1964

Ray J. Robinson v. Kathryn B. Robinson : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

RAY J. ROBINSON,
Plaintiff and Respondent,

vs.

KATHRYN B. ROBINSON,
Defendant and Appellant.

CASE

NO. 10022

APPELLANT'S BRIEF

Appeal from Judgment of the Fourth District Court
of Utah County
HON. MAURICE HARDING, Judge

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RAY J. ROBINSON,
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CASE NO._____

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STATEMENT OF THE CASE

This is a case in which the mother of two minor children sought to have a decree of divorce, entered November 30, 1959, and which awarded the custody of two minor children, then aged 3 years and 7 months, now aged 8 years and 5 years, modified; the district court denied the petition for modification. Appellant seeks a reversal of the District Court judgment and custody of the minor children.

STATEMENT OF FACTS

Appellant, Kathryn B. Robinson Wilkins, was the defendant in a divorce action filed by her husband, the respondent, on November 24, 1959 (R. 4). The plaintiff

prayed for and was awarded the custody of two children, Pamle Rae, a girl then of the age of 3 years, and Vicki Lynn, a girl of the age of 7 months.

The appellant signed an appearance, consent and waiver in the proceedings and a default judgment of divorce was taken against her. The complaint was filed and heard on the same date, the 24th day of November. A decree of divorce was entered on the 30th day of November, 1959, awarding the custody of the children to their father, "with the provision that defendant shall have the right to visit with said two children and have them visit with her at any and all reasonable times and occasions, when not detrimental to their health and well-being."

After the divorce respondent remained in Lehi for a period of approximatey two months and then he went to Spokane, Washington, taking the children with him, where he lived with his sister (Tr. 23). He remained in Spokane until June of 1960 at which time he moved with his sister and children to Couer d'Alene, Idaho, where he worked in a garage.

In October of 1960, one year after the divorce, respondent married his present wife and the children lived in a home on Front Street in Couer d'Alene. They moved, after a period of about four months, to a home located at 1316 Wallace Street, where they resided for approximately two years. After a period of two years respondent moved with his family to the town of Worley, Idaho, where he went into a service station business (Tr. 26).

When the Robinsons moved to Worley they lived in one home for a period of approximately five months. Next they moved to the place of their residence at the time of the trial (Tr. 29).

At the time of the hearing the respondent had in his house one child of his present wife by a former marriage, the two children of appellant and respondent and two children by his present marriage (Tr. 38 and 39). According to respondent, he has an income of approximately $400.00 per month, (Tr. 39) and must work approximately 10 hours a day six days a week in order to maintain his business (Tr. 98). Respondent and his family live in a home, pictures of which are in evidence.

Shortly after the children left Utah in 1960, their mother went to Idaho to visit them. She went to Spokane in February of 1960 (Tr. 60). The record does not reflect the period of time which she visited with them at the time, but it does show (R. 24), "that the defendant has visited with her children for a period of only a few hours since the entry of the deccree, November 30, 1959." The court further found, at line 13 of R. 24, "that the defendant has not been afforded reasonable rights of visitation with her children."

On April 20, 1962, the defendant filed a motion to modify the decree of divorce with respect to the provisions for the custody of the children. The defendant's motion to modify the decree to grant her greater rights of visitation with the children was first contested by a special appearance (R. 18). In this special appearance, the plaintiff contested the jurisdiction of the district court to modify the terms of the decree. This was done on the basis that the plaintiff was a resident of Idaho and that the Utah court was without jurisdiction to modify the terms of the divorce decree. The plaintiff's special appearance for the purpose of objecting to the court's jurisdiction was denied,

(R. 22) and defendant's petition was granted after a contest.

The order modifying the court's decree, which commences in the record at page 23, provided that the mother should have the right of visitation for a period of one month during the year 1962 (R. 26). It further specifically reserved jurisdiction of the court to modify the decree in the future. It aslo provided that the mother should have the right of visitation with the children during the Christmas holidays of 1962.

Plaintiff appeared and objected to the provision in the court's order awarding rights of visitation to the mother during the Christmas holidays of 1962, contending that those rights of visitation were not to commence until 1963 (R. 27).

Appellant went to Couer d'Alene, Idaho, during the Christmas holidays of 1962 and brought the children to Utah and flew them back to Idaho at a cost to her of approximately $300.00 (Tr. 68). While in Idaho returning the children, there was an altercation between the appellant and the respondent which will be adverted to subsequently (Tr. 71).

The children came to Utah during the summer of 1963 and this action was instituted by the appellant.

POINT I

THERE HAS BEEN A CHANGE IN APPELLANT'S CIRCUMSTANCES SINCE THE ENTRY OF THE DECREE OF DIVORCE SUFFICIENT TO REQUIRE A CHANGE IN THE CUSTODY AWARD OF THE DECREE.

