

2004

Behunin v. Behunin : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

JENNIFER ELAINE BEHUNIN,	:	
Petitioner/Appellant,	:	
	:	Trial Court Case No. 004907012
Vs.	:	
	:	Appellate Case No. 20040874
DEAN FARLAN BEHUNIN,	:	
Respondent/Appellee.	:	

BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT MODIFYING A DECREE OF DIVORCE
ISSUED BY THE HONORABLE STEPHEN L. HENROID OF THE THIRD
JUDICIAL DISTRICT COURT OF A SALT LAKE COUNTY, STATE OF
UTAH ON SEPTEMBER 28, 2004.

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No oral argument or published decision is requested.

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UTAH APPELLATE COURTS
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STATEMENT OF JURISDICTION

STATEMENT OF FACTS

The Petitioner filed a Petition to Modify the Divorce Decree in the above matter, and on July 7, 2004, the matter came to trial before the Honorable Stephen L Henroid of the Third Judicial District Court of Salt Lake County, State of Utah. Marsha M. Lang represented the Respondent. The issue for trial was whether there has been a substantial change in the circumstances, which would warrant a change of custody from the Petitioner to the Respondent. The trial judge found such a substantial change and the Memorandum Decision is attached hereto as R.461. The Petitioner objected to the Findings of Fact and Conclusions of Law, said objections were denied on September 28, 2004. (R. 484).

STATEMENT OF THE CASE

The Appellant filed a Motion to Modify the Divorce Decree in the above matter, asking for physical custody of the Appellee to be changed to physical custody to him. After a trial the judge of the Third Judicial District Court granted said Motion on September 28, 2004, which was the date of the trial judge denied the Appellee's Objection to the Findings of Fact and Conclusions of Law.

SUMMARY OF ARGUMENTS

The trial court found that there were substantial changes in circumstances that would warrant a change of physical custody, However, changes, whether substantial or not has ceased well before trial.

The trial courts decision (R. 461) does not correctly refer to the evidence at trial nor does it address the issue that the appellant's problems with raising the children had

ceased.

ARGUMENT

I. Were the Findings of Fact and Conclusions of Law supported by the trial testimony?

At the record of 461. The trial court found that the Petitioner “has moved five times and has had relationships with multiple men two of which are convicted felons.”

Testimony, which supported those finding, is (Tr. page 5 through 15).

The explanation for the Appellant’s movement is found at (Tr. page 117 through 120).

The Appellant initially moved because of harassment from the Appellee and his family (Tr. page 117 line 7). The next move was from Tremonton, Utah due to the exposure of domestic violence not in front of the children. (Tr. page 118 line 9). In July 2003, the Appellant moved to Magna (Tr. page 27-28). Since that time, the Appellant has maintained a stable and more consistent address. (Tr. page 127 through 128 lines 18 – 3).

The Memorandum Decision (rec.463) has indicated that the Appellant has been involved with two convicted felons.

The Appellee (Tr. page 7 lines 15 through 22) testified that the appellant had a relationship with a convicted felon in approximately February 2001. (Tr. page 9 lines 8). to August of 2001. (Tr. page 11 line 23).

The Appellant testified that her relationship with the first man (Tr. page 117 lines 23 through 24). The trial testimony however, indicated her relationship was short term (Tr. pages 117 through 118 lines 24 through 4). Moreover, no physical abuse was ever witnessed by the children (Tr. page 118 lines 11 through 12). The next relationship of the

appellant was (Tr. page 13 lines 12 through 20).

The Actual evidence was the Appellant's testimony and the only evidence concerning that relationship is as follows at (Tr. page 118 through 120)

had lived together again for approximately two months.

Q. So the total time you lived with him was how long?

A. About three months.

Q. And why did you break up?

A We were not getting along. He was more interested in bodybuilding. He was more interested in spending time with his friends, not necessarily looking for a job or employment

Q. Did he ever commit any violence on you?

A. At, one time.

Q. Was that in front of your children?

A. No, it was not.

Q. After he committed that violence on you, Did you ever see him again?

A..No - well, I saw him when the, a protective order was issued. I had to, I went to court for that and saw him there and that was the last time that I've seen him.

Q. He never lived with you after that?

A. No.

Q. When you left Tremonton, where did you go

A. To the Kathleen Robinson Hunstman building, apartment building

Q. How long did you stay there?

A. little, about 13 months.

Q. Now when did you marry this man, Steely?

A. January 7th, 2002.

Q. Was Mr. Steely, did Mr. Steely ever reside with you

A. No.

Q. Why not?

A. Because I felt that, for one I felt that Adult Probation & Parole was not appropriate for my children to witness, to be around, to see, to be involved with. Also, I felt that he needed to prove himself basically. We had talked and he knew what my, what my, what my reasons were. Those wee being that I, he needed to have a job. He needed to be able economically help support and be a part of the family. He needed to prove that he could act, and would be a positive role model in front and to my children. He needed to prove that he was going to programs doing his classes like we had discussed, because I felt that they were all beneficial and would help.

