1967

Carol Joan Stone v. Val Franklin Stone : Respondent's Brief On Appeal

IN THE SUPR
OF THE STA

CAROL JOAN STONE,
Plaintiff and

vs.

VAL FRANKLIN STON
Defendant

Respond

Appeal from a

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AMES A. McINT
15 East 4th South
Salt Lake City
Attorney for

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IN THE SUPREME COURT OF THE STATE OF UTAH

CAROL JOAN STONE,
Plaintiff and Respondent,

vs.

VAL FRANKLIN STONE,
Defendant and Appellant.

Case No
10698

Respondent's Brief on Appeal

STATEMENT OF THE KIND OF CASE

This is an action by a father to modify the terms of a divorce decree by changing the custody of four minor children from the mother to the father.

DISPOSITION IN THE LOWER COURT

The case was tried before the Honorable Stewart M. Hanson, Judge of the Third Judicial District, who found all issues in favor of the mother, and refused to grant the change of custody.

RELIEF SOUGHT ON APPEAL

Respondent requests that the decision of the trial

court be affirmed, and that respondent be awarded reasonable attorney's fees for the expenses of defending this appeal.

STATEMENT OF FACTS

Carol Joan Stone and Val Franklin Stone were married on March 13, 1952. There were four children born of that marriage, Randall, presently age 13, Richard, age 11, and twins, Bret and Bart, age 8.

In 1961, difficulties arose in the marriage. During that time, the father admits striking the mother and she was either knocked down or she slipped and fell down, and also admits beating the children with clothes hangers (R. 133). The father admits that he knew his actions were upsetting to the mother, and that he also made repeated threats to take her children from her, knowing that it was terribly upsetting to her (R. 135).

A divorce was granted to the mother July 21, 1964, on the grounds of mental cruelty, and it was found by the court that the father had treated her cruelly, had become unaffectionate toward her, had told her he no longer loved her, had refused to live with her, and this had been caused by no fault of hers. In spite of the fact that the father had been repeatedly requested to discontinued such conduct he refused to do so (R. 8). Prior to the divorce, the father and his new wife were working at the same place and frequently he would pick her up on 21st South Street and take her to work (R. 104).

The new Mrs. Stone was divorced in 1963 and has three children, two girls, age 13 and 7, and a boy age 9. In April, 1965, the father married the new wife and took on the obligations of her three chlidren. He admits that from that time on, he never offered to help his ex-wife in the raising of his children, except for the payment of support (R. 137).

The father brought this action less than a year after his new marriage, and alleges that the mother is mentally ill. He admitted, however, on cross-examination, that he knew that she had a physical problem all of the time (R. 137). He knew that his wife had been examined by her family doctor and was told that she had a blood sugar problem called hypoglycemia. Hypoglycemia is an abnormally diminished content of glucose in the blood, giving the same general symptoms associated with sugar diabetes (R. 187-9). The father testified that he knew that the mother was taking pills for the problem, and had told him that she was feeling much better prior to his filing the action (R. 137).

The father admits that the mother has done a good job in caring for the children. He did not contest the divorce or attempt to obtain custody of the children at that time. The father further stated on cross-examination that the mother was doing a good job raising the children until approximately September 1965 (R. 146-7). He further stated that since the action was initiated in March 1966, she has been doing a real job (R. 146). The only period the father complains about is the Fall of 1965 and January and February 1966 (R. 147). He

further admitted that the children were doing well in school, that they were active in Sunday School and Scout activities, and that he knew the mother had taken the children two or three times a week on picnics to the park, and swimming, and had gone fishing and camping over night on several occasions with them (R. 146).

