

1983

## Melody Leetham v. Richard D. Leetham : Brief of Appellant

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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MELODY LEETHAM, :  
Plaintiff-Respondent, :  
v. : No. 19250  
RICHARD D. LEETHAM, :  
Defendant-Appellant. :

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BRIEF OF APPELLANT

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Appeal from a Final Order and  
Decree of Divorce entered in  
the Third Judicial District  
Court, Tooele County, State of  
Utah, Honorable Scott Daniels,  
Judge.

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BRIEF OF APPELLANT

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NATURE OF THE CASE

The Appellant appeals from that portion of the trial court's Decree of Divorce which granted custody of the minor child of the parties to the respondent.

DISPOSITION IN THE LOWER COURT

The respondent filed an action for divorce on or about May 10, 1982. Following the trial which was heard before the Honorable Scott Daniels, a Decree of Divorce was entered, awarding in pertinent part the custody of the minor child to respondent.

RELIEF SOUGHT ON APPEAL

The appellant seeks an Order reversing the trial court's award of custody, and further seeks an award of custody of said minor child to the appellant.

STATEMENT OF THE WITNESSES

Appellant and respondent were married on or about October 1, 1979. There was one child born of the marriage, to wit: Casey Lynn Leecham, born May 24, 1980 (T. at 4). As a result of alleged marital difficulties, respondent brought suit for divorce (T. at 4). Respondent had custody of a minor child, Chris, from a prior marriage, said child was 5 1/2 years old at the time of trial (T. at 9).

Respondent was living in a mobile home during the time of the trial, with the two children in her custody (T. at 9). In response to question put to respondent during cross-examination, respondent denied that she had a male individual, not her husband, living with her in the mobile home (T. at 18), but admitted that the male individual named Rex Stromberg, spent the night, on an average of three to four nights a week (T. at 13). Further testimony by her neighbor, John Chidester, evidenced that Rex Stromberg stayed every night with respondent and had done so for approximately ten months (T. at 58-59). Respondent later testified on re-direct that Mr. Stromberg was at the home every day (T. at 62).

Respondent further testified that she was aware of a court order barring her from visiting bars or taverns where alcohol was served in the presence of Casey (T. at 19). Respondent stated that she had been in a bar at 10 o'clock in the morning after entry of the order, allegedly to return milk

bottles (T. at 61). She admitted to having a beer while Casey had a soft drink (T. at 61). Testimony of one Charles Johnson further illuminated the situation by stating that the respondent was sitting at the bar, drinking a beer, while Casey was playing on the floor behind the bar (T. at 55).

The appellant stated that he just separated from the respondent because he discovered her in a bar with the man she was now living with (T. at 28). His concern was that the life that the respondent was leading would be detrimental to the child (T. at 28), and that his major concern was what Casey would become when she grew up, having lived in such an environment (T. at 39).

In his closing argument, counsel for the respondent suggested that the sibling relationship between Casey and her half-brother should be the compelling reason for granting custody to the respondent, stating that the court should not separate the two (T. at 63). Respondent's counsel recommended that the court order the respondent to eliminate all over-night visits with males, and that Casey should not be present where liquor was being served, to which the court stated that there was already an Order to that effect (T. at 70).

Appellant's counsel, on closing, noted that the evaluation report on the respondent failed to include any information on psychological testing of the respondent, nor

did it mention anywhere in the report respondent's nightly visits with Mr. Stromberg (T. at 71). Counsel argued that the best interests of Casey would not be served by having her live in the environment desired by respondent, and that said best interests far outweighed the relationship Casey might have with her half-brother.

In making its Order, the trial court stated that it would be useless to order respondent not to take the child into bars or not to have her boyfriend stay over (T. at 76). The Court further recognized that if respondent was not going to refrain from doing those things while the custody hearing was pending, she certainly was not going to refrain from doing them afterwards (T. at 76). The Court recognized, however, that respondent's continued conduct could give rise to a modification petition (T. at 79). The Court stated that keeping Casey and her half-brother together was very important, and that the two should not be separated except for very compelling reasons (T. at 75) and awarded custody to the respondent (T. at 76).

#### ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING CUSTODY OF THE CHILD TO THE RESPONDENT, ERRONEOUSLY FAILING TO CONSIDER RESPONDENT'S IMMORAL ACTIVITIES, AND PLACED TOO GRANT AN EMPHASIS ON NON-SEPARATION OF THE CHILDREN, AND THEREFORE FAILED TO MAKE AN AWARD THAT WAS IN THE BEST INTERESTS OF THE CHILD.

Section 30-3-10, Utah Code Annotated, 1953 as amended, states as follows:



in any case of separation of husband and wife having minor children, or whenever a marriage is declared void or dissolved, the court shall make such order for the future of the minor children as it may deem just and proper. In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties. The court may inquire of the children and take into consideration the children's desires regarding the future custody; however, such expressed desires shall not be controlling and the court may, nevertheless, determine the children's custody otherwise. (Emphasis added.)

