1969

Clair R. Rogers v. Frances J. Rogers andrews : Brief of Appellant

IN THE SUPREME CO
OF THE STATE OF

CLAIR R. ROGERS,

Plaintiff

vs.

FRANCES J. ROGERS ANDREWS,

Defendant-Appellant

BRIEF OF APPE

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IN THE SUPREME COURT OF THE STATE OF UTAH

CLAIR R. ROGERS,

Plaintiff,

vs.

FRANCES J. ROGERS ANDREWS,

Defendant-Appellant.

Case No. 11875

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from an Order and Decree of the District Court modifying the Decree of Divorce heretofore made and entered, by awarding the permanent custody of the two minor children of the parties to the father with the right of the mother to have the custody of said children for one day and one night each week.

DISPOSITION IN THE LOWER COURT

By a Decree of Divorce made and entered in 1961, the custody of the two minor children was awarded to the Defendant with visitation rights to the Plaintiff. Although there were a number of restraining orders

compelling the Plaintiff to visit the children only in the presence of the Defendant, who was their mother, the parties worked out an agreement whereby the children had overnight visitations each week with the Plaintiff. This arrangement continued until June 10, 1969, when the Plaintiff filed an affidavit, and pursuant thereto an Order to Show Cause was issued on June 16, 1969, wherein the Plaintiff sought to have the custody of the children changed. The youngest of the two minor children had in May of 1969 reached the age of ten years and based on Section 30-3-10 and Section 30-3-5, of the Utah Code Annotated, which has now been rewritten, Plaintiff contended that both the children had reached the age of ten years and were therefore entitled to select the parent to which each child would attach himself. On the 18th of June, after a hearing in which both parties were present and presented evidence, the Court took the matter under advisement and on the 24th day of June, 1969, modified the Decree by awarding to the father, the custody of the children during the summer months only, from June until September, with the right of the Defendant to visit with said children over night one day each week. Late in August, 1969, Plaintiff registered the boys in the elementary school and junior high school of Plaintiff's district. (Tr. 23). On the 2nd day of September when Defendant attempted to get the children back to register them in their proper district where she resides, to-wit, in Sunset, Davis County, Utah, considerable difficulty and unpleasantness arose and she was required to obtain the assistance of the Juvenile

Court officer to enforce the order of the District Court (Tr. 23-27-51). Thereafter, Defendant took the boys to her home and prepared to send them to their schools in her district. She registered them in the Sunset schools (Tr. 53). After spending the night of September 3rd in her home, the boys on September 4th left for school. They did not attend the schools in which they were registered, however, but instead, called a certain woman who was the sister of the Plaintiff's present wife (Tr. 123-125). She picked the boys up and took them to her apartment and kept them from contacting the Defendant during the entire day. After numerous calls to the Plaintiff and the Police Department and Sheriff's office, the children at 10:30 p.m. were located in the home of the Plaintiff (Tr. 58), by a Juvenile Court officer of Weber County. When she was informed of the situation, Defendant consented to having the Juvenile Court officer take them into his custody until the following morning. When she went for the children at 10:00 a.m. the next day, Plaintiff had obtained an exparte order, changing the custody of the children from the mother to the father. The Defendant came to the chambers of the Honorable Charles G. Cowley, the District Judge who had heard this matter, with an affidavit and an Order prepared by her attorney in line with the previous Decree of June 24, 1969. At that time Judge Cowley made a Minute Order as follows:

> "Defendant's requested Order submitted to the judge in chambers at about 4:15 p.m., Friday, September 5, 1969, for custody of the two boys, in the opinion of the Court is well taken; however,

> because the hearing is but one week away and for the further reason that the transfer of the boys back and forth might have some impact on them, therefore the Court refrains from signing the order at this time, and the boys may remain with the father until the hearing September 15, 1969, without prejudice to the custody rights of the defendant."
>
> Charles G. Cowley
> Judge

(Tr. 16)

Thereafter, a Petition was filed by the Plaintiff, requesting the modification of the Decree of Divorce to change the custody. On September 18 the matter came on for hearing. After both sides had presented a number of witnesses, the Court took the matter under advisement and on September 24, made and entered its order granting permanent custody of the two boys to the Plaintiff with the right of defendant to have overnight visits once each week. It is from this Order that the Defendant appeals.

Thereafter, Defendant filed a further Affidavit and Motion, asking the Court to fix a definite time for her overnight visits, the Plaintiff having failed and refused to give her any definite time in which to have said minor children with her. After a hearing on this matter on the 14th day of October, the Court, after considerable discussion (Tr. 26) fixed a definite period of time for Defendant's overnight visits.

