1963

Jayne Wetherell Chase v. Edwin Amos Chase, Jr. : Brief of Respondent

Utah Supreme Court

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James F. Housley; Attorney for Respondent;

IN THE SUPREME COURT
of the
STATE OF UTAH

JAYNE WETHERELL CHASE,
Plaintiff-Appellant,

vs.

EDWIN AMOS CHASE, JR.,
Defendant-Respondent.

Case No.
9919

BRIEF OF RESPONDENT

Appeal from Judgment of the Fifth Judicial District Court
in and for Juab County
Honorable C. Nelson Day, Judge

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STATEMENT OF THE CASE

The defendant, having been divorced by plaintiff in 1961, sought by this action to have the decree of divorce modified to award custody of a minor child of the marriage to him.

DISPOSITION IN LOWER COURT

At a hearing held on May 6, 1963, pursuant to defendant's order to show cause, the District Court of

the Fifth Judicial District, Hon. C. Nelson Day presiding, found that the child's welfare and interest would best be served by awarding custody to defendant and ordered that custody of the child be accordingly awarded to defendant subject to plaintiff's right of reasonable visitation and terminated the requirement that defendant pay child support. (R. 29-30).

STATEMENT OF FACTS

Plaintiff and defendant were married at Nephi, Utah, on August 29, 1958. (R. 16, 27). A child, Robert Leon Chase, was born to the marriage on October 10, 1960. (R. 16, 27).

On March 11, 1961, the District Court of the Fifth Judicial District, Hon. Will L. Hoyt presiding, entered a Judgment and decree of divorce which, among other things, awarded plaintiff a divorce from defendant; awarded custody of the boy, Robert Leon Chase, to plaintiff and required defendant to pay $1.00 per month alimony and $60.00 per month child support to plaintiff. (R. 14, 15, 27).

About the first of March, 1961, plaintiff moved from Nephi to Salt Lake City, Utah, leaving the boy with her parents, the boy's maternal grandparents, and from that time to the date of the hearing in question, with the exception of one week in the first part of November, 1962, plaintiff has lived in Salt Lake City and the boy has remained with her parents in Nephi. (Tr. 56-60).

From the time plaintiff moved to Salt Lake City, she has been regularly employed and at the time of the hearing was earning in the neighborhood of $390.00 per month. (Tr. 56).

On July 28, 1962, the plaintiff married Harry F. Hanes, to whom she was still married at the date of the hearing, (Tr. 54-55) and about October 1, 1962, moved into the home where they resided at the date of the hearing. (Tr. 55). Plaintiff's present husband is an insurance salesman and earns in excess of $500.00 per month. (Tr. 56). Plaintiff and her husband live in a two-bedroom duplex apartment in Salt Lake City. (Tr. 56).

From the date of the divorce, defendant has lived in Nephi and has worked as a cook in a local cafe, where he now holds the position of chef, supervising the employment of several employees. (Tr. 5, 11, 44). His salary at the time of the hearing was $500.00 per month before deductions. (Tr. 6). His employer testified that he expects to expand his operations and to elevate defendant to a position of greater responsibility in his organization. (Tr. 45, 46).

Defendant remarried on June 26, 1961, and lives with his present wife and eight month old (at the time of the hearing) daughter in a two bedroom duplex in Nephi. (Tr. 5, 9-10). Defendant's wife is not working.

Defendant has made all alimony payments regularly and on time and has visited with the boy and has

had him in his home three or four times per week since the original divorce. (Tr. 4, 7-8, 37).

There is some discrepancy in the record with regard to the frequency of plaintiff's visits. Plaintiff testified that she visited her son in Nephi every weekend and stayed from Friday night to Sunday. (Tr. 57). Plaintiff's husband testified that they visited "at least every other week." (Tr. 66).

Both plaintiff and her husband work full-time. Plaintiff testified that she planned to continue working until their furniture and two 1963 cars were paid off, that is, until October, 1963, (Tr. 56-57) and that as soon as they were paid off, she would " . . . quit work and bring Robbie up with me." (Tr. 56). Plaintiff also testified that she had originally planned to place the boy in a nursery school until that time but later changed her mind and decided to leave the child in Nephi because she "didn't want to fight with them." (Tr. 60). Plaintiff also testified that she can quit work if necessary. (Tr. 58).

On one occasion, about the first of November, 1962, plaintiff, over the objections of defendant and plaintiff's parents, removed the child from the care of her parents and took him to Salt Lake City. Two days after making the change, she placed him in a day nursery where he spent the following five days, during the hours from 8:00 a.m. to 5:30 p.m., until plaintiff's mother came to Salt Lake City from Nephi and pre-

vailed upon plaintiff to allow her to take the child back to Nephi with her. (Tr. 19, 23-31, 58-61).

