1994

Susan Newell Baldwin v. William Andrew Baldwin : Reply Brief

Utah Court of Appeals

David S. Dolowitz; Cohne, Rappaport & Segal.
Barbara K. Polich, James H. Woodall; Parsons Behle & Latimer.

IN THE UTAH COURT OF APPEALS

SUSAN NEWELL BALDWIN, Plaintiff/Appellee, vs. WILLIAM ANDREW BALDWIN, Defendant/Appellant.	Case No. 940541-CA Priority No. 4

REPLY BRIEF OF APPELLANT

On Appeal from Decree of Divorce
Entered in the Third Judicial District Court
of Salt Lake County, Utah
Judge Leslie A. Lewis

BARBARA K. POLICH (2620)
JAMES H. WOODALL (5361)
PARSONS BEHLE & LATIMER
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Telephone (801) 532-1234

David S. Dolowitz
COHNE, RAPPAPORT & SEGAL
525 East 100 South, Suite 500
Salt Lake City, Utah 84102

IN THE UTAH COURT OF APPEALS

SUSAN NEWELL BALDWIN,	)	
Plaintiff/Appellee,	)	Case No. 940541-CA
vs.	)	
WILLIAM ANDREW BALDWIN,	)	Priority No. 4
Defendant/Appellant.	)	

REPLY BRIEF OF APPELLANT

On Appeal from Decree of Divorce
Entered in the Third Judicial District Court
of Salt Lake County, Utah
Judge Leslie A. Lewis

BARBARA K. POLICH (2620)
JAMES H. WOODALL (5361)
PARSONS BEHLE & LATIMER
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Telephone (801) 532-1234

David S. Dolowitz
COHNE, RAPPAPORT & SEGAL
525 East 100 South, Suite 500
Salt Lake City, Utah 84102

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Appellant has not relied on any statutory or case authority in support of this brief.

INTRODUCTION

In his opening brief, appellant carefully set forth each of the challenged findings and showed that the trial court's decision to give appellee custody of the parties' three minor children is not rationally supported by the evidence adduced at trial.

In response, appellee repeats these unsupported findings without providing substantive citations to the record to defend them. For example, appellant repeats finding 10, that "[appellant] stated that his work schedule was unpredictable." Brief of Appellee at p. 6 (citing R. 2952-56, 3029-30, 3346-51, 3370). The fourteen pages of citations given by appellee do not support this statement. As discussed in Appellant's Brief at page 18, appellant never said his work schedule was "unpredictable." Rather, it was appellee who testified that her schedule was "very erratic," R. 3428, while appellant testified that his was totally at his discretion, R. 3009. The error illustrated in this finding typifies the other challenged findings; the Court simply ignored the evidence presented and abused its discretion in failing to enter findings that were rationally supported by the evidence.

Appellee also misstates the record, such as by claiming that Dr. Strassberg admitted the MMPI can be manipulated, implying that appellant manipulated his MMPI test. Brief of Appellee at p. 7. Dr. Strassberg did say that the test can be manipulated, but his entire statement reveals an entirely different focus:

> It's fairly easy to manipulate, but quite difficult to do and not get caught at it. The test is, while transparent in some respects, is quite nontransparent in a number of others. I routinely ... have my graduate students try to fake on the MMPI or MMPI II, and not get caught.... [It's] almost impossible for most of them to manage it. It would take somebody who was quite familiar with the test, not just that the test exists, or what some of the items on the test are, but would have to be quite familiar with the scoring of it to effectively manipulate such as to fool an experienced clinician.

R. 3174-75.

There was no evidence that appellant had any familiarity with the MMPI II, or that he attempted to manipulate it. Rather, the evidence was that appellee, consistent with her dishonest and manipulative personality profile, attempted to manipulate the test and got caught at it. Like virtually every finding, however, the Court accepted, without question, Elizabeth Stewart's sixteen-month-old decision to reject appellant's normal psychiatric profile and appellee's disturbed profile in order to reach a decision completely at odds with the parties' conduct and history throughout this matter. This was an abuse of judicial discretion.