Though the father claims that the mother was mentally incompetent from September 1965, to January 1966, the evidence in no way substantiated this claim. After Dr. Anderson diagnosed her problem as hypoglycemia and prescribed drugs, the temporary difficulty of the mother was corrected. All of the witnesses, both medical and neighbors, testified that the children were properly cared for and never neglected by the mother. Dr. Jack Tedro, a physician and surgeon, specializing in psychiatry, testified that a person with hypoglycemia would not be able to recognize members of his own family at times, and that a person could believe that he had a tape recorder in his head and still do a pretty good job with the family without having the children suffer under these conditions (R. 191-3). Dr. Tedro further testified that the mother had done a worthwhile job with the children in the last six years, and it would be very disturbing to her if the children were taken from her (R. 200). Dr. Tedro never at any time said that Mrs. Stone had schizophrenia as represented in appellant's brief, nor is there any evidence showing that he recommended hospitalization in the L.D.S. Hospital psychiatric ward as appellant has claimed.

Four neighbors substantiate the fact that the chil-

dren were never neglected by their mother. Mrs. Marjorie Jones, a neighbor of six years, testified that only once did the mother state to her that she had a difficult time with the children, and that she could think out things clearly, that the only difficult period was between October 1965 to February 1966. She further testified that prior to that time, things were perfectly normal, and since February, the mother appeared perfectly normal. She further testified that the children always apeared to be normal, well dressed, well fed, clean, well adjusted in the neighborhood, and active in church and scout work (R. 170-172).

Mr. Teddy Jones testified that he had lived right next door to the mother for six years, that he had observed the children, and that they were not in any way different from any other children in the neighborhood, that they were well clothed and clean (R. 177).

Jeanine Snider, a neighbor of five years, testified that the mother had done an excellent job with the children. She testified that she was aware that Carol had had a diabetic problem during October 1965 to March 1966, and that she was taking pills for this problem. She observed that the children were not hungry, that they were properly dressed, well adjusted, clean, and not dirtier than any other children in the neighborhood. She also testified that she knew they were active in church and considered Mrs. Stone a good mother (R. 182-5).

Madelon Close, also a neighbor of six years, who had lived directly across the street from the mother testified that the only difficulty she observed was from

October 1965 to January 1966, and that she had been much better since January 1966. She further testified that the children were dressed like all other children in the neighborhood, and that she had never observed the children being hungry or neglected in any way (R. 161).

All of the children testified concerning the fine care they received from their mother. Randall, age 13, testified that he knew his mother loved him, that she fed him well, and that he had a good breakfast, lunch and dinner every day (R. 215). Ricky, age 11, stated that his mother had taken them swimming and fishing many times, and that his mother stays home and takes care of him (R. 218-20). The two younger children, age 7, also testified that their mother fed them well, kept them clean, and washed them (R. 222-3).

In spite of the excellent care given to these children, the father requested the court to grant him custody of his four sons and place them in a new home with limited supervision. The father's new wife testified that she had worked continuously since high school, and that her children had been cared for five days a week in nursery schools, or by someone coming into the home and caring for them (R. 89). She further testified that her seven-year old child had not been living in her home from January until June, 1966, and gave the reason as an illness she had in January (R. 91). Her mother had taken the child to ease her work load (R. 96). The child was enrolled in school in Pleasant Grove in January and remained there the rest of the year (R. 95). The new wife, however, continued to work, having lost only one

week from her employment at Litton Industries for the illness. The new wife testified that she was presently alowing her 13-year-old daughter to tend her children at home, and this notwithstanding the fact that she and her husband leave for work at 7:15 A.M. and do not return until after 4:30 P.M. (R. 90). This required the children to get themselves ready for school, prepare their own breakfast and go to school without the aid of either parent, and return without their parents being home (R. 90). The new Mrs. Stone also testified that she had been nervous prior to her marriage with Mr. Stone and had sought medical attention for aches and pains in her points and hands the entire year proceeding the trial. She testified that she sought medical attention at least once a week for the past year (R. 96-99). The new Mrs. Stone also testified that she would have to continue to work indefinitely as she did now, and this in order to take care of present bills and obligations (R. 104). Her nine-year old child, Richard, also has a health problem and requires private tutoring (R. 92).

