

1994

# Lesia Denice Bird v. Brian Bird : Petition for Rehearing

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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LESA DENICE BIRD,

Plaintiff/Appellant,

PETITION FOR REHEARING

-vs-

BRIAN BIRD,

Defendant/Appellee.

Trial Court No. 88-431-9991DA

Appeal Court No. 940419-CA

Priority Classification 2

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APPEAL FROM THE JUDGMENT AND ORDER OF THE  
THIRD JUDICIAL DISTRICT COURT  
OF SUMMIT COUNTY, STATE OF UTAH  
HONORABLE DAVID S. YOUNG, PRESIDING

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**FILED**

APR 18 1995

COURT OF APPEALS

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BRIAN BIRD,

Priority Classification 2

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Plaintiff/Appellant, (hereinafter "petitioner"), submits the following Petition for Rehearing pursuant to Rule 35 of the Utah Rules of Appellate Procedure. Counsel for petitioner hereby certifies that this petition is presented in good faith and not for the purpose of delay.

**POINTS OF LAW AND FACT OVERLOOKED OR MISAPPREHENDED**

1. On April 6, 1995, the Utah Court of Appeals entered its unpublished Memorandum Decision affirming the trial court's order of contempt, in part, on the grounds that the petitioner did not appeal the underlying visitation orders and did not demonstrate that the underlying orders are illegal.

2. Petitioner files this request for rehearing on the grounds that this court has overlooked or misapprehended the following points of fact:

a. A telephone conference was held on March 28, 1994 between the court and counsel for both parties on father's motion to reinstate visitation. The trial court signed a written order setting forth its visitation order commencing on March 28, 1994. (R. 280-281). The March 28, 1994 order was signed by the court on the same day that it was submitted. The order does not reflect that it was ever submitted to petitioner's then counsel. (R. 281). On or about May 5, 1994, petitioner's new counsel filed a motion for relief under Rule 60(b)(6) & (7) of the Utah Rules of Civil Procedure.

b. On May 9, 1994, the trial court issued a ruling from the bench which modified the March 28, 1994 visitation order. (R. 81 & R. 280). The trial court signed both plaintiff's and defendant's proposed orders, which orders differed in material respects with one another and with the court's unsigned Minute Entries. (R. 355 & R. 470). The court resolved the differences and entered an Amended Order on August 8, 1994, but not before the trial court again modified the May 9, 1994 visitation order. (R. 484-488 & R. 451-453).

c. The hearing held on May 9, 1994, before the trial court was continued to May 24, 1994. (R. 485).

d. At each hearing held in this matter which led up to the contempt citation, the trial court modified the prior visitation orders of the next earliest hearing. The March 28, 1994 visitation order modified the visitation order under the Decree of Divorce. (Compare R. 81 with R. 280-281). The May 9, 1994 visitation order modified the visitation order from March 28, 1994. (Compare R. 280 with R. 484). The May 24, 1994 visitation order modified the visitation order from May 9, 1994. (Compare R. 443 with R. 484).

e. On May 5, 1994, Petitioner filed a motion requesting a child abuse investigation. (R. 294) Her motion was denied by order entered June 16, 1994. (R. 448).

f. At the hearing held on May 9, 1994, mother raised the issue of best interests of the children with respect to a visitation order (Tr. at 11); the issue of transitional visitation (Tr. at 11); and the issue of an abuse investigation (Tr. at 12 & 15). The trial court stated that the children would be placed into protective custody or mother would agree to visitation. (Tr. at 16). The parties stipulated that issues raised by both of the parties would be continued to May 24, 1994. (Tr. at 25).



g. At the hearing held on May 24, 1994, mother moved the court for a supervised visitation order that considered the best interests of the children including new evidence from the children's therapist; the need for transitional visitation; and the need for an abuse investigation. (Tr. at 39 & 40, 12, 13, 42, 48). The order following the May 24, 1994, hearing was entered on June 16, 1994. (R. 443).

h. Petitioner filed her Notice of Appeal on July 15, 1994. (R. 474).

i. In her brief, petitioner argued that the trial court abused its discretion by failing to apply the best interests requirement of section 30-3-5; the fact that the trial court refused to consider the fact that visitation had not occurred for an extended period of time and the children were not bonded with the noncustodial parent as required by section 30-3-36; by refusing to suspend proceedings and order an abuse investigation as required by section 30-3-5.2; and refused to consider significant evidence of the children's severe and continuing emotional and psychological disturbance following visitation with their father. (Brief at 23-34). Petitioner cited with great specificity to the pages in the record supporting her claim and to the relevant law.

j. The father in this case did not submit an affidavit alleging contempt on April 22, May 14, May 15 and May 21 until the very day of the contempt hearing. (Tr. at 17).

