

2000

Vickie Jean Butler Heath v. Darrell Eugene Heath : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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Case No. 13941

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n to Set Aside
n District

Judge

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FILED

JUL 1 1975

Clerk, Supreme Court, Utah

IN THE SUPREME COURT
OF THE STATE OF UTAH

VICKIE JEAN BUTLER HEATH, :
 Plaintiff-Respondent, : Case No. 13941
-vs- :
DARRELL EUGENE HEATH, :
 Defendant-Appellant. :

BRIEF OF PLAINTIFF-RESPONDENT

Appeal from Order Denying Motion to Set Aside
Default Judgment of the Fourth District
Court, Utah County
Hon. J. Robert Bullock, Judge

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IN THE SUPREME COURT OF
THE STATE OF UTAH

VICKIE JEAN BUTLER HEATH,	:	
	:	CASE NO. 13941
Plaintiff and	:	
Respondent,	:	
	:	
-vs-	:	
	:	
DARRELL EUGENE HEATH,	:	
	:	
Defendant and	:	
Appellant.	:	

BRIEF OF APPELLANT

NATURE OF CASE

This was an action filed by plaintiff seeking a divorce from defendant, and that plaintiff be awarded certain various relief including custody of a minor child and support money. Upon the 29th day of April, 1971 the divorce decree was signed by the Judge and filed in the Office of the Utah County Clerk. On the 29th day of October, 1974 defendant filed a Motion to Set Aside the Judgment and Decree of Divorce based on various grounds.

DISPOSITION IN LOWER COURT

The lower court, acting through the Hon. Joseph E. Nelson, signed a Judgment and Decree of Divorce which recited

appellant's default and awarded respondent, inter alia, a divorce, custody of the minor child, and \$50.00 per month child support; said Default Judgment was filed on April 29, 1971. Thereafter, appellant's Motion to Set Aside the Judgment and Decree of Divorce was denied by a Minute Entry denominated "Ruling" signed by the Hon. J. Robert Bullock, dated December 4, 1974.

RELIEF SOUGHT AGAINST APPEAL

Respondant seeks the affirmation of the lower court's Judgment and Decree and that the Supreme Court set at rest this case.

STATEMENT OF FACTS

The Complaint in this action was verified and filed on February 4, 1971 (R. 304), together with an Affidavit of Impecuniosity and an Order to Show Cause and Affidavit. The Complaint alleged, inter alia, that the parties to the action had had one child as issue of their marriage, whose custody should be awarded to plaintiff (paragraph 3 of complaint, R. 3). The Order to Show Cause (R. 8) required defendant's appearance on February 11, 1971, and the Sheriff's Return (R. 11) reflects that a Summons, Complaint, Order to Show Cause and Restraining Order were served upon defendant on February 9, 1971. No hear-

ings were held in connection with the Order to Show Cause (R. 12-13).

On April 28, 1971 the matter was heard by the Court. Findings of Fact and Conclusions of Law, and a Judgment and Decree of Divorce, were signed on April 29, 1971 and filed in the Clerk's office on that date (R. 14-16, R. 17-18). Both of those documents recited that it appeared "to the satisfaction of the court that the defendant herein ... was duly served in person with summons herein attached to a copy of the complaint on file" and that "the defendant (had) failed to appear and answer the complaint ... the time for answering having expired and no answer having been filed and the default of said defendant ... having been duly entered according to law." Finding of Fact No. 5 (R. 15) states: "That because the defendant is using drugs to excess and at the present time is in jail, the Court determined there would be no basis for reconciliation of the marriage;". Conclusion of Law No. 3 (R. 15) states: That there is no basis for reconciliation of the marriage because of the defendants (sic) excessive use of drugs and being in Jail, therefore, the 90 day waiting period should be waived." The Judgment and Decree of Divorce (paragraph three) contained an Order (R 17) that the ninety day waiting period was waived and a default certificate was filed in the clerk's office on April 29, 1971 (R. 20).

