2001

Dixie Whitaker v. James Whitaker : Brief of Respondent

Utah Supreme Court

SUPREME COURT

BRIEF

COURT

OF THE STATE OF UTAH

DIXIE WHITAKER, aka DIXIE D'OLIVER

Plaintiff and Respondent,

vs

Case No. 14329

JAMES WHITAKER,

Defendant and Appellant.

BRIEF OF RESPONDENT

Appeal from an Order and Judgment of the Third District Court for Salt Lake County, State of Utah, the Honorable Stewart M. Hanson, Jr., Judge presiding.

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STATUE

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STATEMENT OF THE KIND OF CASE

This is an action seeking reversal of Judge Stewart M. Hanson, Jr.'s Order and Judgment pursuant to Respondent's Order to Show Cause for child support.

DISPOSITION IN LOWER COURT

Respondent's Order to Show Cause was heard before the Honorable Stewart M. Hanson, Jr., Judge of the Third Judicial District Court, In and For Salt Lake County. Said hearing was had on the 28th day of October, 1976. Judgment was entered against the Defendant in the amount of $840.00 and the Defendant was further ordered to pay $75.00 per month per child to the Plaintiff as child support. From that Order the Defendant appeals.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Judgment and Order of the Court below to the extent that it makes a support obligation from the Appellant in excess of $120.00 per month from and after June 10, 1972.

STATEMENT OF FACTS

Appellant and Respondent were married in Salt Lake City, Utah, on September 14, 1966. On October 21, 1971, the Appellant was served with a Summons in Colorado, Respondent having initiated a Divorce action in the State of Utah. The Appellant made no responsive pleading and a Divorce Decree was entered on February 10, 1972, in the Third District Court of Utah. The Decree awarded the Respondent $75.00 per month per child as child support or a total of $150.00 per month.

Subsequently, Appellant became delinquent in his support payments and on May 19, 1972, an Order to Show Cause and Declaration In Re Contempt was filed. Pursuant to the Order to Show Cause, a hearing was held on May 31, 1972 and an Order was signed by Judge Emmett Brown on June 10, 1972. The Order read in part as follows:

1. Plaintiff is given Judgment against the Defendant for the sum of $350.00 for unpaid support money.

2. Defendant is found in contempt of Court and sentenced to five (5) days in jail.

3. Defendant is ordered to pay $60.00 on the 10th and $60.00 on the 25th of each month, beginning with the 10th of June, 1972.

4. If he fails to make any payments from June to November of 1972, he shall serve the five (5) days jail term.

On June 19, 1972, William G. Shelton, attorney for the Respondent, filed an Affidavit with the Court. The Affidavit asserted that the Appellant had failed to make the payments as ordered by Judge Emmett Brown. On the basis of the Affidavit filed, Judge Merrill C. Faux signed a Commitment ordering the Defendant to jail in accordance with the Judgment entered June 10, 1972.

The Appellant began to make payments to the Respondent in the sum of $60.00 per child per month or $120.00 per month. On various occasions, the Respondent orally demanded that the Appellant increase the payment to $75.00 per month per child, pursuant to the Decree of Divorce. The Appellant refused or neglected to do so.

In October of 1975, the Respondent filed an Affidavit in support of an Order to Show Cause and a hearing was held on October 20, 1975. Thereafter Judge Stewart M. Hanson, Jr. signed an Order which gave Judgment for the Respondent and against the Appellant in the sum of $840.00 which reflected child support arrearage and enforced the $75.00 per month per child support obligation by ordering the Appellant to immediately begin payments in that amount.

ARGUMENT

ISSUE:

Whether the Order issued on June 10, 1972 modified the original Decree of Divorce entered February 14, 1972.

POINT I

WHERE AN ORDER IS AMBIGUOUS, THE COURT MAY INTERPRET THE SAME IN LIGHT OF THE MINUTE ORDER, THE MINUTE ENTRY, THE NOTICE OF MOTION AND THE CIRCUMSTANCES SURROUNDING THE ENTRY OF THE ORDER.

The June 10, 1972 Order is ambiguous. To be properly interpreted,

the Court below had no alternative but to look to the Minute Entry, the Minute Order, the Notice of Motion and to the circumstances surrounding the Entry of that particular Order. The rule has long recognized the need for these interpretative tools and the Courts have been granted wide discretion and latitude in their use. Roraback vs Roraback 101 P. 2d 772 38 C.A. 2d 592, Gardner vs Rich Mfg. Company 158 P. 2d 23 68 C.A. 2d 725, Western Greyhound Lines vs Superior Court of Los Angeles County 331 P. 2d 793, 165 C.A. 2d 216. And this Court in Huber vs Newman 106 Utah 363, 145 P. 2d 780, 783-1943 construed an ambiguously worded Judgment in light of the Conclusions of Law, giving support to the rule previously expressed.