ARGUMENT

POINT I.

AFTER AN AWARD OF CUSTODY IS MADE BY THE DIVORCE COURT, A CHILD UPON REACHING THE AGE OF TEN YEARS DOES NOT HAVE AN ABSOLUTE RIGHT TO CHANGE THE ORDER OF CUSTODY.

The record in this case discloses that the two older boys, Randall, age 12, and Richard, age 11, while testi-

fying that they loved their mother and that she took good care of them, indicated that they would prefer to live with their father because they hadn't seen him for so long and wanted to spend more time with him. Thus the legal question arises as to whether such preference is absolutely binding upon the trial court. This issue involves an interpretation of §30-3-5 Utah Code Annotated 1953 which provides as follows:

> "When a decree of divorce is made the court may make such orders in relation to the children, property and parties, and the maintenance of the parties and children, as may be equitable; provided, that if any of the children have attained the age of 10 years and are of sound mind, such children shall have the privilege of selecting the parent to which they will attach themselves. Such subsequent changes or new orders may be made by the court with respect to the disposal of the children or the distribution of property as shall be reasonable and proper."

Contrary to what appellant states in his brief, this is not a case of first impression in the State of Utah, the law already having been clearly decided, both in the case of an original divorce proceeding and in the case of a subsequent order for modification.

With respect to the original decree, the court in a split decision in *Smith* vs. *Smith,* 15 Utah 2d 36, 386 P.2d 900, found that it was obliged to construe the statute literally, and that the child's decision was binding upon the court.

With respect to a subsequent modification of the

decree, which is the case here, the court in the case of *Anderson* vs. *Anderson,* 110 Utah 300, 172 P.2d 132, also interpreted the statute literally and held that the decision of the child is not absolutely binding upon the trial court. In so holding, the court stated as follows:

> "The italicized portion thereof, as set out hereinabove, is a limitation on the power of the court to award custody of a child 'at the time the decree is made' to a parent not of the child's choice, where both parents are found to be fit to have such custody. The proviso modifies the first portion of the sentence of which it is a part. As to change of custody subsequent to the decree, the statute states that orders relative thereto shall be dictated by what is 'reasonable and proper'."

Not only would the position of appellant herein require an over-ruling of the *Anderson* vs. *Anderson* case, but such position is contrary to good reason and common sense. Justice Crockett in his dissenting opinion in the *Smith* vs. *Smith* case, supra, makes the following comment:

> "Under such a rule, parents already too deeply immersed in woes because the family is breaking up would have them added to by having to compete with each other for the children's choice. Without elaborating thereon it is easy to see the hazzards to them and to the child this would create. Such a battle might well go to the more unscrupulous parent, who may not be above poisoning the child's mind against the other; or resorting to coercion; or showering him with ill-advised gifts or favors. Even more damaging would be the subjecting of a child to such pressures and making him a pawn in the contest of the spouses for his custody. It is extremely doubt-

> ful that under such circumstances a child of that age would have the stability and judgment to see through the maze of troubles and make a wise choice. In some instances it would be cruel to subject him to it and wholly unrealistic to regard his choice as absolute."

The dangers that Justice Crockett refers to are far more real and apparent in the change of custody case than in the case of the original divorce. At least in the latter, once the decision is made, the parties can accept it and live with it, while in the former, the child would in many cases be under constant pressure from either one parent or the other to change his mind. It would be cruel indeed to place a child in such a position.

Often it is necessary to discipline a child; or to deprive a child of something he desires; or require the child to do things in the furtherance of his education which the child does not wish to do. In these matters a child under the law has a duty to obey his parents. Certainly it is not in the best interests of either society or the child to put an immature 10-year-old child in such a position that he can be absolutely relieved of his duties and obligations to a parent upon his own choice, or that he be placed in a position where he can use that choice as a threat against a well-meaning parent to make demands upon the parent, or to be relieved of unpleasant responsibilities which would otherwise be for his best good.

