

1994

Jones v. Jones : Brief of Appellant

Utah Court of Appeals

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John M. Bybee; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

REBECCA Y. M. JONES,	*	
Plaintiff-Appellee,	*	BRIEF OF APPELLANT
vs.	*	
ROBERT B. D. JONES,	*	Case No: 940002-CA
Defendant-Appellant	*	

APPEAL from the Second District Court, Judge Taylor

UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 940002CA

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John M. Bybee
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Argument priority classification #15

FILED

FEB 07 1995

COURT OF APPEAL

IN THE UTAH COURT OF APPEALS

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Plaintiff-Appellee,	*	BRIEF OF APPELLANT
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TABLE OF AUTHORITIES

UTAH CASES CITED

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STATUTES CITED

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JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is taken pursuant to the *Utah Rules of Appellate Procedure*, Rules 3 and 4. The Utah Court of appeals has jurisdiction pursuant to *Utah Code* § 78-2a-3(2)(h).

This appeal is from the final judgment entered by the Court on December 3, 1993, after a trial on the 26th and 27th of October, 1993.

STATEMENT OF ISSUES PRESENTED ON APPEAL

Did the District Court err when it did not consider the request of Defendant-Appellant for custody or visitation of the minor child of the Plaintiff-Appellee who was the step-child of the Defendant during the marriage?

DETERMINATIVE RULES AND STATUTES

Pursuant to *Utah Code* § 30-3-10 the District Court has jurisdiction to determine the custody and visitation of the minor children of the parties.

STATEMENT OF THE CASE

The parties started co-habiting in 1987 while the Plaintiff was pregnant with Jeremy Niles who was born in August of 1987. The Defendant was not the natural father of the child. After the divorce of the Plaintiff from her prior husband in September of 1987 the Court found that the parties started a common law marriage relationship. A natural child of the parties, Elana, was born in January, 1990. Plaintiff started this action on September 2, 1992 by filing a Petition to Validate Marriage and Complaint for Divorce asking that the custody of Elana be awarded to her with restricted visitation to the Defendant. The Defendant filed an Answer on November 12, 1992, and a Counterclaim on March 24, 1993, asking for custody of both his natural child, Elana, and his step-son, Jeremy. The Defendant had lived with his step-son since his birth until just prior to the filing of the divorce by the Plaintiff.

The Pre-Trial Order (see Addendum) certified that custody of both children was at issue in the case but neither the custody evaluation (see Addendum) nor the Findings of Fact, Conclusions of Law, or Decree of Divorce discuss the custody or visitation of Jeremy by the Defendant.

RELIEF REQUESTED

The Defendant-Appellant seeks an Order from this Court remanding the case to the District Court to adjudicate the issue of custody and/or visitation of the step-son, Jeremy, for the Defendant.

STATEMENT OF FACTS

The parties started co-habiting in 1987 while the Plaintiff was pregnant with Jeremy Niles who was born in August of 1987. The Defendant was not the natural father of the child.

After the divorce of the Plaintiff from her prior husband in September of 1987 the Court found that the parties started a common law marriage relationship. A natural child of the parties, Elana, was born in January, 1990.

During the pendency of the matter Defendant was allowed visitation with Jeremy on the discretion of the Defendant (see Addendum) which he exercised from time to time.

SUMMARY OF ARGUMENT

In the INTEREST OF J. W. F., 799 p.2d 710 (Utah 1990), The Supreme Court of Utah decided that other classes of person besides the natural parents are entitled to standing to seek a determination as to whether it would be in the best interest of the child to have custody. The case law cited by the Court in that case indicates that as a stepparent the Defendant is entitled to hearing on custody and thereby, by implication, to visitation. The facts in this case showed that the Defendant was the only father Jeremy knew and that they had a good relationship. The Supreme Court said at page 716:

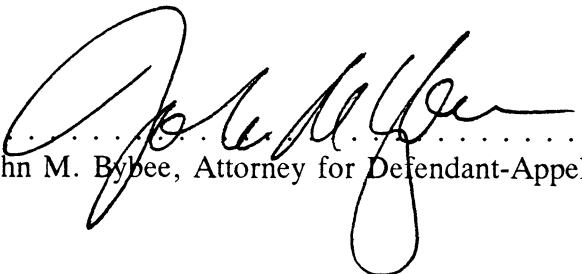
There is no reason to narrowly restrict participation in custodial proceedings. Indeed, our case law and the legislature's pronouncements indicate that the interests of the child are best served when those interested in the child are permitted to assert that interest. The question of who should have custody of the child is too important to exclude participants on narrowly drawn technical grounds, as did the court of appeals. Those who have legal or personal connections with the child should not be precluded from being heard on best interests. Of course, granting Schoolcraft a hearing on best interests does not mean that he has any presumption of entitlement of custody. The court still must determine what custody arrangement would serve the best interests of J.W.F. and act accordingly. Utah Code Ann. Sec. 78-3a-39(13)(b) (Supp.1990); accord *Kishpaugh v. Kishpaugh*, 745 P.2d 1248, 1250-51 (Utah 1987); *Hutchison*, 649 P.2d at 40; *Gribble*, 583 P.2d at 66.

CONCLUSION

Because the trial Court did not consider Jeremy in its Findings and Decree of Divorce,

this case should be remanded with instructions that the Court consider that issue.

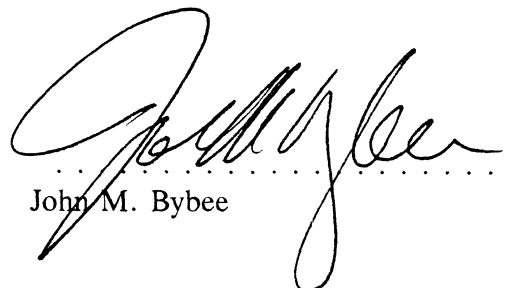
DATED this 3rd day of February, 1995


.....
John M. Bybee, Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES, that on the 2nd day of February, 1995, he served a copy of the attached BRIEF OF APPELLANT upon the Plaintiff-Appellee, by depositing the same in the U.S. Mail, first class mail with sufficient postage prepaid, to the following address:

Rebecca Y. M. Jones
2348 Jefferson Avenue
Ogden, UT 84401


.....
John M. Bybee

1993 JUL 30

KEVIN G. RICHARDS (#5339)
Attorney for Plaintiff
2650 Washington Blvd., Suite 101
Ogden, Utah 84401
(801) 621-1428

IN THE SECOND DISTRICT COURT IN AND FOR

WEBER COUNTY, STATE OF UTAH

----- ooOoo -----
: REBECCA YVETTE NILES JONES, PRE-TRIAL ORDER
: Plaintiff, :
vs. :
: Civil No. 924901888DA
ROBERT BOB DEE JONES, :
: Defendant. :
: STATE OF UTAH, Department Judge Stanton M. Taylor
of Human Services, :
Intervenor. :
----- ooOoo -----

AUG 13 1993

THE ABOVE-ENTITLED MATTER having come on for Pre-Trial Conference on the 28th day of July, 1993, the Honorable Maurice Richards presiding; the Plaintiff being personally present and represented by her attorney Kevin G. Richards, Esq., the Defendant being personally present and represented by his attorney Frank G. Smith, and the State of Utah Department of Human Services being present and represented by its attorney Karl G. Perry; the custodial evaluation report of Rhett Potter having been introduced and received into evidence, as well as a medical report concerning the current medical condition of the Defendant Robert Jones having been admitted and received into evidence; the parties having proffered their various position and the Court being fully

advised on the premises now makes the following recommendations and order:

1. IT IS RECOMMENDED that based upon the Stipulation of the parties Plaintiff waves any claim to alimony from the Defendant either past, present or future.

2. IT IS FURTHER RECOMMENDED, that the State's Order to Show Cause be held in abeyance until such time that the Defendant receives Social Security payments or obtains employment.

3. IT IS FURTHER RECOMMENDED, that the Plaintiff be awarded the sole care custody and control of the minor child to-wit: Elena Katherine Jones, born January 29, 1990, and that Defendant be responsible to pay support at such time that he receives Social Security or obtains employment. Furthermore, that under current State Law Defendant be allowed to provide day care when the Plaintiff is working and that Defendant should be awarded the standard visitation rights as currently defined by statute. That part of the basis for recommending the custody of minor child be awarded to the Plaintiff, is based upon the recommendations of Rhett Potter, and furthermore that the minor child should be with its two other siblings.

IT IS FURTHER RECOMMENDED, that the Plaintiff does not know the whereabouts of the two firearms alleged by Defendant to be retained by Plaintiff and that each party should be awarded all property currently in his or her possession free and clear of any right, claim or interest therein by the

other.

IT IS FURTHER RECOMMENDED, that the standard medical provisions as currently defined by this Court be incorporated in and become part of the final Decree of Divorce.

