

2005

Matthew Marchand v. Kristie Marchand : Reply Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MATTHEW MARCHAND,
Petitioner/Appellee,
and

KRISTIE MARCHAND,
Respondent/Appellant,

REPLY BRIEF OF APPELLANT

Appellate Case No.: 20051105

REPLY BRIEF OF APPELLANT

Appeal from an Order of Modification and Order Denying Respondent's Motion
for New Trial in the Second District Court of Davis County, Farmington
Department, State of Utah entered on December 1, 2005.

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Oral Argument Requested

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BRIEF OF APPELLANT

Appellate Case No.: 20051105

BRIEF OF APPELLANT

Respondent/Appellant (hereinafter “Appellant”) submits the following as
Reply Brief in response to Appellee’s Brief in the above matter:

ARGUMENT

**I. THE TRIAL COURT ERRED IN IGNORING PARENTAL
PRESUMPTION AND TREATING BOTH PARTIES ON EQUAL
GROUND.**

“In a controversy over custody, the paramount consideration is the best
interest of the child, but where one party to the controversy is a non-parent, there
is a presumption in favor of the natural parent.” *Walton v. Coffman*, 169 P.2d 97
(1946). Appellee argues that the Appellant failed to raise the issue that the
Appellee was not the father in the case. However, the trial court raised concerns in
granting custody to the Appellee because he was not the biological father of the
child.

Okay, so the situation then is what the custody
evaluator basically said, okay, we have the history of
Brittany with mom and with grandparents in Arizona
and these other things and now very little time with the

petitioner and then I don't know if they question this or I don't know what the issue is but we have a petitioner here whose not the biological father of the child but says that that doesn't bother him because he's always considered her his child. We have him married to a second wife now who says okay, I will welcome the child even though she has a child of her own and Brittany is neither one of their children's biological child and they haven't had a lot of history with the child. But putting them in that situation is better than what she's been (inaudible) because we don't have any history or background besides a few week here and there to see anything different.

(R p. 560, Page 423 lines 16-25 and p 424 lines 1-6 of Trial Transcript). The Appellee never objected to or argued against the court stating that the Appellee was not the biological father. The court had the duty to follow the law and consider parental presumption in determining custody in this case.

All of the previous case law dealing with parental presumption seeks to protect the best interests of the child being with his or her biological parent. "A long line of Utah cases deals with child custody disputes between natural parents and persons other than natural parents. Although a review of these decisions shows that the results depended heavily on the facts, this Court has consistently stated that there is a presumption in favor of a natural parent who has the care, custody, and control of his or her child. *Kishpaugh v. Kishpaugh*, 745 P.2d 1248 (Utah 1987). It is well documented that children have a much better upbringing if a biological parent raises them. "It is rooted in the common experience of mankind, which teaches that parent and child normally share a strong attachment or bond for each other, that a natural parent will normally sacrifice personal

interest and welfare for the child's benefit, and that a natural parent is normally more sympathetic and understanding and better able to win the confidence and love of the child than anyone else.” *Hutchison v. Hutchison* 649 P.2d 38, 40 (Utah 1982). (quoting *Walton v. Coffman*, 169 P.2d 97, 103). Thus, it would be in the best interests of the minor child that the court considers parental presumption in this case.

Appellee raises various arguments that *res judicata* and the Utah Uniform Parentage Act prevent the Appellant from raising the issue after the decree of divorce that the Appellee is the non-biological father. However, it is apparent that there was a mutual mistake on behalf of both parties that the minor child was an issue to the parties’ marriage. A mutual mistake should not eliminate and/or waive a party’s inherent and natural right to raising her own child instead of a non-biological parent. “If the [parental] presumption could be rebutted merely by evidence that a non-parent would be a superior custodian, the parent's natural right to custody could be rendered illusory and with it the child's natural right to be reared, where possible, by his or her natural parent.” *Hutchison* at 41.

In addition, if this court were to uphold the lower courts decision to grant custody to the Appellee without showing anything additional other than being superior parent, at what point is merely showing that the Appellee is the superior is not enough? For example, Appellee has recently filed with the trial court a Petition to Modify the Order of Modification to restrict the Appellants parent time

with her child to supervised parent time. Should there be any additional factors that would prevent the trial court from ordering supervised parent time in this case other than the standard what is in the best interests of the child?

By the same token, we conclude that the right of a parent not to be deprived of parental rights without a showing of unfitness, abandonment, or substantial neglect is so fundamental to our society and so basic to our constitutional order (see the authorities quoted in Part III of this opinion) that it ranks among those rights referred to in Article I, § 25 of the Utah Constitution and the Ninth Amendment of the United States Constitution as being retained by the people.