There is no reason for the *Anderson* vs. *Anderson* case to be over-ruled.

POINT II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO CHANGE THE ORDER OF CUSTODY.

This court has held on many occasions that the paramount consideration in determining the question of custody of children is the welfare of the children; further, that the trial court has broad discretion in making that determination, and its ruling will not be upset unless there is plain abuse. *Walton* vs. *Coffman,* 110 Utah 1, 169 P.2d 97; *Anderson* vs. *Anderson,* 110 Utah 300, 172 P.2d 132; *Sampsell* vs. *Holt,* 115 Utah 73, 202 P.2d 550; *Smith* vs. *Smith,* 1 Utah 2d 75, 262 P.2d 283; *Steiger* vs. *Steiger,* 4 Utah 2d 273, 293 P.2d 418; *Johnson* vs. *Johnson,* 7 Utah 2d 263, 323 P.2d 16; *Briggs* vs. *Briggs,* 111 Utah 418, 181 P.2d 223.

As is documented by the statement of facts herein, the witnesses overwhelmingly testified that Mrs. Stone was a good mother; that she took excellent care of the children; and that the children were all well-adjusted in their school, church and other activities. Because of the overwhelming nature of this testimony from appellant's own witnesses, respondent found it unnecessary to put on further testimony, and rested her case without calling any further witnesses.

It is understandable why the trial court found that it was in the best interests of the four minor children that they remain under the fine care and supervision they had received from their mother, who spends her

entire time in the care of the children. Particularly is this understandable when the alternative would be to place the children in the home of a step-mother who is employed and away from her home during the day, thereby leaving the boys, some of which are in their early teens, in the unwholesome position of being left alone with children of the step-mother, among which are girls of their own age. While respondent does not wish to question the integrity or the moral character of Mr. Stone or his new wife, nevertheless it would seem unwise to remove the children from a home in which they are well-adjusted and well cared for, and place them in a home where their future adjustment is an unknown factor.

It is true that a mother has no absolute right to the custody of minor children. However, this court has held on numerous occasions that in the absence of a showing that the mother is immoral or unfit, and all other things being equal, preference should be given the mother in awarding custody. *Johnson* vs. *Johnson,* 7 Utah 2d 263, 323 P.2d 16; *Steiger* vs. *Steiger,* 4 Utah 2d 273, 293 P.2d 418; *Cooke* vs. *Cooke,* 67 Utah 371, 248 Pac. 83; *Briggs* vs. *Briggs,* 111 Utah 418, 181 P.2d 223. Appellant has made no showing whatsoever which would rebut this presumption in favor of the mother, or otherwise shown that the trial court abused its discretion. The bold claim of mental incompetency of the mother is absolutely unsupported by the evidence, and respondent would invite the court to carefully scrutinize the record in this regard.

POINT III.

THE TRIAL COURT COMMITTED NO ERROR IN REFUSING TO REQUIRE RESPONDENT TO SUBMIT TO A MENTAL EXAMINATION.

Appellant in this case insisted on going to trial as soon as posible, and the pre-trial order (R. 35) was drafted in such a manner so as to set forth as issues for the trial (1) whether the plaintiff was unfit to retain custody of the children, and (2) whether the plaintiff should be required to submit to a mental examination under Rule 35, Utah Rules of Civil Procedure. Appellant then was willing to proceed to trial on the merits, and the question of the mother's fitness was fully litigated. The appellant now, after having had his day in court, says that the trial court should have ordered a mental examination. He is thus placing the trial judge in the rather strange position of having to rule on a question involving pre-trial discovery after the case is all over. Never at any time prior to the trial was the preliminary issue noticed for hearing, and the appellant is now simply attempting to get two shots at his case.

