1994

# Crookston v. Crookston : Reply Brief

Utah Court of Appeals


Willard R. Bishop; Attorney for Plaintiff/Appellee.
Utah Legal Services, Inc.; Stephen W. Julien; Attorneys for Defendant/Appellant.

DOCKET NO. 940190 IN THE COURT OF APPEALS

STATE OF UTAH

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| MICHAEL EUGENE CROOKSTON, | : | |
| Plaintiff/Appellee, | : | Case No. 940190-CA |
| vs. | : | |
| REBECCA ANN BATIO CROOKSTON n/k/a REBECCA ANN BATIO CROOKSTON HACKING, | : | Priority No. 4 |
| Defendant/Appellant. | : | |

# REPLY BRIEF OF APPELLANT REBECCA ANN BATIO CROOKSTON, N/K/A REBECCA ANN BATIO CROOKSTON HACKING

Appeal from Order Overruling And Denying Objection To Recommendation Of Commissioner

In the Fifth Judicial District Court
for Washington County, State of Utah

Honorable James L. Shumate
District Court Judge

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IN THE COURT OF APPEALS

STATE OF UTAH

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| BARBARA LYNN BUNCH, | : | |
| Plaintiff/Appellant, | : | Case No. 93070-CA |
| vs. | : | |
| BRIAN LYNN ENGLEHORN, | : | Priority No. 15 |
| Defendant/Appellee. | : | |

# REPLY BRIEF OF APPELLANT BARBARA LYNN BUNCH

Appeal from Judgment of Dismissal With Prejudice

In the Fifth Judicial District Court
for Iron County, State of Utah

Honorable J. Philip Eves
District Court Judge


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TABLE OF CONTENTS

## TABLE OF AUTHORITIES



### STATUTES

IN THE COURT OF APPEALS

STATE OF UTAH

| | | |
|---|---|---|
| MICHAEL EUGENE CROOKSTON,<br><br>Plaintiff/Appellee,<br><br>vs.<br><br>REBECCA ANN BATIO CROOKSTON n/k/a REBECCA ANN BATIO CROOKSTON HACKING,<br><br>Defendant/Appellant. | : | Case No. 940190-CA<br><br>Priority No. 4 |

REPLY BRIEF OF APPELLANT REBECCA ANN BATIO CROOKSTON HACKING n/k/a REBECCA ANN BATIO CROOKSTON HACKING

## ARGUMENT

### POINT ONE

### THE ALLEGATIONS RAISED IN THE PETITION DO NOT, ON THEIR FACE, ESTABLISH THAT A CHANGE OF CUSTODY IS REQUIRED

Crookston argues that because Hacking failed to respond in time to the default certificate, the allegations raised in his petition are assumed to be true and that the trial court properly adopted them as its findings of fact, and based on those findings, properly found it was in the best interest of the minor children to change their custody. Crookston cites Stevens v. Collard, 837 P.2d 593 (Utah App., 1992) as authority for his position. The court in Stevens also said that:

> A trial court asked to render a judgment by default must first conclude that the uncontroverted allegations of an appellant's petition are, on their face, legally sufficient to establish a valid claim against the defaulting party.

The allegations raised by Crookston in his petition are that Hacking moved several times with the children; that she did not always let Crookston know her whereabouts; that she developed poor housekeeping habits; that she did not kept the children clean; that she was receiving Aid to Families with Dependent Children; and that she was living with a man to whom she was not married. In contrast, Crookston points out that he has remarried and has a house. (Record on Appeal, pp. 160-63.) It is submitted that these allegations, as those raised in Stevens, do not on their face, establish that there has been a material change in Hacking's ability to properly care for the children. In his detailed version of the facts, Crookston alleges that he has had problems since 1988 with Hacking taking the children and not letting him know of their whereabouts. (Brief of Appellee, p. 4.) In September of 1990, Crookston stipulated to Hacking having custody, in spite of those allegations. (Brief of Appellee, p. 4.) It appears that Crookston was not concerned enough about Hacking's movements to say she was an unfit parent.

Simply because Hacking may have moved on several occasions, and not kept Crookston fully informed of her whereabouts, does not necessarily mean that the children lacked proper care. Only a hearing going into the details would establish that fact. It would be necessary to determine why the moves took place, why notice may

not have always been given, and the affect of both on the children. Crookston points out in his brief that Hacking has alleged abuse of the children by him. (Brief of Appellee, p. 4.) Hacking has made the same allegation recently. (Record on Appeal, pp. 390-91, 377-80, 384-85.) It would seem that the allegation needs to be considered in connection with Hacking's reasons for moving around. There may also be a question whether Crookston was always available to receive messages since there is no evidence of his whereabouts.