In re P., 648 P.2d 1364, 1375 (Utah 1982). If the present course of action were to take place, Appellants parental rights to her natural child could be slowly eroded by merely the standard of what is in the best interests of the minor child. This course of reasoning is contradictory to the Appellants constitutional right to raise her own natural child. Therefore, there should be additional safe guards in removing the Appellants natural rights to her child and it was an error for the court to grant custody of the minor child to the Appellee without applying parental presumption.

A. THE UTAH UNIFORM PARENTAGE ACT DOES NOT PREVENT THE ISSUE OF PATERNITY BEING RAISED AFTER ADJUDICATION.

Appellee argues that the Utah Uniform Parentage Act prevents the mother from rebutting the adjudication of the Appellee being the father of the child in the divorce action. However, there are provisions in the Act that allow the adjudication of paternity to be challenged. "A party to an adjudication of paternity may challenge the adjudication only under law of this state relating to appeal,

vacation of judgments, or other judicial review.” Utah Code Ann. § 78-45g-623(6). It was not determined until after the parties divorce in this matter that the Appellee was not the biological father. In essence, it was a mutual mistake on both parties to stipulate prior to the decree of divorce that the child was an issue to the marriage.

We have previously held that a mistake of fact or false assumption may be grounds for relief under rule 60(b)(7) or pursuant to an independent action in equity regardless of the length of time that has passed: Mistake of fact may be grounds under an action in equity to grant relief as provided under Rule 60(b)(7). It states "any other reason justifying relief from the operation of a judgment." Further, the Supreme Court of this state has ruled erroneous assumptions may be grounds for entering a new order.

Gillmor v. Wright, 850 P.2d 431,435 (Utah 1993). Presently, the Rule allowing a party may be relieved of a judgment based upon “any other reason justifying relief from the operation of the judgment” is Utah R. Civ P. 60(b)(6). As a result, the Utah Uniform Parentage Act does allow the Appellant to rebut the previous adjudication of the Appellee being the father of the child in this case.

In addition, adjudication of the Appellee being the father of the minor child has no binding effect on the child in this case.

(2) A child is not bound by a determination of parentage under this chapter unless:

(a) the determination was based on an unrescinded declaration of paternity and the declaration is consistent with the results of genetic testing;

(b) the adjudication of parentage was based on a finding consistent with the results of genetic testing and the consistency is declared in the determination or is otherwise shown; or

(c) the child was a party or was represented in the

proceeding determining parentage by a guardian ad litem.

Utah Code Ann. § 78-45g-623(2). There were never any genetic results provided in this case that would support the Appellee being the father of the minor child. In addition, the minor child was not represented by a guardian ad litem in the divorce action. Therefore, the child is not bound by the adjudication of the Appellee being the father of the minor child.

II. THE TRIAL COURT ERRED IN DENYING APPELLANTS MOTION FOR A NEW TRIAL

A. THE TRIAL COURT ERRED IN RULING THE ISSUE OF WHETHER THE APPELLEE WAS THE NON-BIOLOGICAL FATHER WAS NOT RAISED

The Appellee argues that Appellants Motion for a New Trial was based on newly discovered evidence that the Appellee was not the biological father. However, as previously mentioned above it was perfectly clear to the court and all of the participants during the trial that the Appellee was not the biological father. The Appellee never objected or argued against the Appellee not being the biological father. There was no reason to present the DNA testing at trial, since it was never disputed during the trial that the Appellee was not the biological father.

THE COURT: Is it your understanding that Matt had any idea before this paternity testing thing?

KATHRYN KAIR: He reported that someone had suggested to him that he might not be the biological father before Kristie gave birth and —

THE COURT: Who did the paternity test, Steve or Matt?

KATHRYN KAIR: Well, they probably both did but Steve did one.

(R. p.559, Page 29 lines 24-25 and Page 30 lines 1-7 of Trial Transcript)

MS. CLINE (counsel for Appellee): We were just talking about the paternity issue before the break.

THE COURT: Could I just ask a question about that? If somebody can refresh my mind. If, is it Mr. Rogers?

MS. CLINE: Burton.

THE COURT: Steven Burton?

MS. CLINE: That's correct.

(R. p. 559, Page 51 line 19-25 of Trial Transcript). The Appellee even offered the name of the biological father to the court. As a result, it would have been a moot point for the Appellant to present the results of the DNA test to the trial court. Therefore, the issue was raised properly and the court should have granted a new trial based on the fact that its decision was based upon an error of law.