Plaintiff testified that during the pendency of the divorce proceedings she was earning $200.00 per month working for her father. (Tr. 63-64). In addition, plaintiff's counsel elicited testimony to the effect that prior to the entry of the decree of divorce the Court offered plaintiff $170.00 per month alimony and child support if she would stay with the child, which she refused. (Tr. 15, 21; R. 10).

The boy is physically and mentally healthy, (Tr. 71) although an impending discipline problem was mentioned at various stages of the testimony. (Tr. 13, 39, 66-67, 68-70).

Both couples are in their early twenties and are physically and mentally fit. Both couples are financially able to provide for themselves and for the child. Plaintiff (Tr. 58, 60) and her husband (Tr. 65) and defendant (Tr. 16, 18, 19, 21, 22, 23, 24) and his wife (Tr. 37-39) have all expressed a love for the boy and a desire to have him live in their respective homes. There is no real showing that either of the parties are morally unfit or that the family groups into which they propose to place the boy would have a negative moral influence on him.

After finding that plaintiff had "evidenced not an entire lack of attention, but certainly not what would be expected of a mother who was greatly concerned

about her child . . . " (R. 29), the trial court held that the child " . . would be better off by having a more stable home environment and the care and attention of parents who love and care for him in their home." (R. 29), and ordered that custody of the child be awarded to defendant subject to the plaintiff's right of reasonable visitation and accordingly discontinued the requirement that defendant pay child support payments to the plaintiff. (R. 29-30).

ARGUMENT

POINT I.

THE TRIAL COURT'S DETERMINATION OF ISSUES OF FACT SHOULD NOT BE DISTURBED ABSENT A CLEAR SHOWING OF ABUSE OF DISCRETION.

This court has repeatedly held that it would not disturb a trial court's judgment with regard to findings in matters in equity on appeal unless it appears to be unjust, inequitable, and contrary to the evidence and therefore an abuse of discretion. *Johnson v. Johnson,* 7 Ut. (2d) 263, 323 P.(2d) 16. In that case this court said:

> "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 latitude of discretion and his orders will not be disturbed unless

it appears that there has been a plain abuse thereof."

In the recent case of *Wilson, et ux. v. Pierce,* 14 Ut. (2d) ...., 383 P.(2d) 925, handed down this year, this court stated that:

> "Because of his close contact with the parties and the opportunity it affords him [the trial court] to form a judgment not only of their veracity, but of their qualities of character and sincerity of purpose, which are particularly important factors in proceedings of this kind, we make due allowance for his advantaged position; and in accord with the traditional rule, review the evidence in the light most favorable to the findings and decree; and will not disturb them unless it is shown to clearly preponderate to the contrary. Nokes v. Continental Min. Co., 6 Ut. (2d) 177, 308 P. (2d) 954."

POINT II.

THE TRIAL COURT CORRECTLY FOUND THAT THE BEST INTEREST AND WELFARE OF THE MINOR CHILD WOULD BEST BE SERVED BY AWARDING CUSTODY OF SAID CHILD TO HIS FATHER.

The record and transcript disclose a marked similarity in a great many of the qualifications presented by both parties in their suit to gain the custody of the boy. Both parties have remarried and are establishing homes in houses suitable for the rearing of a small boy. Both couples are young, physically and mentally fit

and are financially able to provide for themselves and the boy. Although there is some evidence disparaging the moral fitness of the parties, it is submitted that there is not and cannot be serious dispute with the proposition that neither party would, if given the opportunity, expose the child to adverse moral influences. As the court said in *Wilson, et ux. v. Pierce,* supra:

> "As is quite usual in these cases, the contending parties sought to disparage each other as unfit to rear this child. While there was some evidence in support of their respective accusations, it must be appraised in the light of the facts that the parties felt obliged to engage in such recriminations; and that we are not dealing with angels, but with human beings who are prone to frailty. In spite of these efforts to show to the contrary, we say advisedly that there was nothing brought out by either party to create any real concern that the other was actually unfit to have the child's custody."

The only real disparity in the qualifications of the contending parties manifests itself in a comparison of the parties' respective capacities to give the necessary love and personal attention to the child.

The evidence on one hand shows that plaintiff could have remained in Nephi, financially comfortable, and kept the child with her and thereby afforded herself an opportunity to give such personal attention and love and affection to the boy. Instead, for reasons personal to herself, she chose to leave the child in the care of her parents in Nephi and move to Salt Lake City. In addi-

tion, after she had remarried and moved to a home which she testified was suitable and large enough for the child and with an income large enough so that it was not necessary that she work, she still put off bringing the child to live with her until she had accomplished other objectives which apparently seemed more important to her, such as paying off two 1963 automobiles and completing payment on household furnishings and other personal possessions. And when she did bring the child to Salt Lake City she did not give him her personal attention, love and support during the difficult time of adjusting to a new family and surroundings, but instead placed him in a day nursery where he spent virtually all of his waking hours until his grandmother rescued him one week later.