Crookston acknowledges in his petition that Hacking was initially a good housekeeper, but he now claims that she has developed poor housekeeping habits. An initial question is what Crookston means in saying that Hacking is a poor housekeeper. It could mean very little as far as having any adverse affect upon the children. It does not necessarily follow that because one is a poor housekeeper, one is also a poor parent. Hacking suggests that many rich parents with immaculate houses have proven to be unfit parents. Hacking also wonders how Crookston has been in a position to judge Hacking's housekeeping abilities if he has not known her whereabouts. It is not as easy to keep a house spotless as children come or sickness sets in or other unforeseen events take place. More information would have to be gathered to determine the extent of the problem, its causes and its affect upon the children before saying that a change of custody is proper. The same can be said for the allegation that the children are not kept clean. One does not know what Crookston means by "clean." Perhaps it has been assumed that the children are not clean because on one occasion one

of them did not smell good. There is no information on the type of odor, its causes, or how often it was detected. A hearty game of football can cause one to smell. There may be a logical explanation for the bad odor, and it does not necessarily follow that the children are not otherwise receiving proper care.

Crookston also appears to be saying that a change of custody is justified because at the time the petition was filed Hacking was receiving AFDC and living with a man to whom she was not married. Hacking believes that Crookston cannot seriously say that because one is receiving public assistance that person is a bad parent. It is common knowledge that there are millions of good parents in our society, who for one reason or another, have received public assistance. Nor can Crookston seriously say that because Hacking was living with a man out of wedlock she is a bad parent. The boyfriend may be an excellent source of support, stability, or guidance to the children.

The upshot is that the allegations raised by Crookston in his petition justifying a change of custody are not sufficient on their face.

Crookston also suggests that he is the more fit parent because he has remarried and has a house. Hacking does not see how those two facts lead to the conclusion that the children would be better off with him. One with the bigger or newer house is not necessarily the best parent. Nor can it be said that a remarriage is necessarily in the best interest of children.

## POINT TWO

### HACKING HAS NOT RAISED ANY ISSUES FOR THE FIRST TIME ON APPEAL

Crookston appears to be arguing that Hacking is alleging, for the first time on appeal, that the lower court erred in not taking any evidence before changing custody and awarding child support and attorney fees to Crookston. After Crookston filed a default certificate, Hacking's prior counsel filed a motion to set aside the default judgment and an accompanying memorandum. (Record on Appeal, pp. 181-84.) In that memorandum, Hacking stated:

> This case represents the future of small children and their interest's must be protected, we are not in receipt of any evaluations by qualified experts. Nor have any material allegations as to the childrens welfare be(en) raised other than they have been subject to several moves. I would ask the court to allow my clients the opportunity to respond to the complaint as they do have a legitimate defense to the allegations of the plaintiff. (Record on Appeal, p. 184.)

When Hacking's present counsel entered the case, just prior to the hearing on Crookston's motion for default judgment, he filed a supplemental memorandum of points and authorities. (Record on Appeal, pp. 234-38.) In that memorandum Hacking stated, in urging the court to set aside the default certificate:

> The Petition raises serious allegations. Plaintiff seeks to change the custody of three minor children from Defendant to Plaintiff. In considering those allegations the Court must put the children first. It must decide if there has been a substantial change in circumstances justifying a change of custody and also whether it would be in the best interest of the children to change custody. It is submitted that it is critical to the children that these issues be decided after a full hearing rather than on the basis of a default

certificate. (Record on Appeal, p. 237.)

When the motion for default judgment was argued before the commissioner, Hacking's present counsel stated the same argument, though not very well. (Record on Appeal, pp. 336-37, 341.) Present counsel also made the same argument to the trial court judge by saying:

> Now, the effect of that order if you -- if you let that order stand, what that means is that the defendant in this case is denied a trial. That means you're going to have a change of custody from one parent to another without any evidence being taken. And we're talking about children that aren't real, real young. They're not real old, but their ages are 13, 12 and eight. I also means you're awarding child support and attorney fees without -- without a hearing.
>
> Now, the way I view this, Your Honor, is there -- there are very few issues that come before the Court that are more important than child custody. And anytime the Court gets one of those sort of issues, that places a heavy burden on the Court. And my understanding is you -- you really don't want to change custody from one parent to another, unless you can show that there's been a substantial change in circumstance, and that number two, it would be in the best interest of the children to make that change. (Record on Appeal, p. 352.)