IT IS FURTHER RECOMMENDED, that the Plaintiff divide the family pictures with the Defendant.

IT IS FURTHER RECOMMENDED, that if this case is settled at the this time the pre-trial stage, that neither party be awarded any attorneys fee, should the Defendant elect to take this matter to trial that Defendant should be obligated to pay Plaintiff's attorney fees for trial of \$1,000.00 depending upon the time already spent and time for trial.

IT IS HEREBY ORDERED that the following issues are certified for trial:

1. Custody of the parties minor child including the custody of the Defendant's step child Jeremy Niles.
2. The issue of the amount of child support, both ongoing child support as well as back child support.
3. Property division specifically to firearms that the Defendant alleges are in the possession of the Plaintiff and the issue of attorney fees to be awarded to Plaintiff.

DATED this 13 day of August, 1993.



MAURICE RICHARDS
Domestic Court Commissioner

RULE 4-504 NOTICE

TO: Frank G. Smith and Karl G. Perry

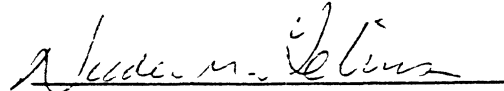
Pursuant to Rule 4-504 of the rules of Judicial Administration, the undersigned will submit the foregoing to the Honorable Maurice Richards, Domestic Court Judge, for signature upon the expiration of eight (8) days from the date of this notice is mailed to you, unless written objection is filed prior to that time.

CERTIFICATE OF MAILING

I certify that on the 3 day of August, 1993, I mailed a true and correct copy of the foregoing: PRE-TRIAL ORDER, postage prepaid and first class mail to:

Frank G. Smith
Attorney for Defendant
550- 24th Street, #300
Ogden, Utah 84401

Karl G. Perry
Assistant Attorney General
2450 Washington Blvd. 7th Fl.
Ogden, Utah 84401


Secretary

DEC 27 AM 7 06

UTAH LEGAL SERVICES, INC.
 Frank G. Smith, #2998
 Attorney for Defendant
 550 - 24th Street, #300
 Ogden, Utah 84401
 Telephone: 394-9431
 Fax: 394-9434

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
 WEBER COUNTY, STATE OF UTAH

REBECCA YVETTE NILES JONES,	/	
Plaintiff,	/	RECOMMENDED PRELIMINARY
		PRE-TRIAL ORDER
v.	/	
ROBERT BOB DEE JONES,	/	Civil No. 924901888DA
Defendant.	/	Judge Stanton Taylor

APR 27 1993

The above-entitled matter came on for a pre-trial hearing before District Court Commissioner B. Maurice Richards on March 4, 1993. Plaintiff was present and represented by Attorney Kevin G. Richards, Defendant was present and represented by Attorney Frank G. Smith. Based upon the representation of the parties, and good cause appearing, the Court

HEREBY RECOMMENDS AND ORDERS:

1. That the pre-trial hearing be continued until May 10, 1993 at the hour of 10:00 a.m.
2. That the Attorney General's office be given notice of said continued hearing.

3. That the Defendant shall have ten days in which to file a counterclaim in this case.

4. That Plaintiff shall have temporary custody of the parties' minor daughter, Elana Katherine Jones, subject to standard visitation by the Defendant. That the Defendant shall have visitation on alternating weekends, from Friday at 6:00 p.m. until Sunday at 6:00 p.m., beginning Friday March 5, 1993. That Defendant may also have visitation with his step-son, Jeremy Adam Niles, if the Plaintiff voluntarily chooses to permit such visitation.

5. That the Defendant currently resides with his father; that the Defendant shall not take either child to that residence during visitation. That the Defendant may take the parties' daughter, and, with Plaintiff's consent, the Defendant's step-son, to the residence of Defendant's aunt, Elizabeth J. Royal, of 378 Broadway Circle, Toole, Utah, during visitation.

6. That both parties are restrained from removing the children from the state of Utah until further order of the court.

7. That a home study evaluation shall be prepared for the court. That Mr. Rhett Potter, L.C.S.W., is hereby appointed by the court to perform said evaluation. That the cost of said evaluation shall be borne initially by the Defendant. That the court reserves the issue of apportioning said cost.

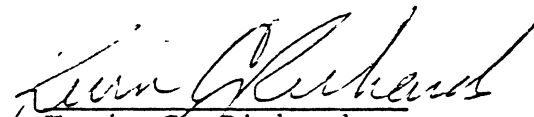
8. That the court reserves the issues of attorney's fees, division of property and division of debts.

