

2000

June Marlene Thomas v. Harry Edward Thomas : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jay D. Edmonds; Attorney for Plaintiff-Respondent.

Ronald C. Barker; Attorney for Defendant-Appellant.

Recommended Citation

Brief of Appellant, *Thomas v. Thomas*, No. 14503.00 (Utah Supreme Court, 2000).

https://digitalcommons.law.byu.edu/byu_sc2/353

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
KFU
45.9
.S9
DOCKET NO

UTAH SUPREME COURT

BRIEF

14503A

SUPREME COURT OF THE STATE OF UTAH

No. 14503

JUNE MARLENE THOMAS,

Plaintiff-Respondent,

vs.

HARRY EDWARD THOMAS,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM JUDGMENT OF CONTEMPT OF THE
DISTRICT COURT OF SALT LAKE COUNTY, UTAH,
HONORABLE BRYANT H. CROFT, JUDGE

RONALD C. BARKER
Attorney for Defendant-Appellant
2870 South State Street
Salt Lake City, Utah 84115
Telephone 486-9636

JAY D. EDMONDS
Attorney for Plaintiff-Respondent
10 Exchange Place #309
Salt Lake City, Utah 84111
Telephone 531-6686

FILED

SEP 10 1976

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	Page
Nature of the Case-----	1
Disposition in Lower Court-----	1
Relief Sought on Appeal-----	2
Statement of Facts-----	2

ARGUMENT

POINT I

SINCE THERE ARE NO WRITTEN FINDINGS, CONCLUSIONS, OR JUDGMENT, THERE IS NO PROPER FOUNDATION TO SUPPORT A SENTENCE FOR CONTEMPT AGAINST DEFENDANT, AND THEREFORE SAID SENTENCE MUST BE VACATED-----	4
--	---

POINT II

THE COURT FAILED TO MAKE A FINDING THAT DEFENDANT WAS ABLE TO DELIVER THE STOCK, WHICH FINDING IS ESSENTIAL TO A FIN- DING OF CONTEMPT-----	6
---	---

POINT III

IMPOSITION OF 30 DAY JAIL SENTENCE WAS TOO SEVERE-----	7
--	---

POINT IV

THE ORDER REQUIRING DELIVERY OF STOCK WAS IMPROPERLY ISSUED AND SHOULD NOT BE ENFORCED BY CONTEMPT PRO-	
--	--

	Page
CEEDINGS-----	8
Conclusions-----	12

CASES CITED

<u>Adams v. Adams</u> , 30 U. (2d) 121, 514 P. 2d 536 (1973)-----	4
<u>Bott v. Bott</u> , 22 U. (2d) 368, 453 P. 2d 402-----	10
<u>Brown v. Cook</u> , 123 U. 505, 260 P. 2d 544 (1953)-----	4, 11
<u>Davis v. Broughton</u> , (Mo. App.) 382 SW 2d 219-----	11
<u>Ellinwood v. Bennion</u> , 73U. 563, 276 P. 159-----	5
<u>Ex Parte Gerber</u> , 83 U. 441, 29 P. 2d 932-----	11
<u>Harris v. Harris</u> , 14 U. (2d) 96, 377 P. 2d 1007-----	7
<u>Hillyard v. District Court of Cache County</u> , 68 U. 220, 249 P. 806--	6, 11
<u>Hinkins v. Santi</u> , 25 U. (2d) 324, 481 P. 2d 53-----	4, 9
<u>In re Clift's Estate</u> , 108 U. 336, 159 P. 2d 872, 874-----	11
<u>Lukich v. Utah Const. Co.</u> , 46 U. 317, 150 P. 298-----	5
<u>Neilson v. Dennett</u> , 22 U. (2d) 166, 450 P. 2d 93 (1969)-----	4
<u>Parish v. McConkie</u> , 89 U. 396, 35 P. 2d 1001 (1934)-----	4, 11
<u>Powers v. Taylor</u> , 14 U. (2d) 118, 378 P. 2d 519 (1963)-----	4, 5, 6, 7
<u>Robison v. Fillmore Commercial & Savings Bank</u> , 61 U. 398, 213 P. 790-----	5
<u>State v. Bartholomew</u> , 85 U. 94, 38 P. 2d 753-----	6, 11
<u>State v. Reese</u> , 43 U. 447, 135 P. 270-----	10