The complaint prayed (paragraph No. 3, R. 4) "\$350.00 per month alimony and support money;" Paragraph No. 6 (R. 17-18) of the Judgment and Decree of Divorce herein awarded plaintiff \$1.00 per year alimony and \$50.00 per month child support, and judgment for \$250.00 for the use and benefit of plaintiff's attorney.

On November 1, 1974, defendant filed a Motion to Set Aside the Judgment and Decree of Divorce based upon the ground that said Judgment and Decree were based upon hearing held in contravention and violation of provisions of Sec. 30-3-18, Utah Code Annot. (1953), (R. 21), and upon the further ground, as set forth in defendant's Affidavit (R. 25-26), that the return was erroneous by reason of the fact that at the time of service recited therein defendant did not reside at nor was he present in, Salem, Utah, but was in fact involuntarily restrained in the Utah State Hospital at Provo, Utah, and upon the further ground that thereafter the defendant was incarcerated in the Utah County Jail, did not intend to default herein, but was discouraged from filing an Answer to plaintiff's Complaint by jail personnel who stated to him that he could not be released from custody to attend any trial in the action in any event. Said motion was denied by a ruling of the above Court dated December 4, 1974 (R. 27) and an additional Order denying the Motion was subsequently signed and filed herein on December 20, 1974.

ARGUMENT

THE LOWER COURT DID NOT ERR IN DENYING DEFENDANT-APPELLANT'S MOTION TO SET ASIDE THE JUDGMENT AND DECREE OF DIVORCE HEREIN

The lower court had before it the record of the trial. the record shows the defendant-appellant was personally served with a twenty day Summons and in the affidavit of the defendant-appellant to Set Aside the Judgment and Decree of Divorce defendant-appellant admits he had personal knowledge of the complaint since he contemplated answering the same. The defendant-appellant failed to answer said complaint and the court upon the hearing authorized the default of said defendant-appellant; and for a good cause being shown waived the remainder of the ninety day waiting period. This was done in accordance with 30-3-18; Utah Code Annotated, 1953, as Amended. The jurisdiction of the court was had as to the person and res of the suit. Under Rule 55-2 of Utah Rules of Civil Procedure, no notice need be given any defendant in default. The Legislature in 30-3-18, Utah Code Annotated, 1953, as Amended does not provide for an additional hearing for a defendant in default. Thus we see that no notice of a subsequent hearing was ever intended to be had or oust the jurisdiction.

POINT I

THE ACTION OF THE TRIAL COURT WAS VALID

Since defendant-appellant had not answered the complaint

or to the knowledge of the court or plaintiff-respondent or plaintiff-respondent's attorney attempted to answer the complaint the court could enter a default judgment.

The court at the time of the hearing further noted that since the defendant-appellant had been in jail a number of times and had used drugs there was no hope of reconciliation of the parties thus the ninety day waiting period should be waived. The court nor plaintiff-respondent nor plaintiff-respondent's attorney had any knowledge that the defendant-appellant was being deprived of his rights in answering the complaint.

The fact that the court did not put this finding, that said ninety day period would be waived, in its minute entry was an oversight by the judge who did so order as shown by the fact that he included it in his Findings of Fact and Conclusions of Law and Judgment and Decree of Divorce.

The defendant-appellant did not rely upon the statutory ninety day waiting period since he did not at the ninety day limit attempt to appear before the court or make any written communication with it.