DATED this 26 day of April, 1993.

BY THE COURT:

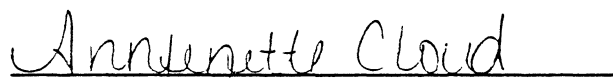

DISTRICT COURT COMMISSIONER

APPROVED AS TO FORM:


Kevin G. Richards
Attorney at Law

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing document to Kevin G. Richards, Attorney at Law at 2650 Washington Blvd., Suite 101, Ogden, Utah 84401 and ASSISTANT ATTORNEY GENERAL at 2540 Washington Blvd., 7th Floor, Ogden, Utah, 84401, via first-class U.S. Mail, postage prepaid this 24 day of March, 1993.


Secretary

SUMMARY

I. IDENTIFYING INFORMATION

CIVIL NUMBER: 924901582SA

PLAINTIFF

Name: REBECCA YVETTE NILES
Maiden Name: NILES
Address: 2348 Jefferson Avenue
Ogden UT

DEFENDANT

Name: ROBERT D. JONES
Address: 9155 W. 25800 N.
Portage UT

II. CHILDREN

ELENA KATHERINE JONES (3), born January 29, 1990, in Ogden UT

III. COLLATERAL CONTACTS

My office contacted 9 references provided by Rebecca Niles, Bob Jones, and Andrew Genta, as well as representatives of Child Protective Services of the State Division of Family Services.

IV. SUMMARY AND RECOMMENDATIONS

I made no attempt to interview Elena or to elicit a preference about where she wants to live. She has a half-brother, Jeremy Niles (5), with whom she lives at Rebecca's. Elena and Jeremy did not appear to be particularly close.

Elena seemed bonded with each of her parents, but exhibited more affectionate behavior toward Bob than she did toward Rebecca during my visits; it should be borne in mind that Elena lives with Rebecca most of the time and visits on occasion with Bob. Elena seemed relatively happy at Rebecca's home, and she seemed accustomed to Jeremy and his roughhouse play; she appeared very comfortable with Andrew Genta. Bob touched and held Elena more during my contacts than Rebecca did, but he has limited visitation, and Rebecca generally has Elena with her.

Moral character may favor Bob, since Rebecca has been pregnant by 3 different men. On the other hand, Bob seemed to have had no moral compunctions about setting up housekeeping with 17-year-old Rebecca soon after he met her and without benefit of clergy. He apparently has no current girlfriend or romantic involvement, while Rebecca is pregnant with Andrew Genta's baby and talked of marrying him. Emotional stability is also questionable. Bob told me repeatedly of Rebecca's emotional/psychological/psychiatric/neurological problems, ranging from epilepsy to multiple personalities. I encountered only one personality in my interviews with Rebecca and did not pick up signs of mental illness. A couple of references talked of Bob's emotional and psychological problems and said he is the one who needs psychiatric help. His long list of somatic complaints and illnesses was the only area I encountered which suggested possible emotional/psychological problems, other than his persistence in commenting about Rebecca's alleged psychiatric dif-

ficulties.

Both parents desire custody and have wanted both children during the time they lived together and since their separation. Neither has relinquished custody in the past.

If Bob is granted custody, he will care for Elena personally. He remarked that he was the primary care parent all the time he, Rebecca, and the children lived together. That is not entirely correct, since Rebecca did not work outside the home until after Elena's birth, and her employment has not always been full time. Rebecca has been the primary care provider since July 1992. I would not be surprised to learn that Bob spends much of his time at his parents' home where his mother and his sister help provide care for Elena. If that turns out to be the case, there is cause for concern, since there have been complaints to Child Protective Services about the filth and poor hygiene at his parents' home.

Rebecca works and places the children in state-licensed day care during her working hours. She provides personal care the rest of the time.

There was no apparent impairment of the ability of either parent to function as a parent through drug abuse or excessive drinking. Both parents have some shortcomings as parents because of intellectual or emotional limitations.

Religious compatibility with the child does not seem to be an issue. Kinship is the same in each case.

Neither parent has ample finances, but Rebecca's appear to be a little better than Bob's. If she and Andrew Genta marry or cohabit, their combined income is considerably better than Bob's alone. Rebecca's home is considerably more adequate than Bob's in terms of size and repair.

I recommend that custody of ELENA KATHERINE JONES be granted to the Plaintiff, REBECCA YVETTE NILES.



RHETT F. POTTER, ACSW

7/23/93
DATE