1963

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JAYNE WETHERELL CHASE,
Plaintiff-Appellant,

— vs. —

EDWIN AMOS CHASE, JR.,
Defendant-Respondent.

Case
No. 9919

APPELLANT'S BRIEF

Appeal From the Judgment of the
Fifth District Court for Juab County
Hon. C. Nelson Day, *Judge*

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STATEMENT OF THE KIND OF CASE

This is an appeal from an order made as a result of an Order to Show Cause. The court, by its action, deprived the plaintiff, the mother, of the custody of her two-year-old child. One of the questions involved is whether the evidence justified this separation. Also involved is the question of the propriety of terminating the requirement that defendant pay plaintiff the sum of $60.00 per month as child support and the propriety of denying plaintiff any attorney fees for her defense of the Order to Show Cause.

DISPOSITION IN LOWER COURT

This case was tried to the court on May 6, 1963, on defendant's Order to Show Cause and plaintiff's Affidavit

and Motion for Attorney Fees. From an Order in favor of Defendant, plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the Judgment and Order and judgment in her favor as a matter of law and equity, or that failing, a new hearing before an unbiased judge.

STATEMENT OF FACTS

The plaintiff, Jane Wetherell Chase, and the defendant, Edwin Amos Chase, Jr., were married at Nephi, Utah, on the 29th day of August, 1958. (R-2) They had two children born as issue of the marriage: Richard Edwin Chase, who died on the 14th day of October, 1959, and Robert Leon Chase, a boy, born October 10, 1960, who survives and who was two years and seven months old at the time of the hearing of the Order to Show Cause (Tr. 4).

The evidence and record shows that the defendant, prior to the divorce, came home intoxicated, left the plaintiff for considerable periods of time, left plaintiff to her own means of support for months at a time and remained absent from the residence of the parties for months at a time (R-17). It further shows that at the time of divorce the plaintiff contemplated employment in Salt Lake City at a salary in excess of $300.00 per month (R-15, 16) which employment she obtained and has continued at until the date of the Order to Show Cause (Tr. 56). While plaintiff was working she made arrangements

for the infant child to stay with his maternal grandmother in Nephi (Tr. 57) where she visited him every weekend from Friday night to the late hours of Sunday (Tr. 57). The undisputed evidence of plaintiff showed that she could not obtain nursery care for the child until he was two years old (Tr. 57) and that she intended to, *and did*, bring the child to Salt Lake City to reside with her and her present husband in November of 1962 (Tr. 58), when he was just a few days older than two years of age.

The evidence shows that the defendant did not wish the child to be taken to Salt Lake City although he denied that he pleaded or begged plaintiff not to take the child with her as plaintiff testified (Tr. 58 and 19) but admitted that he asked her not to take the child away.

At no time was there any claim whatsoever that plaintiff was in any way unfit nor was any claim made that the child had not received excellent care. Defendant testified that the plaintiff's mother, Mrs. Wetherell, was "excellent to him" (Tr. 12 and 23) and that the child remained with Mrs. Wetherell at his request (Tr. 23).

Defendant testified that he had remarried (Tr. 4-5), that he has another child eight months of age and that he is a cook who works from 4:00 a.m. to 11:00 a.m. and from 6:00 to 7:30 p.m. seven days each week for which work he earns approximately $500.00 per month before deductions are taken from his wages (Tr. 5-6). He testified also that he lived with his wife and child in a duplex and that his present wife loved the child.

