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

IN THE SUPREME COURT OF THE STATE OF UTAH

CLAIR R. ROGERS,

Plaintiff, Respondent and Cross Appellant

vs.

FRANCES J. Rogers Andrews,

Defendant and Appellant

Case No. 11875

BRIEF of RESPONDENT and CROSS APPELLANT

Appeal from the Judgment of the Second District Court
For Weber County
HONORABLE CHARLES G. COWLEY, JUDGE

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TABLE OF CONTENTS

AUTHORITIES

CASES CITED

STATUTES CITED

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STATEMENT OF KIND OF CASE

This is a child custody case arising out of the plaintiff father's petition to have custody of his two minor sons, now of the ages of thirteen and ten, awarded to him; and also, concerning the District Court awarding to defendant mother certain visitation rights over each week-end.

DISPOSITION IN LOWER COURT

The Trial Court granted plaintiff father's petition awarding the custody of the two minor sons, Kim and Robyn, of the ages thirteen and ten respectively, to plaintiff, and awarding to defendant the right to take said children each weekend from Saturday through Sunday.

RELIEF SOUGHT ON APPEAL

Plaintiff and Cross Appellant prays that the Judgment awarding custody of the two minor sons to plaintiff be affirmed, but that the Judgment of the Trial Court awarding to the defendant mother each weekend from Saturday at 6:00 o'clock P.M. to the following Sunday at 9:00 o'clock P.M. be reversed.

STATEMENT OF FACTS

Plaintiff agrees substantially with the Statement of Facts as set forth by Defendant, except the insinuation that plaintiff had been systematically attempting to turn the affections of the children away from their mother; and plaintiff respectfully states there is nothing in the record to show that such was the case.

Defendant's attitude toward the children is shown clearly where she stated on the stand that she knowingly had the two minor children, Kim and Robyn, taken from their warm bed while in the custody of their plaintiff father by the police and lodged in the Juvenile Detention Home as punishment for running away. (Tr 59, lines 17 through 30; Tr. 60, lines 1 through 30; Tr. 61, lines 1 through 20; Tr. 57, lines 22 through 27.) The facts further show that this treatment apparently has marked the children substantially and that the frightening and degrading experience will be long in their memories. (Tr. 119, lines 6 through 19).

The facts further show there had been some conflict in the home of defendant and her present husband, (Tr. 66, lines 13 through 19; Tr. 115, lines 19 through 30; Tr. 116, lines 1 through 30; Tr. 117, lines 1 through 30;

Tr. 118, lines 1 through 30.) wherein Kim had stated that the home atmosphere was not one that represented happiness; that there was some friction between defendant and her new husband and apparently no affection shown to Kim or the younger brother, Robyn, by defendant's present husband to the point where Kim indicated that it was impossible to live with mother any longer. These factors explain the boys' strong desire to live with their father, rather than any so-called systematic scheme to alienate them from their mother. The two minor boys had indicated throughout the case that they both had affection for the both parents and that neither parent had degraded the other during the course of these events. Mrs. Andrews, the defendant, admitted throughout her testimony that she knew of no attempt of the children's father to alienate their affections from her. Kim and Robyn have both indicated they could no longer live with their mother and did in fact, as set forth in Appellant's Statement of Facts, run away from her because of these problems and their desire to live with their father, who as a dentist has a warm and adequate home for the children to live in; who has shown a strong affection for the boys, taking them hunting, fishing and boating and providing the boys with very happy and harmonious home atmosphere. Kim indicated his very strong desire to live with his father (Tr. 120, lines 14 through 25.).

Throughout the proceedings the boys stated they had gone on weekend trips with their father and continued their desire to do so, and the Court took away this right for weekend skiing, boating and fishing trips when defendant mother was granted visitation each

and every weekend for each and every month without exception.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR IN MAKING AN ORDER CHANGING THE CUSTODY OF THE MINOR CHILDREN FROM DEFENDANT MOTHER TO PLAINTFF FATHER.

Throughout the hearings the children had continuously indicated their very strong desire to live with their father rather than with their mother. The Court heard testimony as set forth in the Statement of Facts to the effect that the home atmosphere of defendant mother and her present husband was one of, not just a little conflict, but apparently of some quite substantial conflict. Kim, who is thirteen years old, had been induced to do things, which were of a wrongful nature, by the older son of defendant's present husband. All parties indicated that defendant's present husband was a quiet, undemonstrative person who did not spend time with Kim and Robyn, or his own youngsters for that matter. Kim and Robyn felt uncomfortable in his household and felt that favoritism was shown to the cildren of defendant's present husband.

There was no showing that plaintiff could not provide a suitable home, and the testimony showed, without doubt, that the home atmosphere with plaintiff and his present wife was much happier, and that plaintiff's present wife had great affection for the children of plaintiff, and that they had great fun together as

a family unit with no conflicts. The evidence further shows that the plaintiff spends much more time with the youngsters than did defendant's present husband, and took them skiing, hunting and fishing, which was not done while in defendant's home. Plaintiff is a dentist and has a large home with enough rooms to accommodate his own children and those of his present wife.