The Court below interpreted the Order in light of the Minute Entry to mean that the $60.00 payments were temporary and would end in November. This Respondent submits is an entirely appropriate interpretation of the Order.

In Appellant's brief counsel cites various cases for the proposition that a formal written order supersedes a Minute Entry if they are inconsistent. This may be true, but here the Respondent is not attempting to enforce the Minute Entry. The Respondent simply states that where a written order is ambiguous it is appropriate that the Minute Entry by used so that a proper interpretation may be made by the Court.

Counsel further makes reference to the Order itself and specifically to paragraph 3, saying that the paragraph must be given its "plain meaning". We submit paragraph 3 has no "plain meaning" and must be

interpreted. As the Court in Bailey vs Superior Court 297 P. 2d 795 stated:

> "If construction be needed as to the meaning and effect of this Decree permissible reference to the pleadings and to the Findings suffice to make the judgment clear." * * *

See also Brown vs Superior Court 110 Cal. App. 464, 294 P. 428.

The Court below used the tools available to it and gave an ambiguous Judgment a valid interpretation.

POINT II

THE ORDER ENTERED JUNE 10, 1972, WAS THE RESULT OF A HEARING IN RE CONTEMPT, NOT A HEARING TO CONSIDER MODIFICATION OF THE ORIGINAL DECREE.

The June 10, 1972 Order was the result of a hearing which considered the delinquency of the Appellant in his support payments. It further considered whether or not he should be held in contempt. A Judgment for $350.00 was entered, the Defendant was found to be in contempt and ordered to spend five days in jail. This however, was suspended on the condition that he make payments of $60.00 twice a month. He failed to make these payments and a Commitment was signed by Judge Faux in June of the same year. It is argued that this Order modified the original Divorce Decree, Respondent cannot agree. It is highly unlikely that a modification would come out of a hearing In Re Contempt initiated by the Respondent. While Section 30-3-5 U.C.A. 1973 provides for the continued jurisdiction of the Courts to make subsequent changes or a new orders with respect to support and maintenance of the parties, this Court in Chaffey vs Chaffey 63 Utah 261, 225 P. 76 set forth the rule that there be a required

showing of change of circumstances before the Court can modify an original Decree. There is nothing in the record that would indicate that testimony relative to a change of circumstances was taken nor is there any other evidence which would support Appellant's claim that the child support obligation had in fact been modified.

POINT III

RESPONDENT DID NOT ACQUIESCE BY ACCEPTING THE $60.00 PER MONTH PER CHILD PAYMETNS MADE BY APPELLANT.

The fact that Respondent accepted the $120.00 does not mean she acquiesced. She made demand for the additional money based on her interpretation of the Order. In State vs Hawaii 48 H 152, 397 P. 2d 593, it was undisputed that the parties acquiesced in the Judgment of the Court. Here the record indicated that the Respondent did not acquiesce, but in fact, resisted Appellant's continued reduction of the child support payments.

CONCLUSION

The June 10, 1972 Order should not be construed as modifying Appellant's child support obligations, since:

1. The Court below properly construed the ambiguous order in light of the Minute Entry.

2. The record reflects no testimony or evidence going to a change of circumstances which would support a modification of the original Decree.

3. The Respondent did not acquiesce to the reduction of support

payments and should not be bound thereby.

WHEREFORE, Respondent respectively requests this Court affirm the Judgment of Judge Stewart M. Hanson, Jr.

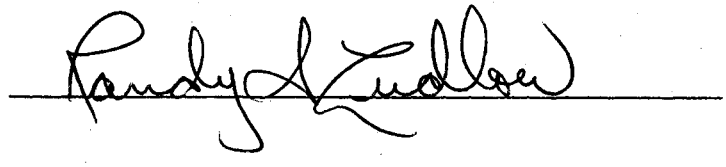
DATED this 15th day of March, 1976.

Respectfully submitted,

JOHN C. GREEN
ATTORNEY FOR RESPONDENT

CERTIFICATE OF DELIVERY

I hereby certify that I delivered 11 copies of the foregoing Brief of Respondent to the Supreme Court Clerk's office, at the State Capitol Building, Salt Lake City, Utah, this 16th day of March.



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I hereby certify that I delivered 2 copies of the foregoing Brief of Respondent to Gordon F. Esplin, Esq., attorney for the Appellant, at 216 East Fifth South, Salt Lake City, Utah 84111, this 16th day of March, 1976.