30-3-18 Utah Code Annotated, 1953 (Amended) does not forbid the court from holding a hearing on the divorce case before the end of the ninety day waiting period nor does the section allow the defendant-appellant ninety days in which to file an answer, but rather leaving it to the sound discretion of the court

to determine the facts. If the legislature had wanted to extend the time for answering they would have so stated in the statute; this they did not do nor did they define "good Cause", thus leaving it up to the court to determine this matter also. Therefore, the term "good Cause" as referred to in 30-3-18 UCA 1953 as Amended is left solely to the discretion of the judge. Under 30-3-6; 30-3-7 and 30-3-18 UCA 1953 as Amended, the statutes give the trial judge discretionary power in the matters of waiving the ninety day waiting period and the length of time to be waited before the divorce becomes final. The defendant-appellant had all the time allowed by law to answer and prepare a defense to the complaint in said divorce case.

The defendant-appellant has not claimed that he has any defense to the grounds in said case. The only things he wants to contest is the paternity and one item of personal property which could be done by other proceedings. Hence, if the Judgment and Decree of Divorce is set aside the defendant-appellant would be no further ahead.

In answer to the defendant-appellant's claim due to Rule 5 (a) of Utah Rules of Civil Procedure, it should be noted that the plaintiff-respondent asked for no new or additional relief, therefore defendant-appellant was not entitled to notice.

In this case there was really no need for the ninety day waiting period or "cooling off" period as there was no attempt

by the defendant-appellant either before or after the divorce for reconciliation of the matter. He had placed himself by his own actions beyond the point where he could make such a move.

The court must, therefore consider the statutes and rule thereon. All the cases I found dealt with the peculiarity of the statutes in question which were not exactly like those of Utah.

POINT II

THE LOWER COURT WAS RIGHT IN REFUSING TO SET ASIDE ITS DECREE OF DIVORCE

Public Policy dictates that a decree of divorce should be final and that the parties may rely upon it unless it is challenged within a reasonable time limit. Section 60 of the Utah Rules of Civil Procedure requires that a decree of divorce or judgment to be set aside must be commenced within a reasonable time limit, and in no event more than three months. In this case defendant-appellant did not seek to set aside the divorce in a reasonable time limit since he did not seek to set it aside until more than three years after the decree.

To show an abuse of discretion the Supreme Court of Utah has held in many cases that the motion must be timely filed. In this case the defendant-appellant made no attempt to set aside the default judgment and relied thereon for a period of more than three years. The reliance is shown by the fact he did not attempt to resume his marital status with the plaintiff-respondent nor

visit the said child. The following is the ruling of the Supreme Court of Utah as to abuse of discretion in setting aside judgments:

Echo Ney, Trustee, Wasatch Homes, Inc., a Corporation

v. G. T. Harrison and Alda J. Harrison, 299 P. 2d 1116.

In the recent case of Warren v. Dixon Ranch Company, we had occasion to review the policy consideration and reaffirmed the attitude of liberal consideration, thus:

The allowance of a vacation of judgment is a creature of equity designed to relieve against harshness of enforcing a judgment, which may occur through procedural difficulties, the wrongs of the opposing party or misfortunes which prevent the presentation of a claim or defence. *** Equity considers factors which may be irrelevant in actions at law, such as the *** hardship in granting or denying relief. Although an equity court or longer has complete discretion in granting or denying relief it may exercise wide judicial discretion in weighing the factors of fairness and public convenience, and this court on appeal will reverse the trial court only where an abuse of this discretion is clearly shown.

In the case of Bylund v. Crook, 208 P. 504; 60 U. 285 the following is the ruling of the Supreme Court of Utah in setting aside default judgments:

Our trial courts are usually very liberal in vacating and setting aside default judgments entered against a defaulting party by reason of mistake, inadvertence, or excusable neglect, or in case where there has been fraud or deceit practiced. Under our practice it is generally regarded as an abuse of discretion for a trial court not to vacate and set aside a default judgment when there is any reasonable grounds for doing so, and timely application is made. But in this particular instance it is our judgment that no reasonable grounds existed, and that it would have been error for the court to have done so.