The issues of custody, child support and attorney fees go together. A child support award can only be determined after custody is decided. Attorney fees are likewise affected by who is awarded custody. All of these issues were clearly raised at the trial level, as illustrated above.

## POINT THREE

## HACKING CLEARLY POINTED OUT HOW THE TRIAL COURT ABUSED ITS DISCRETION

Crookston argues that Hacking has failed to point out how the

trial judge abused his discretion. Hacking believes she clearly stated that the trial judge abused his discretion in changing the custody of the minor children from Hacking to Crookston without holding an evidentiary hearing. Hacking's summary of argument (Brief of Appellant, pp. 6-7.) and argument (Record on Appeal pp. 7-10.) center on that point.

Hacking's prior counsel sought to set aside the default certificate pursuant to Rule 60(b), Utah Rules of Civil Procedure. (Record on Appeal, pp. 181-84.) While prior counsel concentrated on Rule 60(b)(1), both prior and present counsel also urged the court to set aside the default certificate in order to hold an evidentiary hearing to determine if it would be in the best interest of the minor children to have a change of custody. Rule 60(b)(7), Utah Rules of Civil Procedure, clearly empowers the court to set aside a default judgment, ". . . for any other reason justifying relief from the operation of the judgment." Hacking has continually argued that she should have been given relief from the default certificate and that the trial court erred in not granting it.

## POINT FOUR

## HACKING IS NOT BARRED FROM PROSECUTING HER APPEAL THOUGH SHE HAS BEEN HELD IN CONTEMPT OF COURT

Crookston argues that Hacking is barred from prosecuting her appeal because she has been held in contempt of court. This appeal is from the default judgment granted by the trial court on November

18, 1994. (Record on Appeal, pp 246-48.) Hacking was not in contempt when that order was executed and filed. Hacking was found in contempt on May 31, 1994 (Record on Appeal, pp. 402-5.) as a result of an order to show cause initially signed by the court on March 10, 1994. (Record on Appeal, pp. 316-17.) Hacking is not seeking relief from that order. The contempt stemmed from Hacking retaining custody of the children in Oregon after the default judgment was granted. (Record on Appeal, pp. 276-77.) Hacking believed it would be in the best interest of the children to remain in Oregon with her, and it was her hope that the trial court judge would overturn the order of the commissioner. (Record on Appeal, pp. 292-94.) It was a very emotional and difficult situation for her. Once the trial judge ruled against her, Hacking immediately filed a motion for stay of default judgment and order overruling and denying objection to recommendation of commissioner. (Record on Appeal, pp. 290-91.) Hacking was convinced the children should not be turned over to Crookston for the reasons set forth in the affidavits, (Record on Appeal, pp. 377-80, 384-85, 390-91.) and so sought to retain their custody until the appeal was over. The order of the trial judge was filed March 7, 1994. (Record on Appeal, pp. 262-64.) Hacking's motion for a stay was filed March 21, 1994, (Record on Appeal, pp. 290-91.). The matter was set for hearing on April 6, 1994. (Record on Appeal, pp. 295-96.) Counsel for Crookston then asked that the April 6, 1994 hearing be continued, which it was. (Record on Appeal, pp. 303.-04.) Counsel for Hacking then attempted to obtain another hearing date, but

found that counsel for Crookston had an extremely heavy schedule. The first open date available to counsel for Crookston was May 31, 1994. In order to accommodate counsel for Crookston, counsel for Hacking agreed to have Hacking appear on that date to answer to the order to show cause, rather than requiring Crookston to serve Hacking personally. By the time the matter came on for hearing, the children were with Crookston and the trial court judge ruled that the motion to stay the change of custody was moot. (Record on Appeal, p. 404.) For the above reasons, Hacking believes that she has the right to be heard on her appeal, in spite of the contempt order.

## CONCLUSION

For the reasons set forth above, it is respectfully submitted that the concerns raised by Crookston in his brief are without merit. The default judgment should be set aside and the trial court instructed to take evidence on whether there has been a substantial change in circumstance justifying a change of custody and whether it would be in the best interest of the children to make a change. The court should also determine what, if any, child support and attorney fees should be awarded.

DATED this 2nd day of September, 1994.

UTAH LEGAL SERVICES, INC.
By: Stephen W. Julien
Attorneys for Defendant

**CERTIFICATE OF DELIVERY**

I hereby certify that on this 2nd day of September, 1994, I delivered two true and correct copy of the REPLY BRIEF OF APPELLANT REBECCA ANN BATIO CROOKSTON HACKING: to Willard Bishop, Attorney for Appellee, 36 North 300 West, P.O. Box 279, Cedar City, Utah 84721-0279.