<u>Watson v. Watson</u> , 72 U. 218, 269 P. 775-----	6
--	---

CONSTITUTIONAL PROVISIONS CITED

Art. I, Sec. 12 of the Utah Constitution-----	10
Art. I, Sec. 16 of the Utah Constitution-----	10, 11
Fifth Amendment to the Constitution of the United States-----	10

RULES CITED

Rule 52(a), URCP-----	6
Rule 65A , URCP-----	9
Rule 65A(e), URCP-----	9
Rule 65B, URCP-----	9
Rule 65B(a), URCP-----	9
Rule 69, URCP-----	8
Rule 72(a), URCP-----	5

STATUTES CITED

Title 77, Chap. 4 (Security to Keep the Peace)-----	9
77-1-10, UCA, 1953-----	10
77-8-9, UCA, 1953-----	10
77-22-10 through 77-24-13, UCA, 1953-----	10
78-32-9, UCA, 1953-----	4

TEXTS CITED

16 Am. Jur. 2d 723, 727, Constitutional Law, Sec. 386, 388-----	11
17 Am. Jur. 2d, Contemp. Sec. 51, 100, 111-----	6, 10

SUPREME COURT OF THE STATE OF UTAH

No. 14503

JUNE MARLENE THOMAS,

Plaintiff-Respondent,

vs.

HARRY EDWARD THOMAS,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

NATURE OF THE CASE

Defendant was sentenced for contempt for failure to obey an order requiring him to deliver certain trading stock to his ex-wife. Defendant had earlier been found innocent of a contempt charge for failure to deliver that same stock to his ex-wife as ordered by the divorce decree.

DISPOSITION IN LOWER COURT

Court entered minute entry and memorandum decision without formal findings, conclusions of law or judgment and sentenced defendant to thirty (30) days in jail for contempt of Court.

RELIEF SOUGHT ON APPEAL

Defendant seeks to have finding of contempt and jail sentence vacated, or that failing, to have the jail sentence reduced.

STATEMENT OF FACTS

The parties were divorced in 1970. The divorce decree provided, among other things, that plaintiff was awarded 10 shares of Ute Distribution Corporation stock, (R. 27, Par. #3), and that defendant was ordered to deliver that stock to plaintiff. Plaintiff brought an order to show cause in March, 1974, (R. 47, Par. 5), charging defendant with contempt for his failure to deliver those 10 shares of stock to plaintiff as ordered by the divorce decree. After hearing evidence the Court found that defendant had not delivered the 10 shares of stock to plaintiff, but that he was not in contempt of Court (R. 64), and by minute entry again ordered defendant to deliver that same 10 shares of stock to plaintiff within 10 days after entry of the order (R. 65). That decision was reduced to writing January, 1975, which then ordered defendant to immediately deliver that stock to plaintiff. There was no finding by the Court that defendant had the ability to deliver that stock. Defendant moved for an order striking the Court's order requiring the delivery of that stock (R. 73), at which hearing the Court ordered that ". . . plaintiff is entitled to the distribution of the stock in accordance with the decree of divorce on file," (emphasis added). Thereafter by minute entry the Court denied the motion to amend, (R. 80),

however an order was thereafter prepared by counsel for plaintiff and filed amending those findings to provide that plaintiff had not waived her right to receive the Ute Distribution Stock in exchange for a boat, motorcycle and snow machine as claimed by defendant (R. 82).