The sheriff made a return of the service of Summons and Complaint in the matter in accordance with the Utah Rules of Civil Procedure showing that same was served personally upon the defendant-appellant and the said defendant-appellant admits that he received the Summons and Complaint. The plaintiff-respondent, in the lower court, had the right to rely on the service. In excess of three years had passed before the defendant-appellant made any objections. Therefore, the defendant-appellant has no right to claim that the court has abused its discretion in this regard.

Public Policy dictates that a decree of divorce should be final and that the parties may rely upon it unless it is challenged within a reasonable time limit.

POINT III

DEFENDANT-APPELLANT MUST SHOW A MERITORIOUS DEFENSE

24 Am. Jur. 2d. 471, Sec. 331, Necessity for Meritorious Defense.

The general rule that a defendant against who a judgment has been rendered must show a meritorious defense, as a condition of his right to proceed for the vacation of the judgment, or to seek equitable relief against the judgment, applies to a judgment or decree of divorce. It is accordingly held that if the defendant in the divorce action asks that the decree be set aside he must ordinarily show that he has a meritorious defense to the action, making it at least a possibility that if a new trial is had, the judgment will be a different one.

An exception to the rule imposing such a requirement is made where the attack on the judgment or decree is made solely on the grounds of want of jurisdiction, not involving a submission to the jurisdiction of the court to pass on the merits of the case.

In applying the foregoing rules of law to the instance case, the defendant-appellant relies solely on the non-access of defendant-appellant to plaintiff-respondent between October 14, 1968 and October 14, 1969. The said child was born on May 5, 1970. The defendant-appellant has not represented to the court that he had furloughs during that period. According to the plaintiff-respondent, defendant-appellant did have furloughs during his imprisonment and did visit with her and have sexual relations with her. However, under the affidavit of the plaintiff-respondent, we find the child was not named and a supplemental name report had to be filed with the Utah State Department of Vital Statistics. This was one on certificate number 70-25-9460. The defendant-appellant signed a notarized supplemental name report acknowledging he was the father of said child. The defendant-appellant permitted the child to use his name. Under 70-30-12 UCA 1953 it states that if a father publicly acknowledges a child to be his and so treats him he is regarded as the natural child of that parent.

When a child is born within wedlock it is the legal presumption that the married couple is in fact the parents of the child unless it is disputed by the father at that time,

which was not done in the case dealt with in this action. Until the child was more than four years of age defendant-appellant did not dispute the fact that the child was his.

Thus we see the defendant-appellant would have no standing to claim the child was not his own. If anyone misrepresented to the lower court it would be the defendant-appellant by his action of trying to set aside the Default Judgment and Decree. The plaintiff-respondent was satisfied that the child was sired by the defendant-appellant. If a new trial was had the outcome would be unchanged.

At any time within the four years after the birth of the child, the defendant-appellant could have filed an independent action against the plaintiff-respondent to determine the paternity of the child. Society has the right to be able to depend on the finality of divorce matters and not have to wonder if subsequent marriages will be voided at a later date. Injury to innocent parties may be had in such cases and should be avoided at all costs.

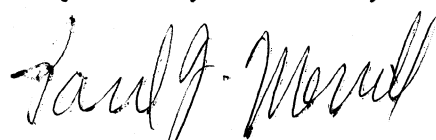
CONCLUSION

The lower court had jurisdiction of the persons and subject matter of said law suit. Within the discretion of the lower court a hearing was held upon the divorce matter; the lower court determined the case, filed its Findings of Fact

and Conclusions of Law and Decree and the divorce became final.

Based upon the brief, plaintiff-respondent prays that the Motion to Set Aside the Default Judgment be denied.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Paul J. Merrill".

PAUL J. MERRILL
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MAILING CERTIFICATE

I hereby certify that on this 7⁵ day of July, 1975,
I mailed, postage prepaid, two copies of the foregoing brief to
Richard M. Day, Esq., Meredith, Barber & Day, at 455 South Third
East, Suite 101, Salt Lake City, Utah 84111.


PAUL J. MERRILL