RELIEF SOUGHT ON THE RULING

The appeal asks this Court to reverse the ruling of the Trial Court denying her Motion of September 5 in which she requested the Court to enforce its prior Decree and to vacate and set aside the temporary, and later permanent order which it had made granting the Plaintiff custody of said minor children with only Defendant's right to visit them overnight on week ends (Tr. 20).

STATEMENT OF FACTS

Ever since the entry of the Decree of Divorce, the two little boys grew up in the home of the Defendant in an apparently normal fashion. Defendant, after certain unpleasant matters with the Plaintiff were straightened out, and after the boys reached an age that they were able to care for themselves, permitted them to have weekly overnight visits with the Plaintiff. During that time, however, Plaintiff let it be known on a number of occasions that he would make every effort to get the children away from the Defendant once they reached the age of ten years. He apparently pointed his efforts toward the time when the youngest boy would reach the age of ten years and based upon the Sections of the Statute, herein referred to was determined to obtain the custody of the children upon the youngest one's reaching the age of ten years. Therefore, in June, on Order to Show Cause was issued to determine whether or not the Court should change the custody of the children. There was no effort on the part of the Plaintiff to show an unfitness upon

the part of the mother, the Defendant herein, to have the custody. This Plaintiff's whole Petition was based on the fact that the youngest child was now ten years of age, and that therefore they were entitled to select the parent to which they would attach themselves. Both of the boys expressed a desire to the Court in the Chambers to go with their father. Therefore, the Court on June 24 modified the Decree of Divorce by giving the custody of the boys to the Plaintiff during the summer months, with overnight visits to the mother, the Defendant, during June, July, and August. During that time the boys were taken on numerous summer picnics, motor boat parties, and Defendant had a considerable amount of trouble getting her overnight visits. Early in August Plaintiff, while he had the boys in his custody, brought them to the home of the Defendant, rang the doorbell of the Defendant, and when she appeared, stated to her: "The boys have something to tell you" (Tr. 20). The boys then proceeded to tell the Defendant that they were not coming home. Plaintiff then left with the children. On August 18, while the boys were still in the custody of the Plaintiff, he took them and registered them in a junior high school and an elementary school in his District. When the 2nd of September arrived, Defendant went to get the children and was unable to do so. After considerable difficulty with the Plaintiff, she obtained a certified copy of the last Order of the Court and with a Juvenile Court officer went to the schools and took the boys out, drove them to the schools in Sunset, Davis County, Utah, and registered them there in her own

District (Tr. 75-78). After spending one night in her home, the boys left for school but did not go to school. Instead, they telephoned one Ann Bodily, who was a sister of the present Mrs. Rogers. She had them taken to her apartment and kept them during the entire day (Tr. 34). Plaintiff, at 10:45 p.m. called the Defendant and told her that he had the boys in his home. Defendant then called a Juvenile Court officer in Ogden, who took the boys with the consent of the Defendant into his custody until the following morning. When the Defendant went for the children, she discovered that Judge Cowley had made a temporary ex parte order awarding them back to the father for the winter months (Tr. 105). She was also informed that the children were then back in Plaintiff's custody. An Affidavit and Petition were filed and after a hearing on September 18, the Court took the matter under advisement and on September 24 made and thereafter entered an Order changing the permanent custody of the boys to the father, the Plaintiff, with the right of the Defendant to have overnight visits with the boys once a week.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN MAKING AN ORDER CHANGING THE CUSTODY FROM THE MOTHER, DEFENDANT, TO THE PLAINTIFF, FATHER.

About the only basis and reason for the Court's changing the custody of the children in its order of

September 24, was the fact that the children wanted to go with their father. There was no showing at any time that the Defendant had been anything other than a good, conscientious, devoted mother to these boys. She had made as honest effort to make their life as normal and happy as possible under the circumstances and had voluntarily permitted them to have weekly overnight visits with the Plaintiff. During all of this time and while they were visiting with their father, the boys were systematically turned away from their mother. They had been given considerable leeway and freedom while in the custody of their father and of course were for several years merely overnight guests of the Plaintiff. He had no responsibility in the raising and disciplining of the boys and they had a party each week end with him on their visits. We submit that the prime consideration in this case should not be the desires of the children, but the Court must be guided as to the welfare and the best interests of the children, and the personal desires of the parent and of said children must yield to determine what is best for the children's ultimate good. *Larkin vs. Larkin,* (1963), 85 Idaho 610, 382 Pac.2nd 784.