3. Further, petitioner files this request for rehearing on the grounds that this court has overlooked or misapprehended the following points of law:

a. The March 28, 1994 order was not a "final order" until the trial court disposed of petitioner's motion to issue an abuse investigation order on June 16, 1994. (R. 447-448). Pearson v. Pearson, 641 P.2d 103 (Utah 1982); Allred v. Allred, 807 P.2d 350 (Utah App. 1991); Rule 54(b) of the Utah R. Civ. Procedure.

b. The May 9, 1994, visitation order did not become a final order until the trial court resolved the differences between the two contrasting orders submitted by counsel for the parties and disposed of both parties' pending motions. Larsen v. Larsen, 674 P.2d 116 (Utah 1983); State in the Interest of T.D.C., 748 P.2d 201 (Utah App. 1988).

c. Pursuant to rule 4(c) of the Rules of Appellate Procedure, this appeal is timely filed in that the Notice of Appeal was filed after the announcement of the May 9, 1994, visitation order but before the entry of the judgment on August 8, 1994, and must be treated as filed after such entry and on the day thereof.

R. Utah Ct. App. 4(c); Anderson v. Schwendiman, 764 P.2d 999 (Utah App. 1988).

d. Petitioner was entitled to prior notice that her former husband was charging her with refusal to release the children for visitation on April 22, May 14, May 15 and May 21. Boggs v. Boggs, 824 P.2d 478 (Utah App. 1991). Petitioner did not have adequate time to prepare her defense.

#### **ARGUMENT**

##### **A. PETITIONER TIMELY FILED AN APPEAL OF THE VISITATION AND CONTEMPT ORDERS.**

The petitioner filed her notice of appeal on July 15, 1994. (R. 474). This date was within thirty days of the contempt order and within thirty days of the only final visitation order.

In Pearson v. Pearson, 641 P.2d 103, (Utah 1982), the parties were divorced in May, 1979. Approximately six months later, the wife brought an order to show cause against husband seeking contempt sanctions. Prior to the hearing, husband requested that the court set aside the stipulated divorce pursuant to Rule 60(b)(7). The court concluded that the prior order should be set aside and the matter set for further hearing to resolve the claims raised by both parties. Thereafter, wife appealed the court's decision to set aside the prior order. Wife's appeal was dismissed on the grounds that there was no final order from which an appeal could be taken. Id. at 105.

In Allred v. Allred, 807 P.2d 350 (Utah App. 1991), the trial court vacated certain visitation provisions of the divorce decree pursuant to Rule 60(b) and ordered further proceedings. This court held that until the trial court addressed all of the remaining pending issues, the decree did not constitute a final order from which an appeal could be taken. Id. at 351.

When the parties in this case appeared before the court on May 9, 1994, the court materially changed the visitation order that had been issued during the March 28, 1994, telephone conference. The remaining issues raised by both parties were continued until May 24, 1994:

Ms. Jelte: Then there is the issue of contempt that is outstanding. That will be continued for hearing on the 24th with the other issues that are presently before the court. I believe that's it.

Judge Young: All right. Mr. Harrison, you have heard the stipulation; do you concur?

Mr. Harrison: Yes, I do. (Tr. at 25).

The comments of the court and counsel indicate that the March 28th and May 9th orders were not intended to be a final disposition of the matter.