The plaintiff testified that she had remarried also and resides with her present husband in Salt Lake City at 1603 Wilson Avenue and that she is employed, as is her husband, and that she earns $390.00 per month and her husband earns $500.00 or $600.00 per month (Tr. 55-56). She further testified that she and her husband would be free from debt in October, 1963, and she could remain home with her child (Tr. 56-58). Since the divorce of the parties, the plaintiff has been extremely faithful in making trips to Nephi on nearly every weekend to visit with her child (Tr. 57) and has provided the medical care necessary to repair a double hernia which the child suffered (Tr. 71). The child was taken to Salt Lake City in November of 1962 (Tr. 58-59) and returned to Nephi approximatley one week later as a result of an emotional appeal made by plaintiff's mother (Tr. 59-60). During the time he was in Salt Lake City he was kept during the day in a reputable day nursery (Tr. 55) and was cared for at night by his mother. Absolutely no evidence was presented which would indicate that he did not receive excellent care except the opinion evidence of defendant that it wasn't good for the child to be put in a nursery (Tr. 24). Both spouses of the parties testified they had feelings of love and affection for the child. Defendant's wife stated she loved him (Tr. 37-38) and plaintiff's husband stated he felt "as if he were my own son" (Tr. 65). The wife of defendant, however, showed by her testimony (Tr. 41) that she has endeavored to coach the child not to care for his mother and further testified that prior to the birth of her child, who is defendant's child, that she had to call the "beer joints" for

defendant to come home because she was afraid to stay alone (Tr. 42-43) but that since she had given birth to her daughter she was not afraid to stay home and her husband, the defendant, stays out two or three nights a week playing pool because "he works hard" and "that doesn't hurt him." (Tr. 43)

The defendant's employer testified, over plaintiff's objection, that defendant had a good business reputation in the community (Tr. 47). He further testified that he and defendant played pool together "night after night" (Tr. 47), and that defendant owed him no obligation (Tr. 48). Defendant, on the other hand, testified that he had been "obligated to Ray for the last two years" (Tr. 5).

The court, in its order dated May 8, 1963, stated that plaintiff's parents "rescued" the child from a nursery and further stated that the word "rescued" was used "advisedly" (R-29) and also made much of the fact that defendant's present wife is a "very personable young woman" (R-28) who will "be 20 years of age next month" (R-28). The court further stated that the child "will 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 than under the present conditions." (R-29)

The Order awarding defendant the custody of the child and terminating payments for support of the child was entered accordingly.

ARGUMENT

POINT I.

THE COURT ERRED IN AWARDING CUSTODY OF THE MINOR CHILD, ROBERT LEON CHASE, TO THE DEFENDANT.

Although a divorced mother has no absolute right to the custody of minor children under U.C.A. 1953, 30-3-10, the policy of the Supreme Court of the State of Utah has been to give weight to the view that, all things being equal, preference should be given to the mother in awarding custody of a child of tender years.

In the case of *Briggs* v. *Briggs,* 11 Utah 418, 181 Pac. 2d 223, the court held in a habeas corpus proceeding between divorced parents for the custody of a child under ten years of age that where there was no claim that the mother was immoral or incompetent, she was entitled to the custody of the child unless it was made to appear that she was an improper person, and the burden of so showing was on the father. This was not shown in this case and, as a matter of fact, there was absolutely no evidence showing that the mother was anything other than a fine, decent person.

To award the custody of a child to another woman, who would be in charge of the child during nearly all his waking hours, rather than to the natural mother is unnatural and abhorent. It should be done only when it is clearly shown by the evidence that the best interests of the child require such an order. This court in the case of *Walton* v. *Coffman,* 110 Utah 1, 169 Pac. 2d 97 said:

"We conclude that the determining consideration in cases of this kind is: What will be for the best interest and welfare of the child? That in determining this question there is a presumption that it will be for the best interest and welfare of the child to be reared under the care, custody and control of its natural parent; that this presumption is not overcome unless from all the evidence the trier of the fact is satisfied that the welfare of the child requires that it be awarded to someone other than its natural parent. Thus the ultimate burden of proof on this question is always in favor of the parent and against the other person.

"In addition thereto, this presumption being based on logic and natural inference, should be kept in mind by the trier of the facts and weighed and considered with all the other evidence in determining this question. The common experience of mankind teaches 'that blood is thicker than water,' that usually there is a much stronger attachment between a natural parent and child than is developed between a child and the foster parent, that ordinarily the natural parent is willing to sacrifice its own interest and welfare for the benefit of the child much more than is the case with foster parents and that generally the natural parent is more sympathetic and understanding and better able to get the confidence and love of its own child than anyone else, all of these things are especially true of the natural mother. That these facts should always be kept in mind throughout the trial and given due weight along with all other evidence in the case in determining what will be for the best interests and welfare of the child. However, this presumption is one of fact and not of law, and may be overcome by any competent evidence which is sufficient to satisfy a reasonable mind thereon."