> "It was held in Larkin v. Larkin (1963), 85 Idaho 610, 382 P2d 784, that in determining which of the parties to a divorce action should have the custody of a minor child, the paramount consideration by which the court must be guided is the welfare and best interests of the child, and that the personal desires of the parent, and even the wishes of the minor child, must yield to the determination of what is best for the child's ultimate good.

In *Berkshire v. Caley* (1901), 157 Ind. 1, 60 NE 696, it was held that the wishes or desires of an infant of discretion, in respect to its custody, are frequently considered by the trial court, not because such infant has the legal right to demand that its wishes be regarded, but because it is proper for the court to be informed relative thereto, in order that it may be better prepared to wisely exercise its discretion upon the question of the custody of such child; the court also stated, however, that the trial court was not to be influenced in any degree by the mere whims of the infant, but could have regard for its feelings, attachments, and reasonable preferments, and its probable contentment and happiness, incidental to its custody. In the instant case, the court apparently gave considerable weight to the preference of a 9-year-old child."

"While holding that the expression of desire of an infant of 8 years as to which parent it would rather live with may be given consideration the court in Bowman v. Bowman (1950), 313 Ky. 806, 233 SW2d 1020, held that such expressions of desire were not binding on the court, which must look to the welfare of the child rather than to its desires."

"The court in Graves v. Wooden (1956, Mo. App.), 291 SW2d 665, recognized that a child's wishes, although entitled to consideration, are not to be indulged if they are inconsistent with the attainment of the paramount objective, that is, furtherance of the child's welfare."

In 4 ALR 3rd, 1410, we find this interesting annotation:

"The polestar by which the courts are to be

guided whenever they consider the question of a child's custody is the best interest and welfare of the child. The dominant thought is that children are not chattels, but intelligent and moral beings, and as such, their interest and welfare are of first consideration. All other considerations, including the wishes of the child, must yield to the child's overall welfare.

. . . In Tobler v. Tobler (1956), 78 Idaho 218, 299 P2d 490, it was held that while the wish of the child to be awarded to one of the parents where the parents were separated and both parties were shown to be suitable persons to have the custody was not finally determinative of the issues, it was a proper matter for a trial court to consider with other evidence in determining the child's best interest, the court taking the position that the wishes of the child must yield to the determination of what is best for such child's ultimate good."

In 4 ALR 3rd, p. 1412:

"Although practically all cases in which the Court refuses to give effect to the child's wishes may impliedly stand for the principle that such wishes are subordinate to the child's best interests, this subsection includes only those cases, not stated in specific connnections indicated by appropriate headings elsewhere in the annotation, which are illustrative of the courts' disregard of the child's wishes, in view of the presence of objective factors affecting its welfare which were contrary to its wishes.

While recognizing that a child, who by reason of its years is capable of indicating a preference regarding custody, is entitled to express its views,

to which a court will always give careful consideration, the court in McCullough v. McCullough (1953), 222 Ark. 390, 260 SW2d 463, held that the expression of a preference was not binding upon the court, and that the chancellor would look behind mere words, appraise conditions, circumstances, and contributing factors, and would alter an order of custody only when a change would be in the minor's best interests. Finding that the boy in this case, 15 years of age, had been carefully reared in a Christian home where evidence of the slightest discord was wholly lacking, the court declined to remove the boy from the custody of his mother despite the fact that the child and had expressed a preference to live with his father.

The court in Anderson v. Anderson (1937), 122 Conn. 600, 191 A 534, affirmed the decision of the trial court, which disregarded the stated preference of a 7-year-old child to remain with this father and grandfather, because the court found that although the child's present happiness would best be served by remaining with his father, the mother was better equipped to exercise the discipline and control which was needed for his guidance during the years of his childhood and adolescence, and that the care and training which she would furnish would be more beneficial to him than that given by his father and grandfather.

It was held by Abair v. Everly (1959), 130 Ind. App. 192, 163 NE2d 34, that the fact that the children whose custody was at issue, aged 4½ and 2½ years, had expressed a desire to be with their father, rather than to go out of the state with their mother, certainly would not con-

stitute a change of conditions warranting a change of a previous decree awarding their custody to the mother. Thus, the court apparently took the position that although the wishes of children may be a factor to be considered in a custody proceeding, they are not controlling, and do not of themselves represent a sufficient change of conditions to warrant a change of a prior custodial decree wihch was based upon the children's best wishes.