In September, 1975, and again in December, 1975, (R. 86-90) plaintiff brought orders to show cause charging defendant with contempt of Court for failure to deliver the same 10 shares of Ute Distribution Stock. Judge Croft found that Titan Corporation, an organization controlled by defendant's brothers, and of which his daughter was secretary, held 10 shares of Ute Distribution Stock during the period from February 4, 1975, to February 20, 1975, after Judge Leary's order of January 3, 1975, but did not find that defendant owned that stock, had control over that stock, or had ability to deliver that stock to plaintiff. Judge Croft then determined that the defendant was guilty of contempt of Court for failure to deliver said 10 shares of Ute Distribution Stock to plaintiff (R. 99-100), and thereafter sentenced defendant to 30 days in the County Jail for that contempt. Defendant testified that he was financially unable to purchase stock to deliver and that he did not have stock of his own or access to stock owned by Titan Corporation which he could deliver to plaintiff to comply with the order of Judge Leary (R.). No finding was made that defendant was able to comply with the order of Judge Leary requiring delivery of the stock.

No Findings of Fact (other than those contained in the informal min-

ute entry - R. 94-100) were ever signed or filed, no Conclusions of Law were signed or filed, and no Judgment was ever entered or signed concerning the contempt discussed in that memorandum decision. Judge Croft sentenced defendant to 30 days in jail, the maximum jail sentence permitted under the provisions of 78-32-9, UCA, 1953.

ARGUMENT

POINT I

SINCE THERE ARE NO WRITTEN FINDINGS, CONCLUSIONS, OR JUDGMENT, THERE IS NO PROPER FOUNDATION TO SUPPORT A SENTENCE FOR CONTEMPT AGAINST DEFENDANT, AND THEREFORE SAID SENTENCE MUST BE VACATED.

It is firmly established that Utah Law requires written findings of fact, conclusions of law and a written judgment reciting facts and conclusions upon which the Court based its opinion before any judgment of contempt can be upheld. Neilson v. Dennett, 22 U. (2d) 166, 450 P. 2d 93 (1969); Powers v. Taylor, 14 U. (2d) 118, 378 P. 2d 519 (1963); Brown v. Cook, 123 U. 505, 260 P. 2d 544 (1953); Parrish v. McConkie, 89 U. 396, 35 P. 2d 1001 (1934); Hinkins v. Santi, 25 U. (2d) 324, 481 P. 2d 53; Adams v. Adams, 30 U. (2d) 121, 514 P. 2d 536 (1973).

In this case the defendant was held in contempt of Court for viola-

ting a previous order of the Court and was sentenced to serve thirty days in jail (R. 100-101) without any written findings, conclusions or judgment. The reasoning of the Court is evidenced only by the memorandum decision of the Court (R. 94-100), which simply does not meet the requirements of Utah Law. A minute entry does not constitute a judgment. Robison v. Fillmore Commercial & Savings Bank, 61 U. 398, 213 P. 790; Lukich v. Utah Const. Co., 46 U. 317, 150 P. 298. An appeal lies only from a judgment and not from a minute entry or memorandum decision. Ellinwood v. Bennion, 73 U. 563, 276 P. 159; Rule 72(a), URPC.

In Powers v. Taylor, 14 U. (2d) 118, 378 P. 2d 519 (1963) the Utah Supreme Court stated in part as follows:

"Unfortunately from the standpoint of the validity of the judgment, perhaps fortunately from the viewpoint of the defendant, no written findings as such were made. . . .

" . . . The essence of contempt of court is the wilful disregard or disobedience of its orders ((cases cited)). Inasmuch as it is punishable by the traditional criminal sanctions of fine and imprisonment, it partakes of the nature of criminal proceedings and is sometimes referred to as quasi-criminal ((cases cited)). Because of this it is essential that the rights of one so accused be carefully safeguarded. He must be apprised of the nature of the accusation; afforded an opportunity to meet it; and in order to justify a finding and sentence for contempt the proof should be clear and satisfactory that the contempter was in violation or defiance of the court's order ((cases cited)). When this is done it is necessary for the court to make written findings upon the specific conduct found to be contemptuous, and draw its conclusions and enter judgment thereon ((cases cited)). As above

indicated, the court made no written findings as such and the recitals contained in the "Judgment" were inconsistent with the express declarations by the court as to any contempt that may have existed ((cases cited)). It is therefore evident that there is no proper foundation to support a judgment of contempt. Accordingly, it must be, and is hereby vacated." (Emphasis added).