These are the facts the Trial Court had before it in awarding the custody of the minors to the plaintiff and cross-appellant. The Court had the welfare of the children as its prime consideration, and ample evidence to sustain such findings that the welfare of the children would be best served by changing custody to their father.

The Court had before it the amended sections of our statute concerning the disposition of children, as follows: Laws of Utah, 1969--P. 320 and 330, § 30-3-5:

DISPOSITION OF PROPERTY AND CHILDREN.

> "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 and 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."

As part of the determination of the lower court as to what would be for the best interest of these minor children the desires of the children must be given great weight, and all of the cases cited by appellant in his brief so indicate this to be the case.

It is interesting to note that in the case of *Berkshire v. Caley* (1901), 157 Ind 1, 60 NE 696, the age of the child was nine years. It is interesting to note also, that in the case of *Anderson v. Anderson* (1937), 122 Conn. 600, 191 A 543, the age of the child involved was seven years. In the case of *Abair v. Everly* (1959), 130 Ind. App. 192 NE2d 34, the children involved were ages four and one-half and two and one-half. In the case

of *Larsen v. Henrichs* (1948), 239, Iowa 1009, 33 NW2d 388, custody of an eleven-year-old child was divided between the contestant parties, the mother and the grandmother. These cases all seem to indicate that as a child grows older and more mature more weight should be given to the wishes of said child. The Court seems to realize that as a male child becomes older he is more likely to need the advice, counseling and companionship of his father than his mother.

There have been many hearings in this case, the Court has had ample opportunity to talk with the boys and observe their desires in this respect, and the Court has had ample opportunity to review the home life of these youngsters, probably more so than in most cases. It is evident from the history of the case and the testimony of Kim, (Tr. 120, lines 14 to 25; Tr. 112, lines 8 through 14.) this part of the Court's decision should be affirmed. There is no showing by the defendant there has been any reversible error or abuse of discretion. There has been no affirmative showing that the Court was wrong in its determination that the welfare of these minor children would be best served by changing custody to that of their father.

POINT II.

THAT THE COURT ERRED IN GRANTING VISITATION RIGHTS TO THE DEFENDANT MOTHER FROM SATURDAY AT THE HOUR OF 6:00 O'CLOCK P.M. UNTIL THE FOLLOWING SUNDAY NIGHT AT 9:00 O'CLOCK P.M. FOR EACH AND EVERY SATURDAY AND SUNDAY THEREAFTER.

If this order is permitted to stand, the plaintiff fath-

er will not be able to take these young men with him on weekend trips--hunting, fishing, skiing and boating. To boys of these ages such recreational functions are extremely important. With the problems youngsters face, in this day and age particularly, family activities of this nature seem to become more and more important.

The testimony of the youngtsers in the course of the numerous hearings clearly shows the importance to them of these family activities. Apparently, very seldom did defendant and her present husband take the boys on outings, and when they did take a trip the atmosphere was not the happy, enjoyable, carefree atmosphere they experienced when with plaintiff.

The lower Court apparently did not take into consideration the fact that plaintiff was working continually during the week and the only time he has to spend with the youngsters is after his work day is completed, with no opportunity to visit with them and vacation with them on weekends. If the lower Court's order is sustained there would be not one weekend during the whole year that these youngsters and their father could vacation together. This would constitute a great hardship upon plaintiff and his sons and is unreasonable under the circumstances. It should be pointed out that such weekend visitations would be reasonable if they were restricted to one or two weekends each month with some extended full week visitation with the defendant during the summer months.

It should be noted further that such an unreasonable visitation arrangement as is now in force, will further alienate the youngsters' relationship with their

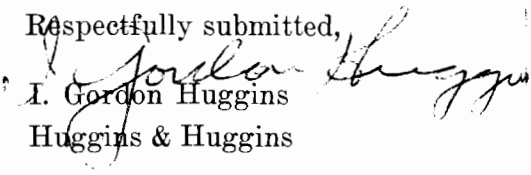
mother, where the youngsters' preferences have been so strongly stated. Reference to the transcript clearly shows that much of the conflict between the boys and their mother arises out of her insistence that the boys stay with her during the times specified, with unreasonable strictness, regardless of circumstances and factors that would be more clearly to the benefit of the youngsters.

CONCLUSIONS

Plaintiff and Cross-Appellant respectfully submits that the order of the lower court transferring the custody of the two minor sons to plaintiff was justified in all respects. Many hearings were had before the lower court and over a period of time the lower court had ample apportunity to observe the boys, to question the boys in chambers, outside of the presence of all parties and counsel, and determine their wishes. The Court had ample opportunity to determine the relationship of these boys with each of their parents and spouses. The Court had ample opportunity to determine the facilities able to be provided by each of the parents, the home atmosphere of each of the parents, and has ample and overwhelming evidence supporting conclusions that it would be for the best interest of these youngsters to reside with their father. The only evidence on the part of either parent that the home is not a suitable one is reference to the two sons of defendant's present husband having instigated some wrongdoing involving Kim, but nothing on the part of plaintiff or his present family along this line.

Visitation rights in the defendant are unfair and unreasonable as they now stand, precluding plaintiff from any vacation trips with the boys at all, which will undoubtedly result in more and more animosity and unhappiness between the minor sons and their mother.

Respectfully submitted,



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