It was held in Lursen v. Henrichs (1948), 239 Iowa 1009, 33 NW2d 383, that although in cases involving the custody of a minor, the desire of the minor was to be considered, various other factors were not to be lost sight of, such as the age of the minor, the length of time the minor had lived in the home for which the preference was stated, the nature of the associations therein, the contacts with the one seeking a change of custody, the relationship and past associations, the natural and legal rights of the contending parties, and any other matters throwing light thereon. Taking all of these factors in consideration, the court concluded that the wishes of the 11-year-old child in the instant case to be placed in the custody of her mother were not in her best interests, and divided the child's custody between her mother and grandmother.

In an action for modification of a custody decree, the wishes of two children, one of whom was 7 or 8 years old and the other 12 years old, were held entitled to less weight than in an original hearing on custody in Smith v. Smith 1965), Iowa 133 NW2d 677, where the court apparently gave more emphasis to the best interests and welfare of the children. On appeal by the mother from a decree awarding custody of the children

to the father during the summer months although the original divorce decree gave custody to the mother and restricted the father's visiting rights to Saturdays, the father contended that since the mother had moved some distance from him in order to obtain employment, and since this entailed some extensive traveling on the part of the children, he should be granted their custody during the summer months. Rejecting this and reversing this part of the decree below, the court noted that while the children's letters expressed love for the father, a dislike for school, and a desire to live with him, the mother was providing a good home for them, with good supervision for them while she was at work both before and after school each day, and had moved for the express purpose of taking a position which would enable her to provide adequately for them, and held that as to the younger child, its wishes should be given little if any weight, since it was not of an age to exercise discretion in choosing a custodian. As to the 12-year-old, the court held that its wishes should not be given as much consideration in an application for change in custody based on alleged subsequent change in circumstances as they would perhaps be entitled to in an original hearing on custody. In this connection, the court pointed out that the wishes of both children may well have been influenced by the fact that since they had spent only Saturdays (nonschool days) with their father, they associated homework with their mother and that their father may have represented an environment free of homework.

Where it appeared that the mother of the child whose custody was at issue was regularly employed and apparently in a position to maintain the child in a suitable environment, while, on

the other hand, the father appeared to be somewhat irresponsible and either unwilling or unable to provide a suitable environment for the child, the court in *Haymes v. Haymes* (1954 Ky.), 269 SW2d 237, while recognizing that ordinarily in custody matters the wishes of a child of the age of the child here involved (13 years) were entitled to great weight, concluded that under the circumstances of this case, the best interest of the child would be served by disregarding its expressed wish to remain with its father, and by granting its custody to the mother.

It was held in Brupbacher v. Brupbacher (1939), 192 La. 219, 187 So. 555, that the mere fact that a 15-year-old girl desired to live with her father and her brother, who had been placed in her father's custody, did not constitute a sufficient reason to establish that this young girl, who needed her mother's guidance and protection, should be taken from the custody of her mother, a person admittedly fit for such charge, and turned over to her father. It also appeared that if the girl were to be placed in the custody of her father, she would be alone much of the time, since her father was a bus driver and was away from home a great deal, and her brother was away at school. Examining all of these factors, the court apparently concluded that the best interest of the child would be served by placing her in the custody of her mother.

Where it appeared that the nature of the father's work was such that he was frequently required to be absent from home overnight and on weekends, and that his second wife was a business-woman, who would be in the home only after business hours, the court in Lyckburg v.

Lyckburg (1962 La. App.), 140 So. 2d 487, concluding that if the children were permitted to remain in the custody of their father they would reside in a home that would be to all practical purposes, run by a house keeper and a maid, held that notwithstanding the expressed desire of the children to remain with their father, it was settled jurisprudence that awards of custody were not dependent upon the wishes or desires of the children, and that since the children's best interests would be served by placing them with their mother, she was entitled to their custody.

Where the lower court, out of respect for the desires of a 15-year-old boy, had changed the custody of the boy from the father to the mother, the appellate court in *Hartman v. Hartman* (1925 Mo. App.), 277 SW 950, held that while the boy's wishes were entitled to great weight in deciding a matter of this kind, the interest of the child was the paramount consideration, and that if the boy's condition would be better with his father than with his mother, his wishes should not govern. Concluding that the interest of the boy would best be served by remaining with his father, the court reversed the decree of the trial court."

In the case of *Smith vs. Smith,* 15 Utah 2nd P. 36, 386 Pac.2nd 900, this Honorable Court in considering Section 30-3-5 and Section 30-3-10 of the Utah Code Annotated which have both been rewritten by he 1969 legislature found that the child shall have the privilege of selecting the divorced parent with whom he wishes to live unless the parent was immoral or unfit to have custody. However, Mr. Justice Crockett in a strong dissenting opinion points out the danger of leaving the

matter of the custody of the minor children to the whim of the children. (P. 39):

> "Further, and more important that the result in this case, is the fact that the holding with respect to this statute seems to me to completely distort its true purpose and reaches a high point in forbearance of the judicial prerogative, if not an outright abdication of judicial duty. If the mere fact that a child has become 10 years old endows him with power to make a choice of his parental custodian, which must be honored in any event, and whether his reasons are good or bad, or in fact whether he has any reasons at all, so that his choice is absolute and not subject to control or review by anyone, even by the court, he could be empowered to make a decision of the gravest possible consequence to himself, his family, and society, under circumstances where, because of his immaturity, and the usual emotional stress, there is little assurance that his judgment would be sound. It would be one of the most arbitrary and far-reaching prerogatives known to the law. This is plainly nonsensical and impractical.
>
> . . . It is submitted that if the whole structure of the divorce law is looked at in the correct light, it will be seen that the clear purpose of the legislature was to grant to the court discretion to do what it has always done, i.e., whatever justice and equity require in regard to the parties, the children and the property rights, and that there are a number of reasons why it is unthinkable that the legislature intended a 10-year-old child to have any such absolute and incontestable power.

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 hazards to them and to the child this would create. Such a battle might well go to the more unscrupulous, 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 doubtful that under such circumstances a child of that age would have the stability and judgment to see through the maze and 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.

Because of the foregoing, the court should be reluctant indeed to place this responsibility upon a small child, forcing him to face and cope with difficulties which the parents themselves have found insurmountable. This is especially so when a further effect is to rob the court itself of the role the law obviously intends it to play as arbiter and concilator of troubles which have proved too much for the family to deal with.

It also must be remembered that any award of custody made by the court must necessarily be an integral part of the over-all adjustment of the family situation. The provision by way of support money or property settlement, and the values to be found in children being together, are considered by the court in judging what is best for the welfare of the entire family. This could all

be lost if the choice were dependent entirely upon the whim or caprice of a 10-year-old child."

We need not consider these sections of the Statute, however, because they have both been amended to read as follows:

Laws of Utah, 1969 — P. 320 and 330, Sec. 30-3-5: *Disposition of property and children — Continuing jurisdiction.*

"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. The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support and maintenance, or the distribution of the property as shall be reasonable and necessary."

30-3-10: Custody of children in case of separation.

"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 care and custody of the minor children as it may deem just the 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 and the natural presumption that the mother is best suited to care for young children. 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."

We respectfully call to the attention of the Court the language of the above new statute.

In this case the evidence is clear that this mother has been an honest, devoted parent, during the infancy of these boys. There is no evidence of any misconduct on her part. It further appears that the father has an interest in the boys and a desire to give them all the necessary things they need during their growing period. However, there appears on a number of occasions, a disposition on the part of the Plaintiff to poison the boys against their mother and to influence them to come with him rather than to obey the Order of the Court.

When he brought the boys in August to the home of the Plaintiff and there told her the boys had something to tell her, he knew that he was disobeying the Order of the Court and so conducted himself for only one purpose, and that was to discredit her with the boys and to encourage them to get away from her and come and live with him. He did not make any attempt to discourage the boys in their statements that they would not abide by the ruling of the Court, but by his conduct he in fact encouraged the boys to disobey the Order of the Court. It is further evident that the running away of the boys on September 4 and their having been received in the apartment of the sister of Rogers' wife, just had to be planned. The language of the boy, Kim, that he "needs a father" (Tr. 118) and that "there is

nothing in common" referring to his relation with Defendant's new husband, is not the language of a thirteen year-old boy, but is the transplant of an anxious father who is helping him to persuade the Court to carry out his personal whim. It is apparent that these desires of the boys have been further brought about by the apparent financial position of the Plaintiff's home as against the Defendant's home. This, of course, should never enter into a decision of this kind. The fact that the boys have been raised in a rather modest home, as against the Plaintiff's more elaborate housing, should not be a factor in determining who should have the custody. The fact that the Plaintiff is apparently more able to provide recreational facilities in the form of motor boats, campers, and sports cars, also should never be considered in determining the welfare of these children.