POINT II

THE COURT FAILED TO MAKE A FINDING THAT DEFENDANT WAS ABLE TO DELIVER THE STOCK, WHICH FINDING IS ESSENTIAL TO A FINDING OF CONTEMPT.

Even had the Court properly reduced the thoughts contained in its memorandum decision (R. 94-100) to findings of fact, conclusions of law and judgment as required by Rule 52(a), URCP, there would be no foundation to support a judgment of contempt since the Court failed to make a finding of fact (in its memorandum decision) that defendant had the ability to deliver the stock and to thereby comply with the order concerning which he was held in contempt of court. Accordingly, such a judgment would be void. State v. Bartholomew, 85 U. 94, 38 P. 2d 753; Hillyard v. District Court of Cache County, 68 U. 220, 249 P. 806; Watson v. Watson, 72 U. 218, 269 P. 775; Powers v. Taylor, 14 U. (2d) 118, 378 P. 2d 519. See also Am. Jur. 2d Contempt Sec. 51, 100, 111, (Volume 17).

Inability to comply with the court order is a complete defense to a charge of contempt of court, unless that ability has been lost through the

defendant's own actions. The memorandum decision descusses some evidence and inferences to the effect that defendant might have the ability to control Titan Corporation and to require its stock to be delivered to plaintiff, however no such finding is made by the Court. In any event, such a finding must be established by proof which is "clear and satisfactory that the contempter was in violation or defiance of the court's order". Powers v. Taylor, 14 U. (2d) 118, 378 P. 2d 519. The inferences in Judge Croft's discussion does not rise to meet the "Clear and satisfactory" burden of proof required for a contempt conviction.

POINT III

IMPOSITION OF 30 DAY JAIL SENTENCE WAS TOO SEVERE.

The maximum jail sentence permitted under 78-32-10, UCA, 1953, for contempt of court is 30 days. Such a severe penalty must be justified by the circumstances if it is to withstand scrutiny. While the amount of penalty for contempt should rest within the sound discretion of the trial Court, it is not without limitation and must be exercised within the confines of reason and justice. Harris v. Harris, 14 U. (2d) 96, 377 P. 2d 1007. In that case imposition of a 30 day jail sentence was reversed under circumstances where the husband was paying \$60.00 per month toward child support and spending \$10.00 per month on the children instead of paying the \$100.00 per month ordered. Failure to pay child support is a far more serious situation than simply

failing to deliver property as in our case. There are no minor children or alimony payments involved in our case. Plaintiff received substantial property in the divorce decree (R. 26-28). The stock in question was a minor part of that property. The stock had no particular value to plaintiff apart from its value in money, said stock being readily available for sale or purchase on the market.

POINT IV

THE ORDER REQUIRING DELIVERY OF STOCK WAS IMPROPERLY ISSUED AND SHOULD NOT BE ENFORCED BY CONTEMPT PROCEEDINGS.

The divorce decree ordered defendant to deliver stock to plaintiff which he claimed was disposed of prior to the entry of that order, thereby disabling him before entry of the divorce decree from complying with that order. Defendant believed that he had thereafter satisfied the obligation by releasing his claim to a motorcycle, boat, snow machine and other property awarded to him but retained by plaintiff (R.). Judge Leary found that he had not thereby been relieved of his obligation but found that he was not in contempt for failure to deliver the stock, thereby finally resolving any claimed contempt arising from the divorce decree itself, (R. 82). The order requiring delivery of the stock was improper for various reasons including the following:

1. Plaintiff had a plain, speedy and adequate remedy by asking the Court to reduce her claim to judgment and by execution under Rule 69, URPC.

