2006

Loren E. Pearce v. Oksana Zapassoff : Reply Brief

Utah Court of Appeals

Loren E. Pearce; Pro Se Appellant.
Terry R. Spencer; Terry R. Spencer PC; Attorney for Appellee Oksana Zapassoff.

IN THE UTAH STATE COURT OF APPEALS

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LOREN E. PEARCE, Appellant, vs. OKSANA ZAPASSOFF, Appellee.	Appellate Case No.: 20061007 District Court Case No : 034900448

APPELLANT LOREN E. PEARCE'S
REPLY BRIEF ON APPEAL

Appeal from the Order of the Second Judicial District Court,
Weber County, Ogden Division, The Honorable Judge Pamela G. Hefferman

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Pleasant Grove, Utah 84062
Appellant

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APPELLANT'S BRIEF

Appellant, Loren Pearce, submits this reply brief in the appeal before this Court.

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ARGUMENT

I. Appellant Has Marshaled the Evidence.

Though Appellant (hereinafter "Loren") has asserted multiple causes for appeal, Appellee (hereinafter "Oksana") argues against only one. She argues that Loren has not met the requirements to "marshall the evidence." See Appellee Brief, p. 1. The evidence, however, demonstrates that he has.

> "[W]hen appealing a highly fact dependent issue, the appellant has a duty to marshal the evidence. This duty requires an appellant to marshal all of the facts used to support the trial court's finding and then show that these facts cannot possibly support the conclusion reached by the trial court, even when viewed in the light most favorable to the appellee. An appellant may not simply cite to the evidence which supports his or her position and hope to prevail."

Waymant v. Howard, 144 P.3d 1147, 1149-50 (Utah 2006). Loren has fulfilled his duty in marshalling the evidence by identifying every piece of evidence that is cited in both the trial Court's written decision and its Findings of Fact and Conclusions of Law in support of its custody decision and then has shown that the manifest weight of the evidence is overwhelmingly contrary to the lower court's decision. See Appellant's Opening Brief. Specifically, Loren has shown that this is not a matter of a "he said, she said contest" where every evidentiary hair is split and the court is left to decide which split hair has greater weight. Rather, Loren has shown that the admission of uncorroborated and false accusations of child abuse was prejudicial against him.

The trial court is required to consider several factors when imposing the "best interests of the child". *Thorpe v. Jensen*, 817 P.2d 387, 390 (Utah App. 1991). Prevalent among those factors is child abuse. *Id.* Courts across the country have ruled that false allegations of abuse used as a strategy to win custody constitute child abuse in and of themselves by wrongfully denying the child adequate access to the accused parent and by denying the accused parent his fundamental parental rights, exposing him to wrongful sanctions of law, damage to reputation and other such consequences. The end result of such actions is a willful deprivation of the noncustodial parent's visitation rights. "[A] custodial parent's willful deprivation of the noncustodial parent's visitation rights constitutes "an act so inconsistent with the best interests of the children as to, per se, raise a strong probability that the [parent] is unfit to act as a custodial parent". *Entwistle v. Entwistle*, 61 A.D.2d 380, 384-385 (NY 1978). The same has been found true in other courts. See *Duro v. Duro*, 392 Mass. 574 (1984); see also C.P. Kindregan, Jr. & M.L. Inker, *Family Law and Practice* § 47.12, at 366-367 & n. 13 (2d ed. 1996).

Notwithstanding the impact of this factor, it is apparent from the findings cited by Loren in his opening brief, that the trial court based it's custodial decision, in part, upon the unsupported allegations of abuse. See Appellant's Brief, pp. 14, 18-41. If Loren has fallen short of the appellate court's standard of review in marshalling the evidence, Loren respectfully reminds the reviewing Court of the standard as cited in his initial Brief at pg. 22. Quoting *Woodward v. Fazzio*, 823 P.2d 474, 477 (Utah App. 1991), the *Barnes* court, held that "[i]f the findings are legally inadequate the

exercise of marshalling the evidence in support of the findings becomes futile and the appellant is under no obligation to marshal." *Barnes v. Barnes*, 857 P.2d 257 (Utah 1993). "The process of marshaling the evidence serves the important function of reminding litigants and appellate courts of the broad deference owed to the fact finder at trial." *State v. Moore*, 802 P.2d 732, 739 (Utah App. 1990). However, this Court should only grant this deference when the findings of fact are sufficiently detailed to disclose the evidentiary basis for the court's decision. See *State v. Lovegren*, 798 P.2d 767, 771 (Utah App. 1990) (trial court decision afforded no deference when findings inadequate). See also *Allred v. Allred*, 797 P.2d 1108, 1111 (Utah App. 1990) (failure to enter detailed findings concerning child support determination constitutes abuse of trial court's discretion). There is, in effect, no need for an appellant to marshal the evidence when the findings are so inadequate that they cannot be meaningfully challenged as factual determinations. In other words, the way to attack findings which appear to be complete and which are sufficiently detailed is to marshal the supporting evidence and then demonstrate the evidence is inadequate to sustain such findings. But where the findings are not of that caliber, appellant need not go through a futile marshaling exercise. Rather, appellant can simply argue the legal insufficiency of the court's findings as framed."

As in *Woodward*, Loren argues that the trial Court's findings of fact were legally insufficient. In his brief, Loren presented evidence that the Court contradicted

itself by indicating it had heard enough[1] and that it did not intend to go back and review the accusations of abuse when, in fact, the Court later did go back and review the accusations of abuse holding that Loren probably was guilty. Decision, pp. 8. Then, as indicated by Oksana, the Court on other occasions reluctantly invited Loren to pursue additional questions if he deemed necessary. *Appellee's Reply Brief* at 12. This had a confusing and chilling effect on Loren.

The chilling effect was influenced by previous experience that Loren had with his attorney, Kim Walpole, in which Kim explicitly expressed fear of alienating the judge and told Loren that justice is based more on the relationship with the judge than it is based on the strength of the case. Rooted in that fear, Loren deferred to Judge Pamela Hefernan's wishes that he not continue to delve into the issue of false allegations of child abuse. Loren attempted to read between the lines and tried to understand what the judge "really wanted". Loren, upon being challenged by the judge as to the necessity of proving false abuse, did not pursue further questioning or develop additional evidence as shown at R.I. p. 152-24 ("I will defer to your judgment on that and I will end further questioning at this point."). In Brady v. Brady, 886 P.2d 104,(1994), in reversing the trial court the reviewing Court found that "contradictory instructions created a high potential for confusion". By creating an environment of confusion and mixed signals, Loren was not able to fully develop

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[1] Court Transcript at pp. 149-5, 16 ("I think your point has been made"), 18 ("to me they're just accusations without basis"), 24 ("there's not a lot I can do in terms of taking that into account in my decision"); 151-15 ("I just think at some point there's diminishing returns").

highly relevant facts, facts that were necessary for a legally sufficient conclusion by the Court.

As in *Woodward*, the trial Court makes "conclusory" statements but without the legally sufficient supporting evidence. *Woodward*, 823 P.2d at 477. The *Woodward* court provides that findings which state that "[appellant's] contacts with the child have been inconsistent, sporadic and token," that "it is evident to the court that the natural Father has abdicated his responsibility as a parent," and that "the court is convinced that the father's conduct has led to the destruction of the parent/child relationship" were conclusory and provide no insight into the evidentiary basis for the trial court's decision. *Id.* They further render effective appellate review unfeasible. See *Adams v. Board of Review*, No. 900597, slip op. at 6-7 (Utah Ct. App. Nov. 5, 1991). The trial court in this case similarly relied only upon conclusory findings, as explained in Appellant's Opening Brief.

The issue before the court in *Woodward* was whether Fazzio had abandoned the parties' minor child (R.A.F.). See *Woodward*, 823 P.2d 474. The *Woodward* court indicated that the findings made by the trial court should have set forth specific facts--subsidiary facts--bearing on that issue. *Id.* In similar manner, the findings of the instant case make comparable conclusory statements that Loren is the less cooperative parent but without the supporting subsidiary facts. See Findings of Fact and Conclusions of Law., p. 5 f. In fact, Loren had presented evidence at trial that were diametrically opposed to the trial Court's findings wherein he showed that he welcomed a cooperative relationship R.I., p. 32-22 (wanted to avoid mudslinging

contest, counter to cooperative parenting); but Oksana was totally opposed to a cooperative relationship. R.I., p.145-11 ("I would prefer no visitation"); 145-19 ("I believe that cooperative parenting is completely out of the question.") Other unsupported and legally inadequate statements by the Court include statements that allegations of past abuse "probably" occurred but were unsupported by legally adequate evidence. Decision, p. 8.

The Court, in its decision, not only awarded sole physical custody to Oksana, but removed joint legal custody from Loren without ever explaining why such decision to remove joint legal custody was made or providing legally adequate evidence to support such a decision. Decision, p. 9. No analysis was made showing that joint legal custody was not in the best interests of the child or that by allowing Loren to have joint legal custody would somehow cause harm to the child. As such, the decision by the lower court must be reversed.

II. Constitutional Challenges to Denial of Parental Rights.

Parents have a constitutional right to manage "the care, custody and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). The U.S. Supreme Court has recognized that this right is "perhaps the oldest of the fundamental liberty interests." *Id.* at 65, 120 S.Ct. 2054. This liberty interest encompasses parents' personal choices in family life beginning with their right to marry and conceive and extending to their right to control the education of their children and raise them according to the dictates of their religion. *See, e.g.*,

Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (recognizing that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment); *Wisconsin v. Yoder*, 406 U.S. 205, 232-33, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (holding that compulsory high school attendance interfered with Amish parents' fundamental rights to raise their children according to the dictates of their religion); *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (recognizing the "rights to conceive and raise one's children"); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (holding that a parent's liberty interest extends to the choice of education and upbringing of children); *Meyer v. Nebraska*, 262 U.S. 390, 399-401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (holding that the right to "marry, establish a home and bring up children" is protected by the Due Process Clause of the Fourteenth Amendment and includes the parents' right to control the education of their children). This fundamental right is no different for a divorced parent than it is for married parents.

The Court should recognize that "[t]he natural right of visitation jointly enjoyed by the noncustodial parent and the child is more precious than any property right." *Resnick v. Zoldan*, 134 A.D.2d 246, 247 (2d Dept. 1987). It should additionally recognize that the best interests of the child would be furthered by the child being nurtured and guided by both of the natural parents." *Bostinto v. Bostinto*, 207 A.D.2d 471, 472 (2d Dept. 1994). Indeed, a custodial parent's interference with the relationship between a child and a noncustodial parent has been said to be "an act

so inconsistent with the best interests of the child as to per se raise a strong probability that the offending party is unfit to act as a custodial parent." *Maloney v. Maloney*, 208 A.D.2d 603, 603-604 (2d Dept. 1994).

Oksana fails to adequately respond to the constitutional challenges posed by Loren and which fall outside the marshaling of evidence requirement cited by Oksana. Each of these constitutional challenges provides further basis for the reversal of the trial court's decision.

Oksana used false allegations of abuse to persuade, influence or otherwise move the trial Court to not only award sole custody to Oksana but to remove Loren's joint legal rights as a parent, effectively relegating Loren to a lesser role in the life of his natural daughter than Oksana's new husband. This effectively removes Loren's constitutional right to parent his child. Within the framework of the status quo at the time of the trial Court's decision, Loren had been awarded approximately 15% minimum visitation time with his daughter while Oksana and her new husband were left with 85% of the time. In addition to being denied meaningful parenting time, Loren was also deprived of any legal standing with his daughter, relegating him to a role of a visitor, not a parent, in the life of his daughter. This should be reversed.

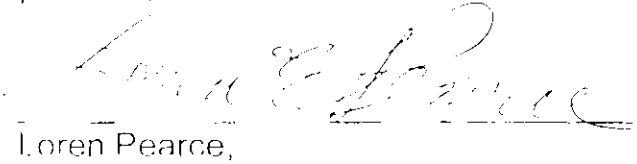
Sole custody should not be awarded a parent who would willfully, maliciously, and knowingly propogate false allegations of abuse to alienate the child from the other parent and to obtain a favorable custody award. This does not comply with the standard of "best interests of the child". Millions of fathers, are denied parental rights under the guise that trial courts, when dealing with domestic matters, have

near absolute discretion to award custody. Though it serves judicial economy and the livelihoods of attorneys, it fails to serve justice and denies those parents one of the most fundamental and inalienable rights known to mankind, the right to the association, care and nurturing of a child, as provided for by the Fourteenth Amendment. The supreme court, in various rulings cited by Loren, has required a standard of extreme close scrutiny before denying parental rights and such close scrutiny is not magically eliminated in the case of divorce. In the instant case, not only has Loren been denied custody but he has also been denied any legal rights to decision making affecting the child. This has been accomplished without any regard to the close scrutiny standards of the supreme court and has been done without legally adequate evidence to support such harsh and extreme denial of parental rights.

CONCLUSION

Pursuant to the foregoing arguments and law, Appellant respectfully requests this Court reverse the error made by the Second District Court in this matter and award Appellant joint custody of his daughter.

DATED this 11 day of September, 2007.



Loren Pearce,
Pro Se Appellant

CERTIFICATE OF SERVICE

I hereby certify that I served two true and correct copies of the foregoing **APPELLANT'S REPLY BRIEF ON APPEAL**, via first class mail, postage prepaid, on the following:

Terry R. Spencer, PhD.
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on this 11 day of September, 2007.