While this Court has recognized a judicial preference for the mother in child custody matters, it has further defined said preference. In Jorgensen v. Jorgensen, 599 P.2d 510 (1979), the Court provided that:

In fact, the preference operates to give custody to the mother all other things being equal. Since the preference is a creature of judicial policy, however, it must yield to the legislative mandate that the best interests of the child be given primary consideration. Whenever, pursuant to a consideration of such interests, any circumstances in the case preponderate in any favor of the husband, all things are not equal. Jorgensen, supra.

In the case at hand, all things were not equal, and in fact, the evidence leaned in favor of the appellant. The respondent admitted to a long-term illicit affair, being carried on in a small mobile home where the minor child lived. There was testimony that respondent had at least once been in a bar at ten in the morning, drinking a beer, while the minor child played on the floor behind the bar. Where all things are not equal, the parent exhibiting tendencies and habits best suited for raising the child should be awarded custody.

Contrary to the wording of the statute, the trial court not only failed to consider respondent's past conduct and demonstrated immoral standards, but openly declined to enter a proper order prohibiting such conduct. Stating that there was no use ordering respondent to cease her conduct, the trial court recognized that she had violated previous orders in the past, and would obviously refuse to follow any such order in the future. In effect, the trial court threw up his hands, claimed that he was powerless, and proceeded to ignore respondent's immoral and immature lifestyle. This decision was made directly contrary to the statutory order in Section 30-3-10 Utah Code Annotated, 1953, as amended, to "...consider the ...past conduct and demonstrated moral standards ..." of the respondent, and resulted in an award made contrary to the best interests of the child.

In addition to the trial court's refusal to consider respondent's past misconduct, the trial court indicated only one factor as the basis for his decision -- a desire not to separate the child from her half-brother. This court has previously considered decrees that split the children. Such action is not improper, nor is the desire not to separate children the most important basis for ordering custody in one parent.

In Humphreys v. Humphreys, 520 P.2d 193 (Utah 1974), the marriage in question was a second one for both parties:

two children, ages eight and six, and the husband had three children, ages eight, six, and three, from each respective prior marriage. The parties had one son together, age four. From an award of custody of the son to his father, the wife appealed. The Supreme Court upheld this decision, reasoning as follows:

There appears to be an adequate basis in the evidence for the trial court's conclusion that because of the somewhat erratic and immature conduct of the plaintiff, and the comparatively more mature and satisfactory home situation of the defendant and his children, there seems to be a sufficient justification for the order of custody made as being in the best interest and welfare of the little boy. Humphreys, supra, at 195.

In Jorgensen, supra, a fact situation similar to the present case occurred. The trial court in Jorgensen, however, ordered the two children of the marriage, both under six, to be divided amongst the parents. The wife appealed, requesting that custody of both children be awarded to her.

The trial court found all things not to be equal, based upon the following considerations:

Testimony at trial bore out the court's finding that plaintiff was at the time of trial, and had been for a period of a year prior thereto, living with and carrying on an extra-marital relationship with another man, and that such was the second such relationship to arise in the course of the five-year marriage; that plaintiff's present income was minimal, that the defendant is responsible, has adequate employment, enjoys a particularly close relationship with his son, and is in all respects competent to care for him. Jorgensen, supra, at 512.

Upholding the trial court's order, this Court reasoned that:

While it is true that a child custody award which keeps all the children of the marriage united is generally preferred to one which divides them between the parents, that preference is not binding in the face of considerations dictating a contrary course of action. Jorgensen, supra, at 512.

The trial court in the present case not only failed to consider respondent's immoral actions, actions which dictated an award to the appellant, but gave improperly compelling and singularly conclusive weight to the decision not to separate the child from her half-brother.

Immoral and illicit relationships carried on by the wife have long been grounds for awarding custody to the father, Francks v. Francks, 442 P. 2d 937 (Utah 1968); said improper conduct has also been proper grounds for modifying a decree to award custody to the father, Martinez v. Martinez, 652 P.2d 934 (Utah 1982). The State of Oregon has a custody statute comparable to that of Utah's. The courts in that state pursue the following rule: "While it is true that the mother's extramarital actions . . . would not permanently disqualify her from being awarded custody, moral transgressions must be considered with other relevant factors in determining what is in the best interests of the children." Marriage of Dahlman, 531 P.2d 909, 911 (Or. App. 1975).

Again, the trial court here not only did not consider

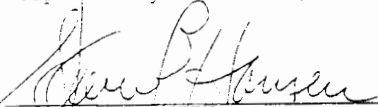
said transgressions; he professed helplessness in correcting the situation, and blithely ordered custody to the respondent based solely on the existence of a half-brother. This action was taken contrary to the statute, case law, and facts, and was therefore in error.

#### CONCLUSION

The trial court's award of custody was made without consideration of respondent's improper lifestyle, and with improperly heavy consideration of non-separation of two children having different fathers. The ultimate effect of this decision may be to have both children suffer from respondent's lifestyle, and give rise to an almost certain request for modification. As the trial court failed to give proper weight or consideration to the pertinent factors, refused to make orders requiring respondent to act properly around the child, and essentially ignored his duties under the case and statutory law, the trial court's award of custody to the respondent was an abuse of discretion and contrary to the facts before him. Said award should be respectfully overruled, with custody being awarded to the appellant.

DATED this 12<sup>th</sup> day of October, 1983.

Respectfully submitted,



STEVEN L. HANSEN  
Attorney for Appellant