2001

Randy Smith v. Linda K. Jacobsen Smith : Brief of Respondent

Utah Supreme Court

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Russell J. Hadley; Attorney for Respondent.

IN THE SUPREME COURT OF THE

STATE OF UTAH

RANDY SMITH, Plaintiff and Appellant, vs. LINDA K. JACOBSON SMITH, Defendant and Respondent	)	Case No. 14695

BRIEF OF RESPONDENT

Appeal from the Judgment of the
District Court of Weber County,
Honorable Calvin Gould, Judge

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INTRODUCTORY STATEMENT

In general, respondent agrees with appellant's brief in the statement of facts and the citation of the law. However, the emphasis of appellant's brief interprets both the facts and the cases in a light most favorable to his point of view, seeking a substitution of the Supreme Court's judgment for that of the trial court. This court has reiterated many times, in countless ways, that upon review the facts will be regarded most favorably for the respondent with due respect for the opportunity of the trier of the facts to observe the witnesses, even in equity cases, Cox v. Cox, 532 P.2d 994, (Utah, 1975).

STATEMENT OF ADDITIONAL FACTS

The trial court, faced with the dilemma of deciding which of two acceptable parents should be awarded custody of two little

children, ordered home evaluation reports from the Division of Family Services of the State Department of Social Services (R. 57, 61), observed and heard each parent and their new spouses, and interviewed in chambers the older of the two children.

The Smiths have a monthly income of $1296 (R. 59). The Moores have a monthly income of $1380. Both homes were recommended as adequate in all respects by the Department of Social Services.

In a memorandum decision, the judge struggled with the agony of Solomon's "understanding heart" to reach the conclusion that the children should be in the custody of their natural mother:

> This is probably the most difficult case the Court has been called upon to decide. The issue presented is the custody of two children born to two loving parents each of whom wants the privilege of nurturing and training these children. The daughter is an attractive, bright, well-adjusted girl and I have every reason to believe that the boy is or will be just as charming. The Court has to decide whether their overall interests will be best served by remaining in the father's household or whether the children's best interests will be served by placing them with their natural mother. The father's household, where the children now are, has two older children living there. The father works a night shift for the Ogden Police Department. The mother in that household is a very loving person, but I think that even she would concede that where the homes are otherwise equal, the natural mother has the edge. There is the added consideration that the mother and her present husband, by the acquisition of the new home, have properly positioned themselves to care for these children. Within the next few years, the question of having her own bedroom will become more and more important to Kirsten. Her training through the years of puberty, it seems to me, will come easy through her natural mother. I conclude therefore that custody should go to the mother with liberal visitation rights of the father which are to include extended visitation rights during summer vacation from school. (R. 68)

In making this decision, the judge was presented with the mind-boggling speed of disruption in modern family relationships. On August 10th, 1975, Randy Smith, the appellant, informed his wife, Linda, that he wanted a divorce (Tr. 49, R. 134). On August 28th, Linda met with Randy's attorney and signed a Consent and Waiver to a Divorce Complaint which sought to deprive her of the custody of her children (R. 6). Although the trial court found that there was no duress or coercion involved in the signing of the stipulation (R. 69), Linda testified that she was at the time not "concerned about the papers" (Tr. 48; R. 133) but "mostly [about] the kids and my health." Forty days later, on October 10th, 1975, (Tr. 173; R. 258; cf. typographical error in Findings, R. 71) Randy married Vickie, who was divorced and maintaining a home for her two children, Tracy, 14, and Jo Ann, 12. Tracy testified in behalf of his new stepfather:

> I have had three dads, and he is the best one I have had...(Tr. 167; R. 252).

Twenty-one days after the Smith marriage, on November 1, 1975, Linda married another Randy...Randy Moore. She immediately began proceedings to regain custody of the children, with a Petition to vacate and set aside the Divorce, but the matter was not disposed of until June 23, 1976, upon a Petition to Modify.

Counsel for Plaintiff-appellant, Randy Smith, urged that the petition was inadequate in that it did not allege the conclusion of changed conditions (Tr. 6, R. 91) but the lower

court pointed out that Paragraph 3 alleged that the defendant (Linda Smith) "is now married and is better qualified..." Counsel for both parties were confused by the rapid change of marriage partners, causing plaintiff's counsel to agree that a remarriage would be a material change of circumstances sufficient to support modification of the Decree (Tr. 6, R. 91).

POINT I

THERE IS SUBSTANTIAL CHANGE OF CONDITIONS TO SUPPORT A MODIFICATION OF DIVORCE DECREE.

Respondent agrees with the statement of Appellant's Point I that modification of divorce decree necessitates showing of substantial change of conditions,[1] but wishes to refute the implication that no such showing was here made.

Linda Smith was naturally shocked and panic-stricken by the sudden demand of her husband for a divorce (R. 58; Tr. 50, R. 135) she was sick at the time (Tr. 50, R. 135) and was making less money than was appellant (Tr. 45, R. 130). Within three months these conditions had changed and she petitioned to set aside the decree. She had remarried, her health had improved, she and her husband were buying a house, the combined income in her new family was $1380 as compared to $1296 earned by her former husband and

[1]Except perhaps in a case like the present one, obtained upon default where the issues of custody and finances have not been litigated. See Lahart v. Lahart, 13 Wash. App. 452, P.2d 145 (1975) where the court held that a showing of change of circumstances is not necessary in such a case.

his new wife.

The court was entitled to consider all of these factors in determining a change of child custody. The case of Robinson v. Robinson, 15 Utah 2d 293, 391 P.2d 434 (1964) cited by appellant was a case where the Supreme Court refused to reverse the trial court's denial of an order to change custody where the children had been in the home of the father for four or five years and were happy and well-adjusted.

> As we have often observed, on appeal it is advisable to allow considerable latitude of discretion to the trial court in such matters because of his advantaged position to judge the personalities and characters of those involved. See Sartain v. Sartain, 15 Utah 2d 198, 389, P.2d 1023. In doing so here we are not persuaded that he abused his discretion nor that the order should be reversed. 391 P.2d at 436.

In the instant case, the children cannot be said to have put down permanent roots. Economic advantages and more individual attention in the smaller family are available through the ordered change. In addition, the children of tender years will be in the home of their natural mother. These considerations led the trial court to its difficult decision and there is neither allegation nor evidence of an abuse of the court's discretion.

POINT II

WIFE HAS NO ABSOLUTE RIGHT TO CUSTODY OF MINORS UNDER TEN YEARS OF AGE; BUT TRIAL COURT IS COMPELLED TO GIVE SERIOUS WEIGHT TO THE NEED OF YOUNG CHILDREN FOR THEIR NATURAL MOTHER.

Respondent has no argument to make against the proposition

that the mother is not invariably and always entitled to custody under the presumption of U.C.A. 1953, 30-3-10, and that the paramount objective of a custody action is to provide for the welfare of the children, Johnson v. Johnson, 7 Utah 2d 263, 323 P.2d 16 (1958). In Cox v. Cox, 532 P.2d 994 (1975) the Supreme Court made its most recent delineation of the rule to answer this often-challenged concept in child-custody cases:

> In addition to and quite beyond the rights of the parents, there is the important principle that the paramount consideration is the long-term welfare and adjustment of the children. That being so, we think there is wisdom in the traditional patterns of thought that the roles of the mother and father in the family are such that, all things being comparatively equal, the children should be in the care of their mother, especially so children of younger years; and that this may be true even where the divorce is granted to the father. 532 P.2d at 996.

POINT III

MODIFICATION OF A DIVORCE DECREE BY CHANGING CUSTODY OF CHILDREN IS NOT A USURPATION OF APPELLATE POWER BUT A NECESSARY, CONTINUING AND SANCTIONED POWER OF THE DISTRICT COURTS.

The award of custody of children is not permanent, but may be subsequently modified when changing times and circumstances dictate a custodial change to comport with the best interests and welfare of the child and the parties involved, Mecham v. Mecham, 544 P.2d 479 (Utah, 1975).

U.C.A. 1953, 30-3-5 provides in part:

> ...The court shall have continuing jurisdiction to make such subsequent changes or new orders with

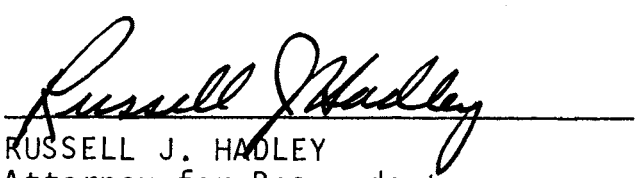
respect to the support and maintenance of the parties, the custody of the children and their support and maintenance, or the distribution of the property as shall be reasonable and necessary...

The cases of Harward v. Harward and Peterson v. Peterson cited by Appellant are inapplicable to the instant case and the argument is completely without merit.

CONCLUSION

The trial court gave careful, concerned attention to every available consideration involved in this action and determined that the children involved should be living with their natural mother. There is no evidence of abuse of discretion and the judgment should be affirmed.

Respectfully submitted,



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CERTIFICATE OF MAILING

A copy of the foregoing Brief of Respondent was posted in the U. S. mail postage prepaid and addressed to the Attorney for the Appellant, Pete N. Vlahos, Esq., Legal Forum Building, 2447 Kiesel Avenue, Ogden, Utah 84401, on this 28th day of October, 1976.

Maxine Hall, Secretary