The order of Judge Leary constituted the issuance of an extraordinary writ under Rule 65B, URCP, and/or constitutes the issuances of an injunction under Rule 65A, URCP, for the sole purpose of assisting plaintiff in collecting a debt. Under Rule 65A(e), URCP, an injunction may only be issued to prevent irreparable injury and under Rule 65B(a), URCP, an extraordinary writ should only be issued when "...no other plain, speedy and adequate remedy exists."

This case is quite similar to the situation in Hinkins v. Santi, 25 U. (2d) 324, 481 P. 2d 53, where the defendant was sentenced to 5 days in jail for disobedience of a restraining order which prohibited him from harassing his former girl friend. In that case the Utah Supreme Court stated in part that "The propriety of issuing the order in the first instance would seem doubtful inasmuch as the plaintiff's action for damages would appear to be an adequate remedy, and if not she had available a statutory proceedings pursuant to the provisions of Title 77, Chap. 4," (Security to Keep the Peace, emphasis added). As in that case, plaintiff in our case has an adequate remedy in an action for damages for failure to deliver the stock, thereby rendering an extraordinary writ requiring delivery of the stock unnecessary and contrary to the restrictions in Rule 65, URCP, limiting the issuance of injunctions and other extraordinary writs to situations where no adequate remedy at law exists.

2. The failure of defendant to deliver the stock constitutes a single offense (if it is an offense). The decision by Judge Leary that defendant's failure to deliver the stock as ordered in the divorce decree did not constitute a contempt of court was a final order and is res adjudicata, (R. 64, 95). The attempt by Judge Leary by the entry of a new order compelling delivery of the same stock to plaintiff (R. 71, Par. 2) and the enforcement of that order by a second contempt proceeding based upon failure to deliver the same stock to plaintiff would constitute placing defendant in double jeopardy in violation of Art. I, Sec. 12 of the Utah Constitution, 77-1-10, 77-8-8, 77-8-9, 77-24-10 through 77-24-13, UCA, 1953, and in violation of the fifth amendment to the constitution of the United States. Punishment for a contempt must be entire. The Court cannot reserve a part as was attempted in our case. See 17 Am. Jur. Contempt Sec. 111, and cases there cited.

3. The finding of contempt constitutes imprisonment for debt, in violation of the provisions of Art. I, Sec. 16, of the Utah Constitution. See discussion in paragraph #1 above. See also State v. Reese, 43 U. 447, 135 P. 270, (Bastardy case where defendant was imprisoned for failure to give security, which imprisonment the Supreme Court held to be lawful absent a showing that he was unable to give the security required of him); Bott v. Bott, 22 U. (2d) 368, 453 P. 2d 402, (contempt for failure to pay monthly installments to wife held to really be alimony payments ((settlement in lieu of ali-

mony)) and therefore not to constitute imprisonment for debt); 16 Am. Jur. 2d 723 and 727, Constitutional Law, Sec. 386 and 388. Since the imprisonment is for the sole purpose of enforcement of a debt, and is not for alimony or child support, punishment for failure to pay that debt (deliver stock) is a violation of Art. I, Sec. 16 of the Utah Constitution. A judgment for alimony is simply a debt, within the meaning of the constitutional prohibition against imprisonment for debt, and payment of the judgment cannot be enforced in a contempt proceeding. Davis v. Broughton, (Mo. App.) 382 SW 2d 219. The award by the Court of the 10 shares of stock to plaintiff was a distribution of assets acquired during the marriage, constituted a debt owed by defendant to plaintiff within the meaning of the constitutional prohibition against imprisonment for debt.

4. Judge Leary was not entitled to order delivery of that stock without an express finding that defendant had the ability to deliver the stock. No such finding was made by the Court, (R. 70-71). See also Brown v. