BARBARA SMITH COUSINS *v.* JIMMY WAYNE SMITH

5-6178 491 S.W. 2d 587

Opinion delivered March 12, 1973
[Rehearing denied April 9, 1973.]

1. PARENT & CHILD—CUSTODY—CONSIDERATIONS IN DETERMINING RIGHT.—In reviewing custody cases, one of the most important considerations is the superior position of the chancellor who has opportunity to observe the parties and other witnesses; and the appellate court must not only give weight to the chancellor's determination of credibility but must also recognize his ability to observe and otherwise evaluate the parties, their personalties, and their apparent interest and affection or lack of affection for the children.
2. DIVORCE—DECREE AWARDING CUSTODY, MODIFICATION OF—CHANGED CIRCUMSTANCES AS GROUND.—The record failed to demonstrate that the welfare of two little girls would be jeopardized by leaving them in the custody of their father, or that the matters recited constituted a significant change of circumstances since February 16, 1972, substantial enough to justify changing custody to the childrens' mother.
3. DIVORCE—CHANGE OF CUSTODY—CHANGED CIRCUMSTANCES AS GROUND.—Appellant's argument that the appellate court should survey changed circumstances by reference to the original divorce decree was foreclosed by her having entered into a stipulation to define visitation rights and to terminate the Ohio litigation, which was approved by the Indiana court.

Appeal from Sebastian Chancery Court, Fort Smith District, *Joe Goodier,* Chancellor on Exchange; affirmed.

Franklin Wilder, for appellant.

Willard Crane Smith Jr., for appellee.

JOHN A. FOGLEMAN, Justice. Barbara Smith Cousins, the mother of Melissa Gail and Kimberly Ann Smith, aged 6 and 3 respectively, contends that the chancery court erred in denying her custody of her children. Appellant and Jimmy Wayne Smith were married June 11, 1965, and divorced March 5, 1971, by decree entered in the Superior Court in Elkhart, Indiana, which awarded custody of the children to appellee and permitted him to remove them to Ohio, the state to which he had then removed and where he now resides. The children had been in the custody of their father since March 1970, and had remained there until June 9, 1972, when they came to visit appellant in Fort Smith, pursuant to a stipulation

entered into between their parents on February 16, 1972, giving appellant certain visitation rights. On July 5, 1972, during this visit, appellant petitioned the Chancery Court of Sebastian County for a writ of habeas corpus awarding her custody. Appellee responded, contending that he was legally entitled to custody of the two daughters.

Appellant's petition was denied because the chancellor found that there had been no substantial change in circumstances since the date of the stipulation. As appellant states, the Arkansas court had jurisdiction to change custody of the children if there was a substantial change in conditions and if the best interest of the children required it.[1] See *Hamilton* v. *Anderson,* 176 Ark. 76, 2 S.W. 2d 673.

Appellant based her claim to custody upon allegations that the children were unlawfully in the custody of Smith, that she had been deprived of them through the fraud and deceit of appellee and that there had been a substantial change in conditions since the divorce decree in that she had remarried and could now provide them a good home, but previously she had no home for them. In support of her allegations, appellant (then 24 years of age) showed that she and her present husband were living in a good neighborhood in a $40,000 home in which there were three bedrooms and 2 1/2 bathrooms, that her husband had an income of $20,000 per year, that since it was unnecessary for her to work she could spend all her time with the children, that the children attended Sunday School and church regularly while with her, that her husband was interested in the children and could support them, and that the children seemed healthy, happy and well adjusted in her home. Mrs. Cousins expected the birth of another child in November 1972.

The divorce decree was entered in a suit brought by appellee upon default by appellant. Although she contends that she had no notice of this decree and admittedly had been assured by appellee at one time that he would dismiss the case, she obviously knew that the suit had

[1]We find it unnecessary to pass upon the jurisdictional question raised by appellee. But see, *Shaw* v. *Shaw,* 251 Ark. 665, 473 S.W. 2d 848.

been filed and had known that a decree was rendered at least since May 1971. It was then that she consulted an attorney in Fort Smith about obtaining a divorce. Apparently, he had no difficulty in ascertaining that the divorce decree had been entered in Elkhart. So far as the record discloses, appellant has never taken any steps to do anything about this decree and in reliance on it seems to have accepted an engagement ring June 1, 1971, from her present husband whom she married October 9, 1971. She then went to Cincinnati, Ohio, where appellee was living to visit the children in November 1971, and had visited them there in April 1971. She admitted that there were no problems connected with her visitation.

After the separation of the parties, the children had been turned over to appellee by appellant because, according to her, she could not support them, and he would not contribute.[2] Appellee said that he did not contribute because he had no job, having been laid off from his employment, and because appellant was spending the money on another man instead of the children. Appellee admitted that when appellant called him to come get the children she attributed her difficulties to his failure to contribute, but also testified that appellant's mother and father asked him to take the children. He also testified that appellant told him that she was going to turn them over to the welfare department.

Appellant's first efforts to procure a change in the custody arrangement took place immediately after appellee's remarriage on December 31, 1971. In February 1972, she filed an action in Juvenile Court in Cincinnati to obtain custody of the children. Either shortly before or shortly after the Juvenile Court action, she filed a suit relating to the matter in domestic court there. She testified that the first step was for visitation rights only. As a compromise of these two actions, in which their respective attorneys participated, the parties signed a stipulation

[2]It is difficult to harmonize appellant's testimony in this regard. She testified that prior to the divorce Smith came to get the children just to visit him during the summer, but that he failed to return them, and when she called his place of employment in Indiana he had left. She also stated that he once returned the children to her but failed to support them, and then took them for a three-day visit but failed to return them.

dated February 16, 1972, subject to the approval of the Indiana court. It recited the agreement of the parties that the mother would have the children in Arkansas each year during the summer months and return them to their father in Ohio each fall one week prior to the commencement of school. The stipulation expressly recited that it should not be construed as changing custody of the children in the absence of further stipulation of the parties or further orders of the Indiana court, but that its purpose was to define in detail the visitation privileges granted appellant in the decree of divorce dated March 5, 1971.[3] Mrs. Cousins testified that the stipulation was filed in Ohio in connection with her petition for custody, but that "they had to take it to Indiana to get it completed." Appellee testified that appellant told him that she would waive custody rights if he would enter into an agreement for visitation.

We agree with the chancellor that there has been no change in circumstance since February 16, 1972, substantial enough to justify changing the custody of these two little girls, who had been with their father for nearly 2 1/2 years, beginning when the youngest was less than a year old. Appellant says that the different circumstances justifying a change are her removal from an apartment where children were permitted to visit, but not to live, to a home purchased by her and her husband in February 1972, but which was not a suitable home for the children until the first of June, because it was not completely furnished until then. She also testified that both children had dental problems when they arrived in Fort Smith which had passed unnoticed by their father and stepmother, and that the older daughter was infected with some type of poison ivy or weed rash, was wearing shoes too small for her feet and was, upon her return to Ohio in August, scheduled to have a tonsil operation which a Fort Smith pediatrician had told her was unnecessary.

We are unable to say that the welfare of these children is in jeopardy by reason of their being in the father's custody, as they have been for such a significant period

[3]According to appellant, this stipulation was approved by the court but no hearing was had or order of approval entered.

in their lives. At 26 years of age he had become a supervisor and detail guardsman at Castle Manufacturing Company, earning $12,000 per year. He lives in a two-bedroom, two-bath, well furnished apartment for which he pays $176 per month rent unfurnished. His sister looked after the two little girls for him during the preceding winter, but they were left with a neighboring lady baby-sitter for two months from 8:00 a.m. to 5:30 p.m., while appellee and his wife were at work. Melissa attended kindergarten from September 9, 1971, to April 19, 1972, and school in Springdale, Ohio, from April 19 to June 9. Appellee's wife was employed by a business forms company at a salary of $156 per week at the time of the hearing, but planned to quit her job after the birth of her own child, expected in October 1972, in order to look after the children. She professed to love these children and to have a good relationship with them. Mrs. Smith said that she had been saving her salary for a down payment on a house, but that the fund had been used to defray the expenses of the custody litigation. Appellee's expression of a possibility that the wife might have to return to work this year was based upon the possibility that this litigation might be prolonged. Perhaps the matter of greatest concern is the contrast in church attendance habits in these homes. The children are taken regularly by their mother, but appellee depended upon his sister to take them when she had them, and neither he nor his present wife has attended church since their marriage. It is noteworthy that appellant made no complaint about the condition of the children when she visited in Ohio, even though she now seems concerned that her former husband when testifying could not remember the name of the children's baby-sitter. His present wife readily gave her name.

Regrettably, tooth cavities among children do occur from time to time, and the necessity of treatment of a cavity of one child on July 18, 1972, and the discovery of a cavity in a tooth of the other on August 9 are not indicative of such gross parental neglect prior to June 9 to justify serious concern about the welfare of the children in their father's home. Although the mother said Melissa's shoes were so small that it was necessary to replace them as soon as she arrived, the father said that he and his wife had just purchased new shoes and new summer

outfits for the children. His present wife, then 21, and without previous experience in child care, except for baby-sitting, testified that she tried to get shoes of the right size for Melissa. A shoe clerk's error should not be a factor demanding that these children be taken from their father; nor should a difference of opinion among physicians relative to a tonsillectomy and adenoidectomy. It is significant that the Fort Smith pediatrician admitted that he would not have taken issue with the Cincinnati doctor if the operation had been scheduled immediately rather than postponed to August.

Not only are we unable to say that the welfare of these children was jeopardized by leaving them in the custody of the father, we cannot say that the matters recited above constitute a significant change of circumstances. In the first place, the acquisition of the new home could not really be considered a change. An investigating social welfare caseworker testified that the Cousinses lived in the apartment until February 1972, and that their position had been basically the same during the year preceding her testimony. Jerry Cousins, appellant's present husband, confirmed the fact that they had moved into the new home in February 1972, even though he said it was May or June until it was livable because they did not have such things as a refrigerator. Neither Mrs. Cousins nor her husband gave any reason for their delay in completing the furnishing of their home. At 26 years of age he has an annual income of $20,000, and is a junior officer in the Van Buren factory of a family-owned furniture business, which is the largest employer in Fort Smith. In spite of appellant's statement that she did not know about the acquisition of the home when the settlement was negotiated, we cannot say with any assurance that the acquisition and establishment of this home was uncontemplated or could not have been made known when the stipulation was signed, or that it would not have been established and furnished sooner if the welfare of these two little girls were a cause for concern or a dominant factor.

One of the most important considerations in our review is the superior position of the chancellor, who had considerable opportunity to observe the parties and their

present mates, as well as the other witnesses. There is perhaps no type of case in which the chancellor's decision carries as much weight. Not only must we give weight to his determination of credibility, we also recognize his ability to observe and otherwise evaluate the parties, their personalities and their apparent interest and affection or lack of affection for the children. *Standridge* v. *Standridge,* 248 Ark. 392, 451 S.W. 2d 726; *Holt* v. *Taylor,* 242 Ark. 292, 413 S.W. 2d 52; *Wilson* v. *Wilson,* 228 Ark. 789, 310 S.W. 2d 500.

We are not impressed with appellant's arguments that we should survey changed circumstances by reference to the original divorce decree. Any such argument is foreclosed by her entering into the stipulation to terminate the Ohio litigation, which was approved by the Indiana court. We have little doubt that at least one of the Ohio actions was a custody suit. Regardless of the nature of the litigation, we cannot believe that appellant would compromise it by a surrender of these children to an unwholesome and unhealthy situation even as a temporary expedient or as a means of obtaining some advantage over appellee by reason of the location of the ultimate forum. We might well consider that the courts of this state were not bound, either by the Indiana divorce decree or the compromise of the Ohio litigation and its resulting effect on the Indiana decree, if we could be satisfied that the return of these little girls to their father was a serious hazard to their welfare, and that there were significant factors not made known to the courts in those states. But, as herein demonstrated, we are unable to do this. We can only hope that the interest expressed by both in the welfare of these two children will be strong enough to eliminate any temptation to future recriminatory action. The evidence indicates that both these parents have matured considerably since the fracture of their marriage.

Since we cannot say that the chancellor erred as a matter of law or that his finding was against the preponderance of the evidence, his decree is affirmed.

HARRIS, C.J., and BROWN and HOLT, JJ., dissent.

CARLETON HARRIS, Chief Justice, dissenting. I would reverse this case for two reasons, first, because, under our cases, unless there are extraordinary reasons for not doing so, the mother is favored to have custody of small children. In the next place, and more important, I would reverse the case because I strongly feel that the welfare of the two little girls demands that they be placed with her. These children are six and three years of age and accordingly it will be a long number of years before either attains her majority. The choice on this point is simply whether the little girls will be better off with their own mother (who has shown enough interest in them to pursue them over the country), or with their father's second wife. The father, of course, will be at his job, and they, in large measure, will be reared, under this court's decision, by a twenty-one year old stepmother.

In *Perkins* v. *Perkins,* 226 Ark. 765, 293 S.W. 2d 889, we stated, "It is a matter of common knowledge that usually there is no love like a mother's love; this is a law of nature that is almost invariable, and *unless there are compelling reasons for giving some one other than the mother custody of a small child, it should not be done.*" (my emphasis) In *Wimberly* v. *Wimberly,* 202 Ark. 461, 151 S.W. 2d 87, this court said, "There is nothing in this case from which it can definitely be said that it is to the best interest of the child for the mother to have custody of it, save and except the humanitarian rule which has most generally been adopted by the courts that during the period of tender years the child should be left in the care of the mother." Case after case could be cited, but I know of no Arkansas case where, all things being equal, custody of small children was given to the father rather than to the mother.

Of course, the controlling consideration is the welfare of the children. *Bornhoft* v. *Thompson,* 237 Ark. 256, 372 S.W. 2d 616. In *Haller* v. *Haller,* 234 Ark. 984, 356 S.W. 2d 9, we commented that the welfare of the children is the "polestar".

Custody is being denied the mother and being given to the father because the majority finds "that there has been no change in circumstance since February 16, 1972,

substantial enough to justify changing the custody of these two little girls * * *." I cannot agree, and it almost seems to me that this mother is being punished for entering into the stipulation, mentioned by the majority, and it unquestionably caused both the trial court and this court to refuse the change of custody. I submit, that under the circumstances, this fact is not sufficient for refusing a custody change. To support my position in this respect, it is necessary to review a few facts appearing in the record. According to appellant, while she was married to appellee, he did not support her or the children the last year or so of marriage. Appellee admitted that he didn't support the children following the separation and prior to the divorce, but said it was because his wife was "pouring the money on another man".[1] Appellant testified that subsequent to the separation appellee came to Arkansas to get the children to visit for the summer. When he did not return, she called at his place of employment in Indiana and was informed that he had left. She testified that she could not learn where he was, and went to the home of his parents in Florida to find him, but his mother slammed the door in her face and said she didn't know where the children were. Mrs. Cousins testified that she knew nothing about the divorce in Indiana until she, herself, filed for divorce. Subsequently, her attorney advised her that she was already divorced.

In February, 1972, Mrs. Cousins filed a suit in the Juvenile Court in Ohio in an effort to obtain visitation rights. She said her lawyers told her not to ask for custody at that time because she had no home for the children, and I submit that under the circumstances (the mother in the courts of another state desperately seeking an opportunity to be with her children, and obeying the advice of her attorneys), should not be penalized for entering into the stipulation.

That the mother was not in a position at the time of the divorce to take care of the children is reflected from the testimony of appellee himself. From the record:

[1]The only allegations with reference to immorality are contained in the testimony of the two parties concerning each other, and I do not consider that immoral acts were established by either. From the record, I would conclude that both are morally qualified to have custody.

"Q. Now, Mr. Smith. As I understand it now, at the time the divorce was granted, your wife at that time was trying to work and support herself. You weren't paying her any support or alimony, were you?

A. No, I wudn't. Indiana doesn't require you to pay alimony. She didn't have the children so I didn't have to pay her anything.

Q. And so the thing about it is, she had no home for the children, did she?

A. She could have made one as easy as I could have.

Q. And at the same time, she was trying to support herself. Is that right?

A. Yes."

Townsend v. *Lowery*, 238 Ark. 388, 382 S.W. 2d 1, bears similarity to the case at hand, in that the father originally had custody of the children, but the court subsequently awarded custody to the mother, not because of any misconduct on the part of the father, and, in doing so, commented that during the period of tender years, it is to the best interest of the child for the mother to have it. The opinion contained, in my view, language pertinent to this cause as follows:

"In the divorce decree the Chancellor awarded appellant 'the temporary care and custody of Alicia Lynn Townsend, infant child of the parties' and specifically retained jurisdiction for the purpose of making further orders relative to custody. * * * * After a hearing on May 14, 1962, the Chancellor granted custody of the little girl to her mother (appellee) for the summer months, permitting appellee to take her to California and requiring a $500.00 bond to guarantee the child's return to White County by August 15, 1962. On April 26, 1963, appellee again petitioned for change of custody, praying that she be granted her daughter's custody during the school year, giving appellant custody during the summer months. After another hearing the Chancellor on July 8, 1973, stating

> that 'it now appears that it would be for the best interest of said child that said custody provisions be revised,' granted appellee custody of the child during the school year in California and appellant custody in Arkansas during the summer.
>
> "We have no doubt of appellant's love for his daughter. Testimony reveals that appellant cared for her as a baby while appellee worked, before the parties separated. The Arkansas Welfare Department report indicates that at a brother's behest, he quit a pipeline job in Michigan so that he could help his aged parents raise his daughter."

One thing concerning the father is rather disturbing to me. He testified that prior to the time when the children came to Arkansas to spend the summer with their mother, the children were left for two months with a lady who kept them from 8:00 A.M. until 5:30 P.M.; yet, he did not even know the name of this woman.

Some of the leading citizens of Van Buren[2] testified on behalf of appellant and her husband, pointing out that they lived in a nice home, attended church regularly, bringing the children with them[3] and were very attentive to the children. The children themselves, according to these witnesses, were very attractive, clean, well-dressed, appeared to be happy, and were receiving adequate care in the home. Mr. Cousins testified that he could support his wife and the children without her having to work;[4] that he gets along fine with the little girls and would like for his wife to have custody, and that he would support them if their father refused to do so.

[2]These included Darrell Thomas, operator of a foam rubber plant in Van Buren and his wife; Mrs. Linda Groom, a case worker for the Department of Social and Rehabilitation Services of Arkansas; Fred Patton, manager of Gordon Transports Truck Line in Fort Smith and an active leader in the First Methodist Church; Dr. John Bayliss, pastor of the First United Methodist Church in Fort Smith; Judge Milton Willis, County Judge of Crawford County for the past eight years; Dr. Jack L. Magness, pediatrician; and Mayor Allen R. Toothaker, Mayor of Van Buren for the last fifteen years.

[3]Appellee does not attend church but stated that his sister took the children to church when they lived at Maderia.

[4]Though appellee stated that his wife would quit work as soon as they returned to Cincinnati, the fact remains that she was working at the time of the hearing from 8:00 A.M. to 5:00 P.M.

Let me again emphasize that these children are of tender years, and in line with our cases, should, in my opinion, be placed with their mother. I think this is particularly true where the children are little girls. In fact, as stated at the outset of this dissent, I know of no case, and none has been cited, where, all things being equal (both parents able financially, and qualified morally), children of this age have been placed with the father instead of the mother.

I, therefore, respectfully dissent.

BROWN and HOLT, JJ., join in this dissent.