The fullest exposition of the law in Utah with respect to the right of the courts to modify a divorce decree, and the right of the party to have a decree modified is as set forth in Anderson vs. Anderson, 172 P. 2d, 132. The general rules enunciated there are in agreement with the rules of most other jurisdictions. The most comprehensive treatment of this general subject that the appellant has found is found in 43 A.L.R. 2d commencing at page 364.

The most frequent justification in conjunction with other facts for the modification of an award of the custody of a child is the remarriage of the spouse who has been deprived of the custody. Ott v. Ott (1932) 127 Cal. App. 322, 15 P. 2d 896; Kelly v. Kelly (1946) 75 Cal. App. 2d 408, 171 P. 2d 95; Farrell v. Farrell (1921) 190 Iowa 919, 181 NW 12; Vullon v. Landreneau (1946) 209 La. 1060, 26 So. 29, 139; Sargent v. Sargent (1948) 320 Mich. 33, 30 NW 2d 422. Other cases to the same effect are cited in 43 A.L.R. 2d at page 371 and following.

However, remarriage is not the only reason which will justify a modification.

Other factors present in this which have influenced courts in modifying a decree are: the presence or absence of other children in the home; the actual care or custody of the child by one other than the parent; the fact of the remarriage furnishing a home as opposed to a previous condition, and the obstruction or difficulty of visitation.

Appellant was 17 years of age when she married the respondent and she was 22 at the time of her divorce (Tr. 62).

At the time of the divorce of the parties, the defendant had not completed high school (Tr. 62). She was un-

employed (Tr. 59). Since the divorce of the parties, she has remarried, having married her present husband on December 27, 1960 (Tr. 59). She has gone to school at night school and finished the requirements for her high school diploma (Tr. 62-63). She completed a business school course in 1960 and then went to work in a responsible position (Tr. 60). Appellant and her husband have lived in the same home since they were married (Tr. 76). Her present husband is a carpenter and in the year 1962 he earned $6,000.00 while being off work for three months with a broken ankle (Tr. 64).

As is pointed out by the case of Anderson v. Anderson, supra, the presumption that children of tender age are better off with their mother is not as strong following the entry of the decree of divorce as it is prior to the entry of the decree. Nevertheless, the same reasons which motivated the legislature to enact Title 30-3-5 have validity in cases such as this. The reason for this fact is well stated in the case of Juri v. Juri, a California case, 160 P. 2d page 73 which reads as follows at page 76:

> " 'it is not open to question, and indeed it is universally recognized, that the mother is the natural custodian of her young. This view proceeds on the well known fact that there is no satisfactory substitute for a mother's love. So true is this that in this state the code exacts that she shall have custody of her child, everything else being equal, unless the child has reached the age which necessitates a particular education or preparation for its life work. Civ. Code, Sec. 138. In the case of girls it is obvious that they are particularly in need of the sympathy, affection, consideration and tender care which only a mother can give —and so normally they should be in her custody.' And

> in Estate of Lindner, 13 Cal. App. 208, 212, 109 P. 101, 103, it was said that 'A mother who is both capable and anxious to rear her own offspring should not be deprived of the opportunity to thus discharge the duty she owes to the child, without a clear showing of unfitness for the trust.' "

There is nothing in the record, either in the findings of fact, conclusions of law or the decree, as originally filed, (R. 9, 10, 11, 12 and 13) which find that the mother, the appellant, was other than a fit and proper person. There is no finding made pursuant to the hearing in 1963 shown at page 55 and 56 of the record, which finds that the mother is not a fit and proper person to be awarded the custody of the children.

The appellant does not claim that the father and his present wife are not fit custodians for the children. She does claim that there has been a substantial change of circumstances since the entry of the decree in 1959 and the hearing of this petition in 1963.

POINT II

THE CHILDREN'S WELFARE WOULD BE BEST SERVED BY BEING REARED BY THEIR MOTHER INSTEAD OF THEIR STEP-MOTHER.

Respondent worked to provide for a family of five children and to do this he must work approximately ten hours a day, six days a week (Tr. 98). Of necessity this results in the children being reared by their step-mother. For the reasons pointed out in Juri v. Juri, supra, and those set forth in the case of Woof v. Woof, 169 P. 2d at 961, the children would be better off if they were in the home of

their mother. Obviously, the children would be better being reared by their mother in a home with one other child than by their step-mother in a home with three other children by two different marriages. See also Emerson v. Emerson, 188 P. 2d 252.

That the environment would be better in the home of the mother is demonstrated throughout the record by the different standards by which the parties comport themselves. Repeatedly the record shows the rude, uncivil, ungracious and ill-mannered way of living on the part of the respondent and his wife that bode ill for the children if their custody is not awarded to appellant.

On two or three occasions after trips from Lehi to Couer d'Alene or to Spokane for the purpose of visiting her children appellant has been treated rudely and discourteously. Surely 900 miles and five years of time should enable all but the most ill-bred persons to breach past wrongs or imagined wrongs and be decent to the mother of one's own children.

As was stated earlier, the children here in question are little girls and the opinion quoted in Juri v. Juri, supra, is, if anything, more cogent in the case of small girls than of young boys.

Without any question, the circumstances of the mother were very materially different at the hearing in 1963 than they were at the time of the divorce. At the time of the divorce the appellant was unemployed and she had no way to earn a living other than that of working as a waitress (Tr. 59 and 60). She had no place to live, she went to live with a friend (Tr. 59). In 1963 the appellant had completed her high school education, she had completed a business school course.

At the trial the witness Mona Christenson testified that the appellant is a good housekeeper and a good cook (Tr. 11). That the children were well cared for when they were with her (Tr. 12). She testified that when she and the appellant went to Idaho to obtain the children in 1963 that they had been bathed but that they were not clean (Tr. 12).

Respondent's husband is well employed and expressed his desire that the children come to his home to live.

POINT III

THE CHILDREN WOULD HAVE A MORE STABLE HOME ENVIRONMENT IF CUSTODY WERE CHANGED.

The period of time that the children have resided with the respondent has been one in which they have moved frequently from town to town and within towns in which they have lived. When the respondent left Lehi some two months after the decree of divorce was entered, he went to Spokane, Washington, where he first worked as a janitor and then for a motor car company (Tr. 23). Then in June of 1960, some seven months after the entry of the divorce decree, he moved with the children from Spokane to Couer d'Alene and went to work at a garage. He worked there approximately three years and then went to work for a veneer company.

After the respondent moved from Spokane to Couer d'Alene, he lived with his sister until he was married and then moved into a home of his own.

It should be noted that the respondent did not remember the date of his marriage to his present wife (Tr. 25).

Neither did he remember the birth dates of his daughters (Tr. 33).

The respondent and his wife lived in two homes in Couer d'Alene in a three year period and they lived in two different homes during the period of time that they resided in Worley (Tr. 29).

Obviously it is not in the interest of the children to be moved from place to place and it is in their interest to reside in one locale where they can become acquainted with their neighbors and where they can acquire friends.

POINT IV

CONSIDERATION SHOULD BE GIVEN BY THE COURT TO THE ATTITUDES OF THE PARENT WITH RESPECT TO RIGHTS OF VISITATION ON THE PART OF THE OTHER PARENT.

Courts have expressed themselves to the effect that children should have the right to know both parents, and when one parent makes it difficult for the child to know the other parent, then that fact is a reason for the intervention of the court in making an order affecting the custody of a child. See Ludlow v. Ludlow, 201 P. 2d 579 and Williamson v. Williamson , 206 P. 2d 605, an Oregon case.

It appears without question that the respondent does not desire to have the mother of the children associate with them. This fact is demonstrated by the finding of the court in the hearing in 1962 that despite a trip from Lehi to Spokane to visit with her children, that she had only been permitted to visit them for but a few hours and that she had been denied a reasonable right of visitation as was awarded her in the decree of divorce.

When she instituted a proceeding to require the appellant to afford her reasonable opportunities to visit with the children, her application was resisted on the ground that the Utah court had no jurisdiction to consider the matter. This despite the fact that such contention could only be labeled frivolous.

When, after having visited with her children only for one month out of two and one-half years, the court awarded to her the right to have the children for the Christmas following the summer of 1962, even that small concession was disputed by the respondent (R. 27). Respondent does not accord his former wife and the mother of his children the common courtesies that one normally expects. When she visited her children in Spokane in 1960 she was accorded only a few hours with them (R. 24).

In December of 1962, the defendant had expended the sum of $300.00 to go to Idaho and obtain the children and to return the children to Idaho by airplane so that she could have a few days with them (Tr. 68).

During the lay-over between planes, she was not invited to the plaintiff's home nor was she given any offer of a place to stay, but rather the respondent's sister made her welcome (Tr. 69).

Even after this large expenditure and after having been with her children for only a week and being just across a street from the children, they were not permitted to remain with her for more than just a few moments prior to her return to Utah.

An altercation took place in the home of the respondent's sister. The record shows that the fight took place in the rear of the home where the appellant was a guest.

The respondent entered the home of his sister, he and his wife went down a hall and through a room and into the bathroom there to confront the appellant and mother of the children and engage in an altercation in the presence of one of the children (Tr. 38).

The attitude of the appellant should be contrasted with that of the respondent. Without any hesitation she made the children available to him when he came to Utah during the period of time that the children were awarded to her (Tr. 49). She invited him into her home as any normal person would. She encouraged the children to visit with their father's parents, all of this in great contrast to the treatment that she received at his hands.

CONCLUSION

From all of the foregoing, it clearly appears that the children would be better off with their mother and that minor children, particularly girls, should be reared by their mother as opposed to their step-mother, if the mother is a fit and proper person. In the instant case the mother is better able financially to support the children. She would furnish a more stable environment; she would rear the children to be more gracious and hospitable; she could bestow a mother's love upon them; and the change of circumstances has been sufficient since the time of the entry of the decree to justify the court in making an award changing the custody of the children.

Respectfully submitted,

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Attorney for Appellant