Similarly, appellee suggests, without any substantive evidence, that the court held "several sidebar conferences" to advise counsel that defendant "needed to be more under control." This is simply false. Such claims should be given no consideration by the Court, except to the extent they bear on appellee's credibility. Appellee points to a single admonishment by the Court to defendant, after he unconsciously shook his head in response to a question posed to another physician, and to a

single incident where appellant was confused by a question posed by appellee's counsel, in a thinly veiled effort to again call appellant's stability into question. Such tactics should not be condoned by the Court, particularly where there is competent evidence on the record to refute such accusations. R. 2736, 2749, 2768 (Dr. Susan Mirow, the psychiatrist who saw appellant sixteen times, testified that he is emotionally "quite healthy," and that he is a thoughtful, interactive parent that is "quite adept" at reaching other people emotionally).

Appellee also claims that appellant has failed to marshal the evidence, and that, in any respect, the trial court's decision should be affirmed. In preparing his brief, appellant carefully searched the record with respect to every challenged finding and set forth the testimony or evidence that supports each one. Where no evidence exists, appellant has so indicated. Some of the challenged findings are supported only by the stale, badly flawed custody evaluation of Elizabeth Stewart, and appellant has shown or referred to those portions of the custody evaluation that support those findings. All of the challenged findings are so outweighed by competent, current evidence and testimony that the trial court manifestly abused its discretion in making them.

The record shows that appellee, a psychiatric nurse with a long, well-documented history of emotional disorders, carefully planned and orchestrated this divorce with a continual pattern of treachery calculated to cast doubt on appellant's integrity and emotional stability. Appellant, by questioning

appellee's veracity and Dr. Stewart's competence at a custodial interview, alienated himself to Dr. Stewart, with the result being a carte blanch acceptance by Dr. Stewart of virtually everything appellee told her.

Sixteen months later, when Dr. Stewart's predictions were already proving themselves wrong, Dr. Stewart's report was accepted blindly by the trial court without considering the evidence presented over six days of testimony. The result was that three young children, the oldest of whom appellee threatened to "make sick," are in the custody of a woman that clearly lacks the skills, or the desire, to care for them beyond meeting their basis physical needs, and then only with extraordinary levels of surrogate care.

ARGUMENT

1. Appellant has properly marshalled the evidence. In challenging appellant's marshalling of evidence, appellee provides "shotgun" citations to the record and then urges the Court to "compare Susan's cites with Andrew's cites." A review of appellee's cites reveals that most have nothing to do with the findings they supposedly support. Following his recitation of each challenged finding, appellant carefully listed the evidence that would tend to support it. He then showed that each finding was contrary to the great weight of the evidence and why the challenged finding represented an abuse of the trial court's discretion. In doing so he has carried his burden of marshalling the evidence.

2. The trial court abused its discretion in awarding custody of the parties' minor children to appellee.

Appellee relies, like the trial court, on the opinions and statements contained in Elizabeth Stewart's report to support the trial court's findings. Dr. Stewart's report, which resulted from two brief interviews in the summer of 1993, was seriously flawed when it was prepared, and it was sixteen months old by the time of trial. Even Dr. Stewart admitted that "the issue of custody should be based on current function." R. 3133. Because the Stewart Report served as the basis for many of the Court's findings, appellant devoted a substantial portion of his brief to illustrating the deficiencies and errors it contains. Rather than reiterating these points, the Court is urged to review appellant's opening brief, particularly the discussion of the Stewart Report at pp. 22-31.

CONCLUSION

Appellant has carried his burden in showing that the trial court utterly failed to consider the best interests of the parties' three minor children by placing them in the custody of appellee. Such a decision was a manifest abuse of judicial discretion, and it must be reversed.

DATED this 3 day of August 1995.

PARSONS BEHLE & LATIMER

BARBARA K. POLICH
JAMES H. WOODALL
Attorney for appellant

CERTIFICATE OF MAILING

I certify that I mailed a two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** to the following on August 3, 1995:

David S. Dolowitz
COHNE, RAPPAPORT & SEGAL
525 East 100 South, Suite 500
Salt Lake City, Utah 84102