On the other hand, the evidence shows that the defendant has taken every opportunity to be with the boy and on such occasions spent considerable time with him and has given him a great deal of attention and has amply demonstrated his love to the boy. Also, it is very significant to note that the defendant's present wife has wholeheartedly joined in these occasions and has also made a separate and substantial effort to give the boy the love of a mother which he had theretofore missed and has expended considerable effort in taking the boy on excursions and in making clothes and other gifts for him. Accordingly, the trial court found that the child's interest would best be served and the child's welfare best promoted if the custody of the child was placed in the family where he would be assured of re-

ceiving the love and attention which he needs. The trial court's fiindings should be affirmed.

POINT III

THE CONTROLLING OBJECTIVE IN AWARDING CUSTODY OF A MINOR CHILD OF DIVORCED PARENTS IS THE PROMOTION OF THE BEST INTEREST AND WELFARE OF THE CHILD.

The authority in support of this proposition is so overwhelming that respondent makes no argument except to cite the following leading and recent cases: *McBroom v. McBroom,* 14 Ut. (2d) ...., ... P.(2d) ...., (handed down in August, 1963); *Wilson, et ux. v. Pierce,* supra; *Johnson v. Johnson,* supra; *Steiger v. Seiger,* 4 Ut. (2d) 273, 293 P.(2d) 418, 420; *Walton v. Coffman et ux.,* 110 Utah 1, 169 P.(2d) 97; Secs. 30-3-5 and 30-3-10, Utah Code Annotated 1953.

POINT IV.

PLAINTIFF HAD NO ABSOLUTE RIGHT TO THE CUSTODY OF HER MINOR CHILD MERELY BECAUSE THERE WAS NO FINDING THAT SHE WAS UNFIT.

While there is no contention that plaintiff is unfit, there is no absolute right, as argued by her in her brief on appeal, of a divorced mother to have custody of her

minor children merely because there is no finding that she was an unfit parent. This has been the established law in Utah since the decision in *Johnson v. Johnson,* supra, and this court has recently handed down two decisions in accord with this view, *Wilson et ux v. Pierce,* supra, and *McBroom v. McBroom,* supra.

POINT V.

PLAINTIFF HAS WAIVED ANY RIGHT TO THE CUSTODY OF HER MINOR CHILD.

As has heretofore been shown, plaintiff has had the right, the opportunity and ability from the date of the original divorce decree to the date of the hearing to have the child and for reasons of her own has failed and neglected to do so. It is respectfully contended that she has thereby waived any paramount right she may have, statutory or otherwise, to have custody of this child as opposed to the right of her ex-husband, the defendant. *Alley v. Alley,* 72 Utah 196, 269 Pac. 487.

POINT VI.

THE TRIAL COURT'S DISINCLINATION TO AWARD COUNSEL FEES TO THE PLAINTIFF SHOULD NOT BE DISTURBED ABSENT A CLEAR SHOWING THAT THE COURT ABUSED ITS DISCRETION.

A very comprehensive annotation dealing with this precise point may be found at 15 A.L.R. (2d) 1270

at p. 1272. See also *Scott v. Scott,* 105 Utah 376, 142 P.(2d) 198; *Anderson v. Anderson,* 110 Utah 300, 172 P.(2d) 132.

POINT VII.

THE TRIAL COURT, AFTER ASSESSING THE RELEVANT FACTORS IN DETERMINING WHETHER COUNSEL FEES SHOULD BE AWARDED TO PLAINTIFF, CORRECTLY DECLINED TO MAKE SUCH AWARD.

There is no contention or showing that the expenditures for counsel fees made by plaintiff to resist defendant's motion were made for the benefit of the minor child or should be properly classified as a necessary. 15 A.L.R.(2d) 1282. Moreover, the record clearly shows that plaintiff is in a better relative financial position to pay these expenses than is defendant. 15 A.L.R. 1281.

CONCLUSION

The trial court correctly found that the defendant and his present wife were better able to provide the love and attention which the minor child, Robert Leon Chase, required and that it was in the child's best interest and that it would serve to promote the welfare of the child if the custody were to be granted to the parent best able to provide such love and attention and, concluding that

there was no overriding legal right possessed by plaintiff, accordingly granted said custody to the defendant. Having granted custody to the defendant, there was no longer any reason for the continuation of the requirement that the defendant pay $60.00 per month child support to plaintiff and the trial court correctly terminated such obligation.

After taking into consideration the effect of the plaintiff's action in resisting defendant's motion upon the welfare of said minor child, as well as the relative financial ability of the families to pay for said resistance, the trial court correctly declined to award plaintiff's attorney's fees for the hearing.

It is respectfully submitted that the trial court's order should be affirmed and that plaintiff should be required to pay her own attorney's fees on this appeal for the reasons stated in support of the denial of attorney's fees in connection with the proceedings here appealed from.

Respectfully submitted this 12th day of September, 1963.

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