No claim has been made that the plaintiff is unfit or incompetent to care for her own child. There is no evidence to show that she has ever been anything but a loving, tender, thoughtful and devoted mother. She and her husband are much better able to provide financially for the child and can better educate and raise the child in their home than can the defendant and his young wife who is already burdened with the care of an infant of her own. There is no question that defendant loves his child but he has shown by his actions in the past that he has more liking for pool halls than he has for his home and that he leaves his present wife alone with her infant child on approximately one-half of the evenings each week.

Why the court stated that the child was was "rescued" from a nursery school is not explainable. It is only logical to believe that association with small children of the same age under proper supervision is more beneficial to a child than would be the raising of a child with young adults with no opportunity to learn or acquire the ability to associate with children of his own age for certain periods of time. This, in itself, however, is not the determining factor in this case because the plaintiff clearly indicated her intention to cease working in the near future to devote herself to attending to the duties of a debt-fee household in the company of her college-educated husband and her child.

The defendant made no complaints regarding the manner in which the child was cared for by his maternal grandparents and was perfectly willing to have the situation continue as it was until he found that plaintiff

was making arrangements to have the child live with her in her home in Salt Lake City and he then suddenly discovered that he, rather than plaintiff, would be confronted with the expense of traveling between Nephi and Salt Lake City in order to visit with his child.

The plaintiff, being the mother of the child, will undoubtedly devote more time to her child, will show it greater love and affection than would any other person, no matter how kind and willing she may be, and in spite of the protestations of defendant's wife that she loves the child as much as she loves her own natural child, it would be very difficult for a twenty-year-old girl to be absolutely impartial in her treatment of this child in the event it would deprive her natural child of any material and important thing. On the other hand, it is easier for a man to accept the responsibility of caring for another man's child. This is based on the premise that the greater responsibility of caring for a child is placed upon the woman.

The best interests of the child require that he be placed with his mother as soon as possible.

POINT II.

THE COURT ERRED IN TERMINATING THE REQUIREMENT THAT DEFENDANT PAY TO PLAINTIFF THE SUM OF $60.00 PER MONTH FOR THE CARE AND SUPPORT OF THE MINOR CHILD.

The law is well settled and it is obvious that in the event plaintiff has custody of the minor child there is a

duty of defendant to assist in the support of his own child.

POINT III

THE COURT ERRED IN FAILING TO AWARD PLAINTIFF ATTORNEY FEES FOR HER DEFENSE OF DEFENDANT'S ORDER TO SHOW CAUSE.

This point is also so well settled that no argument is necessary.

CONCLUSION

The court, in this case, deprived the plaintiff of the custody of her two-year-old child with no evidence that she was in any way incompetent, improper or morally unfit. By devious reasoning which was not based on any evidence, a ruling was made which seemed to base a deprivation of a mother's right to custody of her child on the basis that it was in some way unnatural to place a child in a nursery school, and in some way so detrimental to the welfare of the child that he should be taken away from the mother permanently.

The evidence sustains the finding that the plaintiff loves her child, is willing to love and care for the child and make sacrifices for him, and that she has always done so in the past. Plaintiff will love the child more and make more efforts in its behalf than can be expected of a step-mother, who is little more than a child herself.

Plaintiff is ready, willing and able to make all sacri-

fices which are necessary to provide a comfortable, secure and loving home life for her child.

On the basis of the evidence and the obvious facts, the Order of the District Court granting custody to the defendant should be reversed and the father should be ordered to contribute to the support of his child. Plaintiff should further be allowed attorney fees not only for the hearing in the District Court but also for this appeal.

Respectfully submitted,

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