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Boyd Campbell and Bever;y Campbell v. Janet C. Campbell : Reply Brief

Utah Court of Appeals

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930790

IN THE UTAH COURT OF APPEALS

BOYD CAMPBELL and BEVERLY CAMPBELL, Plaintiffs and Appellants, vs. JANET C. CAMPBELL, Defendant and Appellee.	Appellate Court No. 930790-CA Argument Priority No. 15

REPLY BRIEF OF APPELLANTS

APPEAL FROM FINAL ORDER
IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY
STATE OF UTAH, THE HONORABLE GORDON J. LOW PRESIDING

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In this Reply Brief, the parties will be referred to by the same names as in Appellants' initial Brief.

This Brief articulates three (3) issues. They are:

I. THE TRIAL COURT APPLIED AN IMPROPER STANDARD AND FAILED TO ADDRESS THE PROPER STANDARD IN DETERMINING GRANDPARENT VISITATION.

II. THE TRIAL COURT'S LIMITATION ON VISITATION WAS UNDULY RESTRICTIVE AND IS NOT BASED ON ANY FINDING THAT THE LIMITED VISITATION WOULD BE IN THE BEST INTEREST OF THE GRANDCHILDREN.

III. THIS APPEAL IS NOT FRIVOLOUS OR WITHOUT MERIT AND IF THIS COURT AFFIRMS THE TRIAL COURT'S DECISION, NO AWARD OF ATTORNEY'S FEES ON APPEAL SHOULD BE GRANTED TO THE APPELLEE.

ARGUMENT

I. THE TRIAL COURT APPLIED AN IMPROPER STANDARD AND FAILED TO ADDRESS THE PROPER STANDARD IN DETERMINING GRANDPARENT VISITATION.

In this action, the Court concluded sua sponte that since the statute granting grandparent visitation (§ 30-5-2(1) Utah Code Annotated, 1953 as amended) was unconstitutional, the only visitation Boyd and Beverly were entitled to was that to which Janet stipulated. Janet argues that since the Court granted the visitation Janet stipulated to, the issue of the grandchildren's best interest was, by such stipulation, removed from the case. The argument is fallacious for two reasons:

a. When the Court held the grandparent visitation statute was unconstitutional, it necessarily followed that the Court applied the wrong standard to determination of whether there should be

grandparent visitation. The Court concluded that Boyd and Beverly had no right to visit the grandchildren because the grandparent visitation statute was unconstitutional. The Court then was left to conclude, as it did, that only if Janet voluntarily allowed visitation would the Court grant visitation, and then only to the extent Janet stipulated to such visitation. It is apparent from this line of reasoning that had Janet refused to grant any visitation, the Court would have not ordered any visitation.

It is clear from the decided cases that the courts must be guided by the humanitarian purpose of the statute and by the independent evaluation of the best interest of the grandchildren and not by what the mother of the grandchildren is willing to allow. (90 ALR 3d 222).

In fact, in Goolsbee v. Heft (1977 Texas Civ. App.) 549 SW 2d 34, the Texas Court expressly determined that the trial judge's power to grant visitation was not subject to the will of the parent, because otherwise the statute giving grandparent visitation in the best interest of the grandchildren would have been without effect.

b. When the Court found the grandparent visitation statute unconstitutional, the issue of the best interest of the grandchildren was not then developed, articulated and applied by the Court in this case. The best interest of the grandchildren requires a three-pronged inquiry by the Trial Court. Those inquiries are:

1. The wishes of the grandchildren;

2. The interaction and interrelationship of the grandchildren with their parents, siblings, and any other persons who may significantly affect the grandchildren's best interest; and

3. The mental and physical health of all individuals involved. (90 ALR 3rd, p. 229)

In this case, the Court never addressed these three considerations at all. In its Findings of Fact, the Court found:

> 1. Some visitation of the children by the Plaintiffs will be beneficial and in the best interests and well-being of the children. (R. p. 79-82)

This is a bald statement that offers no basis for the statement, how the statement was arrived at, why visitation would benefit the grandchildren, how visitation would benefit and be in the best interest of the grandchildren, or the extent to which visitation should be granted. The finding does not articulate any of the above three tests for determining the best interest of the grandchildren. This failure on the part of the Trial Judge is reversible error.

II. THE TRIAL COURT'S LIMITATION ON VISITATION WAS UNDULY RESTRICTIVE AND IS NOT BASED ON ANY FINDING THAT THE LIMITED VISITATION WOULD BE IN THE BEST INTEREST OF THE GRANDCHILDREN.

Janet argues that the visitation granted by the Court is that requested by Boyd and Beverly and that Boyd and Beverly cannot, therefore, complain about the visitation. (See page 18 of Janet's Brief.) This argument is lacking in candor. This argument takes

one part of Boyd and Beverly's request in isolation from their other requests. For example, the argument ignores Request No. 1, which is requests:

> 1. One (1) twenty-seven (27) hour period every other week, preferably from 6:00 p.m. Friday night to 9:00 p.m. on Saturday night. If the children have church, school or recreational activities or music lessons during this time, Campbells will see that the children involved attend all such activities.