Even though appellant has had his day in court, the trial court did not preclude a future mental examination. The trial court in its memorandum decision (R. 46) after having found that there was no evidence to show that plaintiff was mentally incompetent or otherwise unfit, stated that if it appears at some future time that a psychiatric or physical examination is necessary, application for the same could be made to the court. Thus the

door was left open, and it is difficult to see how the trial judge could have been more fair to the appellant.

Rule 35, *Utah Rules of Civil Procedure* provides that the court "may" order a party to submit to a mental or physical examination "only on a motion for good cause shown." Cases construing the identical Federal rule have unanimously held that the granting or denying of such a motion is a matter which lies within the sound discretion of the trial court. *Coca-Cola Bottling Company of Puerto Rico* vs. *Negron Torres,* 255 F.2d 149; *Butcher* vs. *Crause,* 200 F.2d 576; *Teche Lines* vs. *Boyette,* 111 F.2d 579; *The Italia,* 27 F.Supp. 785. There is no showing in this case of any abuse of the trial court's discretion.

POINT IV.

WHETHER OR NOT THE TRIAL COURT MADE SPECIFIC FINDINGS OF FACT DOES NOT PREJUDICE THE RIGHTS OF DEFENDANT.

Appellant complains because the trial court did not make findings of fact as specific as appellant would like to have had them. This does not prejudice his case in any manner whatsoever. Where the same objection was raised in the case of *Cawley* vs. *Cawley,* 59 Utah 80, 202 Pac. 10, the court stated as follows:

> "Plaintiff, however, insists that the District Court erred in not making specific findings respecting the charges in his complaint. It is true that the court omitted to make specific findings, and merely found that the statements contained in the complaint were untrue, and upon that find-

> ing dismissed the complaint; yet it is also true that, in view of the fact that divorce proceedings are highly equitable, in equity cases, where the evidence is all certified to this court, as was done in this case, we may make findings or direct what they shall be, or in case the findings are insufficient or incomplete, make them conform to the evidence. In view, therefore, that under the evidence in this case the findings would necessarily have to be against the plaintiff, he was not, nor could he have been, prejudiced by the omission of the court to make specific findings."

If the court sees any merit to requiring detailed findings of fact, the trial court can be required to amend them accordingly. However, in light of the fact that the entire record is before the court, it is difficult to see what purpose this would accomplish.

POINT V.

THE TRIAL COURT DID NOT COMMIT ERROR IN REFUSING TO FIND THE MOTHER IN CONTEMPT, NOR DID IT REFUSE THE FATHER REASONABLE VISITATION RIGHTS.

The original Divorce Decree of the parties gave the father "reasonable" rights of visitation (R. 5). Appellant complains that he was refused visitation privileges on Wednesday evenings, and that such refusal constitutes contempt of court on the part of the mother. There was never an order granting the father visitation privileges on Wednesday evenings, and in the absence of a showing that appellant was deprived of "reasonable" visitation privileges, there is no basis for con - tempt.

The decree of the trial court expanded defendant's privileges to include every other weekend, two weeks in the summertime, plus additional visitation privileges at times convenient to the children and the parties (R. 59). It is difficult to understand how this can be considered as "limited" visitation rights and an abuse of discretion on the part of the trial court.

CONCLUSION

When one examines the complete record in this case, it can readily be seen that the trial judge exercised wisdom in his discretion in refusing to change the order of custody to the father. The decision simply is not the result of an unsavory collusion on the part of a prejudiced trial judge and a plaintiff's attorney who resorts to "brainwashing" tactics as appellant has implied in his brief and would have this court believe.

Based upon all of the arguments and authorities as cited herein, respondent respectfully requests that the decision of the trial court be affirmed.

Respondent further requests that she be allowed costs and a reasonable attorney's fee for responding to this appeal.

Respectfully submitted,

NEIL D. SCHAERRER
1300 Walker Bank Building
Salt Lake City, Utah
Attorneys for Plaintiff-Respondent