Following the May 9th hearing, a new visitation schedule was imposed. However, both counsel submitted orders and the court signed both versions of the order on June 15, 1994. The court resolved the differences in the two orders and a final order was

entered on August 8, 1994. (R. 484). Petitioner filed her notice of appeal after announcement of the decision, but prior to the entry of the May 9th order. Rule 4(c) of the Rules of Appellate Procedure provides that the filing of a notice to appeal after announcement of the decision, but prior to entry is treated as "filed after such entry and on the day thereof." Accordingly, petitioner timely challenged the visitation and contempt orders.

The court wholly disposed of all remaining claims on May 24, 1994, when the court issued its contempt citation and denied petitioner's motions for an abuse investigation and transitional supervised visitation. In the order, drafted by respondent's counsel, the court stated:

13. The Court has been requested by the Plaintiff to order an abuse evaluation consistent with Section 30-3-5.2 and 62(a)-4-509 of Utah Code Annotated (1953 as amended). The Court finds that there is an inadequate basis for the Court to make such a recommendation and denies the same. (R. 447).

The May 24th order was entered June 16, 1994. Petitioner's appeal was filed within thirty days thereafter.

B. PETITIONER ADEQUATELY MARSHALLED THE EVIDENCE THAT THE UNDERLYING VISITATION ORDER WAS UNLAWFUL.

Petitioner relies upon the statements of the court cited in her brief to support her claim that the underlying visitation order was unlawful in that the court placed the interests of the father over that of the children:

Well, you see the thing that occurs to me, however, is all of this is very stale. I would prefer to have the parties agree between themselves as to how to reinstate visitation. If that is being barred then it seems to me that probably what I ought to do is place the children, as traumatic as that may be, in protective custody, and then let the protective custody people allow for some visitation as well by both parents and take the matter from there. I think that you can have relative confidence that the children will not be abused by the father, even though you may think there is a history of that early on or beyond two years ago. It would seem to me the efforts he is trying to make with visitation would be inconsistent with a desire to abuse the children, but we need to be sure that we do everything we can to protect against further confrontation between these parties. (R. 555, emphasis added.)

The court refused to apply the mandatory provisions of the abuse investigation statute, although it did not have the discretion to do so. See Utah Code §30-3-5.2 (1994). The children were placed in protective custody, despite the acknowledgement by the court that this would result in additional trauma to them. With all due respect to the court, the paramount concern for the best interest of the children was cast by the wayside.

C. PETITIONER WAS NOT GIVEN PRIOR NOTICE OF ALL OF THE CHARGES.

The former husband in this case filed his affidavit charging petitioner with refusing visitation after April 8th during the contempt hearing. (Tr. at 17). In Boggs v. Boggs, 824 P.2d 478 (Utah App. 1991), this court reversed the trial court's order

of contempt, in part, upon the failure to file an affidavit of the charges prior to the contempt hearing. Id. at 482. This court concluded that the alleged contemnor "did not receive ample notice." Id. The petitioner did not have full knowledge of the nature of the charge and an opportunity to defend.

#### CONCLUSION AND RELIEF REQUESTED

Petitioner requests that this court restore this case to the calendar for reargument. Petitioner timely filed her appeal within thirty days of the contempt order and the only final visitation order. Petitioner has marshalled the evidence that the underlying visitation order was not lawful. She has directed this court to ample authority to support her position that the order did not consider the best interests of the children; did not require an abuse investigation consistent with the statute; and, did not address the children's need for transitional visitation.

DATED THIS 18 day of April, 1995.

CORPORON & WILLIAMS

  
M. JOY JELTE  
Attorney for Petitioner

**CERTIFICATE OF SERVICE**

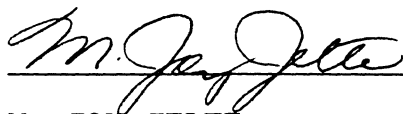
I HEREBY CERTIFY that I am employed in the offices of Corporon & Williams, attorneys for the Plaintiff/Appellant/Petitioner herein, and that I caused the foregoing to be served upon Defendant/Appellee by placing two true and correct copies of the same in an envelope addressed to:

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JUDITH ROMNEY WOLBACH  
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and depositing the same, sealed, with first-class postage pre-paid thereon, in the United States mail at Salt Lake City, Utah on the 18 day of April, 1995.

CORPORON & WILLIAMS



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