Boyd and Beverly's requests for visitation must be taken in their totality. The order of the Court is so restrictive as to make it virtually impossible for Boyd and Beverly to be with all of the grandchildren at the same time or even separately, frequently enough and for a long enough time on each visitation to enable Boyd and Beverly to establish a meaningful relationship with the grandchildren and help the grandchildren to understand their father's family and its values.

The U.S. Supreme Court has recognized the importance of the extended family and particularly of grandparent/grandchild relationships. In Grizwold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), the Court talks of "respect for the teachings of history [and] solid recognition of the basic values that underlie our society." In Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977), (case which held unconstitutional a city zoning ordinance prohibiting a grandmother from allowing two grandsons to stay in her apartment) the Court further elaborates that these societal values include "the tradition of uncles, aunts, cousins and especially grandparents ..." and explains that the Constitution "protects the

sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."

III. THIS APPEAL IS NOT FRIVOLOUS OR WITHOUT MERIT AND IF THIS COURT AFFIRMS THE TRIAL COURT'S DECISION, NO AWARD OF ATTORNEY'S FEES ON APPEAL SHOULD BE GRANTED TO THE APPELLEE.

The applicable statute governing an award of attorney's fees is § 78-27-56, Utah Code Annotated, 1953 as amended. Under that statute, an award of attorney's fees can be made against a prevailing party "... if the Court determines that the action or defense to the action was without merit and not brought or asserted in good faith ..."

This appeal directly challenges the Trial Judge's incorrect application of the standard of review appropriate in determining grandparent visitation. In allowing his personal views of U.C.A. §30-5-2 to influence his decision, Judge Low committed reversible error which is valid justification for appeal "warranted by existing law" and made "based on a good faith argument". Utah Rules of Appellate Procedure, Rule 33. Judge Low had discretion in deciding whether visitation should be awarded, but he was also bound by the requirement that he "minister to the needs of the children according to an enlightened and objective evaluation of the circumstances." Ehrlich v. Ressner, (1977) 55 App. Div 2d 953, 391 NYS 2d 152. Also, that he follow the statute and determine grandparent visitation based on the best interest of the grandchildren.

In the case at bar, Judge Low allowed his personal view on the constitutionality of U.C.A. §30-5-2 to color his focus away from what is actually in the best interest of the Campbell children. By applying the incorrect standard of review, the Trial Judge set a visitation schedule on a basis other than the basis required by § 30-5-2(1) Utah Code Annotated, 1953 as amended, and which does not constitute an arrangement of visitation which is in the best interest of the children involved.

This appeal is motivated solely by Boyd and Beverly's desire to insure a result that is in the best interest of their grandchildren. They contend it is in the best interest of the grandchildren to know and learn from their grandparents since their father is not available to influence the grandchildren and teach them his families' values. Janet argues that Boyd and Beverly's dissatisfaction over the visitation awarded was based on a desire to be allowed free reign of the children without consulting or involving Janet. Boyd and Beverly specifically deny this allegation. Their concern is exclusively for their grandchildren and the desire to continue a meaningful, close family relationship with them. Because they feel the visitation awarded will not result in such relationship and is not conducive to the goal of achieving the best interest of the children set forth in the statute, they appeal the decision of the lower Court. This appeal is warranted, with merit, and motivated solely for the purpose of accomplishing what is in the best interest of their grandchildren. This objective was not achieved in the lower Court, therefore the

lower Court decision should be reversed and no attorney's fees should be awarded.

Appellants submit there is no basis in fact or law for a finding by the Court that their appeal is without merit and not brought or asserted in good faith. Appellee's request for attorney's fees is without merit and should be denied by this Court.

CONCLUSION

In the instant case, the Trial Court applied an improper standard for determining grandparent visitation and failed to address the correct standard. The Trial Judge allowed his personal views of the applicable statute to taint his decision and as a result, failed to address the objective set forth in the statute, that of achieving an arrangement which is in the best interest of the children involved. The error constitutes reversible error.

The statute is concerned exclusively with the children's welfare. Judge Low, believing the statute to unconstitutionally impinge on the mother's rights, granted only the extent of visitation stipulated to by the mother, Janet. This action almost wholly disregarded any analysis of what would actually be in the best interest of the children. This error constitutes a basic disregard for the purpose of the grandparent visitation statute, that of benefitting the children involved.

This appeal is made on the good faith belief that reversible error was committed in the lower Court when it applied the

incorrect standard of review as set forth in U.C.A. §30-5-2(1). Because the appeal has merit and was not brought or asserted in bad faith, and because clear and substantial error was made, Boyd and Beverly respectfully request this Court deny Appellee's request for attorney's fees and remand this Case to the Trial Court for a new trial before a different Judge who can hear and determine the statutory and factual issue without bias and with the best interest of the Campbell grandchildren in mind.

DATED this 23rd day of June, 1994.

Respectfully submitted,

OLSON & HOGGAN, P.C.

L. Brent Hoggan
Attorneys for Appellants

MAILING CERTIFICATE

I hereby certify that I mailed four (4) exact copies of the foregoing REPLY BRIEF OF APPELLANTS, to Defendant's Attorney, Dianne R. Balmain, at 110 North 100 East, P. O. Box 543, Logan, Utah 84323-0543, postage prepaid in Logan, Utah, this 23rd day of June, 1994.

L. Brent Hoggan