Q. Did ever, did he ever do any of those things?

A. No.

Q. Which of these gentleman was the one that used Dean Behunin's name to get an x-ray up at the hospital?

A. Larry Steely.

Q. Did you assist him in that?

A. No, I did not.

Q. Did you know that he had, did you know he was going to do that?

A. No

Q. How did he do it, if you know?

A. I asked him. He refused to tell me I kind, I figured out on my own, to my, best of my knowledge was I had boxes for storage and I had Dean and I's, mine's tax returns that we had done together and they were still in that box, which listed his social security number, his name, his address, his birth date, everything and that's the only way he could have got that information and after I had seen that, and believing that that's where the information came from, I went and blacked out everything.

Q. Jennifer, why did you marry him if you did not intend to live with him?

A. I married him as a means to show him my support in him, that I was, I was going to be there for him if he was willing to do what he said he was willing to do. It was my way to show that I'm gonna be there to do what I said that I would do. It was, it was my way to support him. He needed to see that support. He needed to see that on, I guess, a paper type basis, because he didn't know if he could believe me or not, and I wanted to show him that he could believe me, that he could believe in me, that this could very well happen. We could very well live together and be married and live a life as man and wife. But he needed to do his part too.

There is no evidence that the Appellant had any other romantic relationships, "Multiple men" as stated in the Memorandum Decision and Findings implies something more and her last relationships with any man ended when Mr. Steely went to prison in (Tr. page 29 lines 2 through 3 and the Appellant never lived with that man (see Tr. above). In 2002 the Appellant told Mr. Steely that the relationship was ended. (Tr. 134 lines 3 to 22.)

The point of Appellant's argument in this regard is that "Multiple men" is

misleading. Moreover, the more importantly there was no evidence of any relationship when the case came to trial on July 7, 2004. The Appellant had a three-month relationship with one man (see page 7 of this brief) and with a man with whom she never lived with. These were brief and past relationships that should not amount to changed circumstances.

II. THE MEMORDUM DECISION AT R. 461 CONCLUDES THAT THE APPELLANT HAS MOVED FIVE TIMES SINCE THE DIVORCE DECREE IN NOVEMBER 2000.

The evidence of the Appellee is that the Appellant has lived in Magna at the same address since July 2003. (Tr.26 lines 7 to 23). At the time of the trial the Appellant had been at the same address for one year and at the same job for three years. (Tr. at 163 to pages 165 line 10).

III. THE MEMORANDUM DECISION AT R. 463 AND THE FINDINGFS AT R.488 FOUND THAT THE APPELLANT HAD NOT FOLLOWED THROUGH WITH SPEECH THERAPY.

The only testimony offered by the Appellee concerning this issue is at page 67 and 68 of the trial transcript and specifically at page 68 lines 1 through 10. Where the custody evaluation admitted at page 68 line 1 that he was not fully aware of the Appellant's efforts at speech therapy by that he had concerns of the enough of time that it took to commence therapy.

The specific efforts of appellants are found at transcript page 120 line 25 to page 122 line 9. At page 121 lines 14 to page 122 line 19 the Appellant gave uncontroverted testimony that when she discovered the speech problem she took immediate and positive

steps to eliminate the problem. The Memorandum Decision at R.463 is plainly wrong that Appellant did not follow through with speech therapy.

As of the date of the trial (July 2004) there have no substantial changes in circumstances. The Appellant has a steady job and housing (Tr. 163 through 164 lines 24 through 20), (Tr. pages 117 through 119 lines 24 through 4). There have been no changes in those regards.

Appellant contends that “substantial” changes circumstances do not contemplate temporary and short-termed relationships nor is it that contemplate short-termed changes in residence, for obvious reasons, newly divorced custodial mothers experience periods of adjustments.

Although the application of the doctrine of res judicata in divorce actions and subsequent modification proceedings is distinguished because of equitable doctrine allowing court to reopen determinations upon showing of substantial change in circumstances, a custody decree which is predicated on a particular set of facts is res judicata and will not be modified absent a showing of substantial or material change in circumstances which warrants do so U.C.A 1953, 30-3-5(3) *Smith v. Smith, 1990, 793 P.2d 407*

In order to meet threshold requirement for a change of custody that substantial change in circumstances has occurred since time of last decree, party must show, in addition to existence and extent of the change, that change is significant in relation to the modification sought; the asserted change must, therefore, have some material relationship to and substantial effect on parenting abilities or functioning of the presently existing custodial relationship; in absence of an indication that change has or will have such effect, materiality requirement is not met; it is not; it is not sufficiently merely to allege a change which, although otherwise substantial, does not essentially affect the custodial relationship. *Becker vs. Becker, 1984, 694 P.2d 608*

IV. ATTORNEY FEES

Petitioner made a Motion for Attorney fees (R.437) and due to the differential income and the circumstances of this filing.

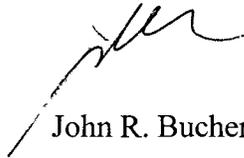
CONCLUSION

The trial court did not consider that at the time of trial there were no changed circumstances except for the better as to Appellant.

The trial court erred in concluding that Appellant's relocation of residences were significant or just her short lived relationships were significant especially since the second one did not include Appellant's husband ever residing with her.

DATED this 10th day of February, 2005.

Respectfully Submitted,

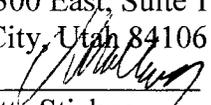


John R. Bucher

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing document on this 10th day of February, 2005 postage pre-paid to following:

Marsha M. Lang
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Charlotte Stickney
Legal Assistant

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ADDENDUM

No addendum required.

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