B. THE TRIAL COURT INCORRECTLY APPLIED THE LORD MANSFIELD'S RULE IN DENYING APPELLANTS MOTION FOR NEW TRIAL

The Appellee argues that the Lord's Mansfield Rule still applies in this state and the court correctly applied the Rule in this case. However, the Appellee fails to recognize or consider that it has been expressly rejected by the Utah Legislature and Appellate Courts of this state. Since the establishment of DNA and blood testing to establish reliable paternity testing, the Utah legislature has specified that certain nontraditional evidence is capable of conclusively rebutting the presumption of legitimacy. In *Teece v. Teece*, 715 P.2d 106, 107 (Utah 1986),

the court observed that Lord Mansfield's rule has been substantially eroded by the enactment of section 78-25-18 of the code, which expressly mandates that courts utilize blood tests to assist in making a determination of paternity. The effect of Lord Mansfield's rule has been substantially eroded by the enactment of U.C.A., 1953, §78-25-18, which provides unequivocally that "in *any* civil action or in bastardy proceedings in which the parentage of a person is a relevant fact, the court shall order the child and alleged parents to submit to blood tests." Since *Teece*, 78-25-18 has been replaced with the Utah Uniform Parentage Act, which allows the use of DNA testing to rebut the presumption of paternity. Utah Code Ann. §78-45g- et seq. Therefore, based upon the foregoing, the trial court incorrectly applied and used the Lord Mansfield's Rule as a basis in its ruling.

III. A NEW TRIAL SHOULD BE GRANTED BASED UPON THE NEGLIGENCE OF COUNSEL

It was clearly an error on the part of previous counsel for the Appellant that parental presumption was not raised during the trial. The common law recognized that incompetence or neglect of counsel, under some circumstances, would entitle a litigant to a new trial. *Garrett v. Osborn*, 431 P.2d 1012, 1014 (1968). In a concurring opinion by Chief Justice Crockett of the Utah Supreme Court, which is concurred by two other justices, Chief Justice Crockett went out of his way in his opinion stating in dicta on whether a new trial should be granted in a civil case for negligence of counsel. *Maltby v. Cox Construction Co.*, 598 P.2d 336, 341 (1979). Monetary damages will not correct the injustice of the Appellant losing custody of her only daughter. The only way to correct the injustice on the part of Appellants

counsel is to order a new trial on all the issues or on issues limited in determining parental presumption. Therefore, based upon the foregoing, Appellant respectfully requests that this Court grant a new trial in this matter.

IV. THE PEARSON V. PEARSON CASE HAS NO BEARING ON THIS CASE

The Appellee has argued in support of his position that the *Pearson v. Pearson* case, recently decided before this court, has a direct bearing on this case.

However, there are vast difference between this case and the *Pearson* case.

In *Pearson*, the minor child was born in September 1999, and Father was named as the father on his birth certificate. Father and Mother raised the child together until they separated in May 2000. After separation and until the trial court's custody determination on May 11, 2003, the Pearsons voluntarily shared physical custody of the minor on a fifty-fifty basis. *Pearson v. Pearson*. 134 P.3d 173(Utah App 2006).

In this case, the parties' minor child was born on September 10, 2000. The parties separated in or about June 2000. Appellee filed for divorce and it became final January 10, 2001. From February 2001 through April 2001, Appellee had consistent visitation with Brittney. In or about April 2001, Appellant relocated to Arizona. In May 2001, Appellee relocated to the state of Illinois and returned to the state of Utah in November 2001. (R. p.448) Since Appellant moved to Arizona, Appellee spent 17 days in 2001, 21 days in 2002, 39 in 2003, and over 50 in 2004. (R. p.458).

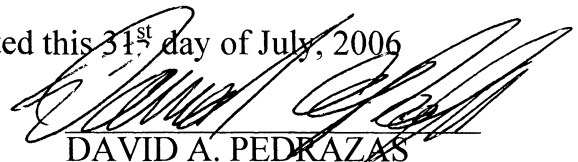
As opposed to the *Pearson* case, the Appellee never lived with the minor

child and never exercised parent time more than 20% of the time prior to the minor child reaching the age of five. The minor child's relationship with the Appellee was minimal at best. Thus, challenging the paternity of the Appellee would not have been detrimental to the child. The parties separated before the child was even born. The *Schoolcraft* analysis should not apply in this case since disputing paternity in this case would have caused minimal disruption to the minor child and the parties had separated prior to the child being born. Therefore, the Pearson case is not on point with this case.

CONCLUSION

In the interests of justice, the trial courts decision should be overturned for the reasons stated.

Dated this 31st day of July, 2006



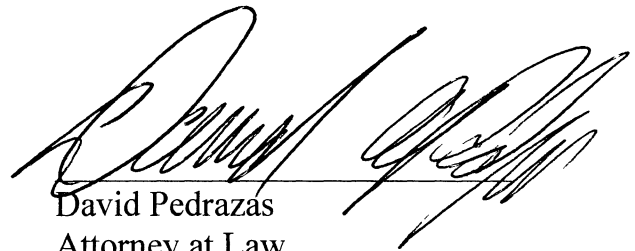
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