We respectfully submit that the Plaintiff, as father of these children, has gone out of his way to deliberately flout the order of the Court. For him to take these little boys in August to the home of the Defendant and tell her "The boys have something to tell you," and then stand by while these little boys told their mother that they were not coming home, could indicate only a cool, calculating, and deliberate plan on the part of the Plaintiff to violate the Order (Tr. 46). Thereafter, he in August admittedly registered the children in schools within his own district which is further proof that at no time did he intend to carry out the provisions of the Order that Defendant have custody during the school months. He

knew what the Order was and he set about to violate the same by first poisoning the children's minds and thereafter assisting them by registering them in schools within his district. On September 3rd when Mr. Andrews drove the boys to get their clothing, they remained in the house for 17 minutes. When they came out to his car, they had with them their musical instruments and a shirt apiece (Tr. 101). We submit that this is further proof of Plaintiff's plan to induce the children to run away on the next morning and thereby violate the Court's order.

Although Plaintiff testified that he had not run Defendant down to the children, he told the boys she was an adulteress, on more than one occasion (Tr. 24-37-114). For this contemptuous conduct and his further participation and assistance in helping the boys run away and secreting from their mother, the Court awarded him the permanent cutsody of the children with only overnight visits to the Defendant.

Thereafter, the Plaintiff gloatingly let Defendant have the children only at his convenience until Defendant on October 14, 1969, had the Court determine and fix a definite time when Defendant might visit with the children over night.

Interesting remarks along this line were made by the Court when counsel told the Court that in fairness the Defendant would have them overnight only once a month (Tr. 157) and then at Plaintiff's convenience, (Tr. 156) as follows:

"MR. HUGGINS: We have one or two items here to consider also, your Honor.

First of all, these youngsters are old enough that their wishes should be given some weight.

THE COURT: Well, they can't get out of their visitation right. That's for sure.

MR. HUGGINS: No. But there must be some reason or some fairness to this thinking behind the mother and the father and the children themselves.

Now we can't force those youngsters to like or dislike someone, by an order of court, your Honor.

THE COURT: You can't force them except to win them.

MR. HUGGINS: Well, this is possible.

THE COURT: And this fellow wants them the way he wants them, and they go along. And then you come here and say it's the kids' fault. Well it isn't. It's this fellow's fault. It's not the fault of the boys.

MR. HUGGINS: No, I don't think that's exactly right, your honor.

THE COURT: There isn't any question about it. He's planned it that way.

It seems apparent that on October 14, 1969, the Court became aware of the attitude of Plaintiff to deprive Defendant, the mother of the children, of having any definite visitation period and that they wanted her to have them only at the will and convenience of Plaintiff. The Court then told counsel Plaintiff had "planned it that

way." This Plaintiff has been obsessed with the idea that he would have the custody of these boys by one means or another, regardless of what may be in their best interest. This in substance is and was Defendant's entire complaint about the ruling of the Court.

We submit that it was never nor is it now the intention of the legislature to, in amending this statute, leave the matter of the custody of the children either to the children themselves nor to permit the parents to compete for their custody.

CONCLUSION

Appellant respectfully submits that in this case the Court was willing to follow the expressed wishes of the children even though there was no evidence of misconduct on the part of defendant. Further, the Court was willing to yield to the wishes of the boys after their refusal to obey the order of the Court, and after they deliberately disobeyed the Order. This Order was also made after the evidence disclosed that Plaintiff had registered the boys in schools in his own District in August, knowing full well that the Order of the Court gave the custody back to Defendant during the school months, commencing September 1. Plaintiff had deliberately planned and connived to get the custody from Defendant and to aid the boys in avoiding the order of the Court.

The Court has erroneously permitted Plaintiff to force the custody change upon the Court when there was nothing to justify such change, except the whim of

the young boys and the designing tactics of the Plaintiff who deliberately planned the events as herein described that led to the Court's Order awarding permanent custody to Plaintiff.

We submit such conduct should never be condoned, especially where it does not appear that the best interests of the children are served by such a ruling.

Th Court had carefully considered the desires of the boys and what was for their best interests at the June hearing. This gave them summer custody to the father with overnight week-end visits to the mother during the summer months and the reverse during the school term. This is a fair and reasonable order and takes into consideration the desires of the boys plus the natural presumption that the mother is best suited to care for young children. This Order should have continued and should now stand as in the best interests of the children.

Respectfully submitted,

LA MAR DUNCAN

Attorney for Defendant and Appellant