first subparagraph deals with the trial court, awarding, in civil action, reasonable attorney’s fees to a prevailing party if the court determines that the action was without merit and not brought in good faith, then its delineates an exception to an award of attorney’s fees, under its subsection, if not merit and bad faith are found by the trial court. Subsection (2) states that the trial court, in its

discretion, may award no fees or limited fees against a party, if bad faith and no merit were found in its prosecution or defense of a case, if the party has filed an affidavit of impecuniosity in the action or if the court enters in the record the reason for not awarding fees under Subsection 1.

In the immediate case at hand, the trial court never reaches subparagraph 2 because there was a holding or finding of serious merit and that the matter was not brought in bad faith. There is not exception to the award of attorney's fees to even consider under subparagraph 2, because the trial court never gets there. *Wardley* does not change the *Jeschke* holding which clarifies *Canyon*. There is still no requirement of the entry of specific Findings on the issue of the court denying an award of attorney's fees on a basis that Petitioner brought this action in good faith. Regardless, the court held that the action had serious merit and was brought in good faith.

Petitioner's Motion was not "frivolous" or of "little weight of importance in law or in fact" or "clearly [lack a] legal basis for recovery"... Respondent's Motion for Summary Judgment was denied and Petitioner allowed to proceed with his Motion and even after six days of trial and twenty-eight witnesses, the trial court, in his discretion held that Petitioner's Motion to Modify Custody was brought with serious merit and in good faith,

such that the denial was not clearly erroneous and the Order should stand in denying Respondent her attorney's fees.

POINT 2

THE TRIAL COURT DID NOT ERR IN ORDERING RESPONDENT TO PAY ONE-HALF OF THE COSTS OF THE CUSTODY EVALUATION BASED ON THE EVIDENCE RECEIVED AND EVEN WITH THE DENIAL OF PETITIONER'S MOTION TO MODIFY CUSTODY.

The Appellant Court accords the Trial Court's Findings great deference and will not disturb those Findings unless they are against the clear weight of the evidence and will set aside factual findings only if they are clearly erroneous. *See Anderson v. Brinkerhoff*, 756 P.2d 95, at 98 (Utah App. 1988), as cited by Respondent. In *Anderson*, the Court of Appeals, found, after reviewing the Findings of the trial Judge, that the trial court's Findings were supported by ample evidence and affirmed the Trial Judge's decision, as it should here.

In this case, Judge Ernie Jones, the Presiding Trial Judge, found that even though, based on the evidence presented, (only after detailing in his Memorandum Decision, those Findings of Fact that he arrived at, after six days of trial and twenty (28) witnesses), there is not a material change in circumstances to justify a change in custody, the "Court concludes, however, that Brenda Krammer should pay one-half of the cost incurred to

have Phil Johnson conduct the custody evaluation in this case.” See page 7 of 9, paragraph 8 of Exhibit “A” of Respondent’s Brief.

Respondent has misinterpreted Rule 6-401 of the Rules of Judicial Administration, as to the finality of Recommended Pretrial Orders of the Domestic Relations Commissioner. The Rule reads, in particular, subparagraph 4 that “[W]ith the exception of Pre-Trial Orders, the commissioner’s recommendation is the order of the court until modified by the court. All other Orders of the Commissioner can be objected to within ten (10) days of the hearing and reviewed *de novo* by the assigned District Court Judge.

Subsection (5) of the Rule entitled *Judicial Review*, states: “Cases not resolved at the settlement or pretrial conference shall be set for trial on all issues not resolved.....”

The Commissioner in his Pretrial Order stated that “Petitioner has met the requirements to re-open the issue of custody” and “[P]rior to scheduling a trial date, the Court orders a home evaluation be conducted.” Petitioner was ordered to pay the costs of the home evaluation, but the “[T]rial is to be continued until the home evaluation is completed, at which time counsel shall request that the matter be re-set.” See Pre-Trial Order, page 2, attached as Exhibit “E” to Respondent’s Brief.

Neither this case nor the matter of the custody evaluation and its costs were resolved at the Pretrial Conference, which resulted in the issuance of the Pre-Trial Order.

The custody evaluation was completed, Petitioner paid for the costs and then the matter went to trial. Petitioner did not file an Objection, because the Rule does not require nor even allow for an Objection to be filed to a Pretrial Order. A Pretrial Order in a Domestic case heard before a Domestic Relations Commissioner is issued preparing the parties for submission of the issues not settled to the trial court. One of the issues of Petitioners' request for a change in custody was the costs of the custody evaluation. The Pre-Trial Order, as approved by Respondent's Attorney, does not indicate that the issue of the costs of the Custody Evaluation was settled or resolved.

Rule 6-401 (2) entitled *Authority of court commissioner*, in particular, subparagraph (K) states as follows:

(K) Conduct pretrial conferences with the parties and their counsel on all domestic relations matters unless otherwise ordered by the presiding judge. The commissioner shall make recommendations on all issues under consideration at the pretrial and submit those recommendations to the district court.

In the immediate case, the Commissioner submitted a recommendation under the Pretrial Order that Petitioner the parties do a home evaluation and that Petitioner pay the costs of the home evaluation. This is a Pretrial Order and is not to be objected to but is a recommendation of the court as to those issues in the Order to be considered at the time of trial by the presiding judge. The presiding judge can consider the recommendations of the Commissioner as set forth in the Pretrial Order, but the presiding or trial judge makes the

final order in cases not resolved at the Pretrial Conference before the Commissioner. If the parties had agreed to who would pay the costs of the home evaluation at the time of the Pretrial and if that agreement was reflected in the Pretrial Order, than Petitioner concedes that it would be an issue that was resolved at the Pretrial Conference and not certified to the trial judge, but that is not the case here.

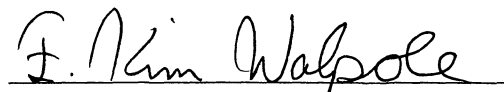
Again, the trial or presiding Judge, after six days of sworn testimony and twenty-eight (28) witnesses, in his discretion, concluded that even though Petitioner did not show a material change in circumstances to justify a change in custody, “that Brenda Krammer should pay one-half of the cost incurred to have Phil Johnson conduct the custody evaluation in this case.” This Order should be followed as a settlement of the issue of payment of the court ordered custody evaluation conducted by the parties.

CONCLUSION

The trial court's judgment is sufficiently supported by the evidence of the case and his findings and there has been no abuse of his discretion nor are the Findings clearly against the weight of the evidence nor erroneous, such that his ruling should be affirmed and no attorneys fees nor costs awarded and each of the parties should pay one-half of the custody evaluation costs already paid by Petitioner to Mr. Phil Johnson.

DATED this 26th day of December, 2002.

LAW OFFICES OF VLAHOS & WALPOLE


F. KIM WALPOLE
Attorney for Petitioner

Original Signature

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLEE was mailed, postage prepaid, to George E. Handy and Raymond B. Rounds, attorneys for Respondent/Appellant, at 2650 Washington Boulevard, Suite 102, Ogden, Utah 84401, this 26 day of December, 2002.

F. Kim Walpole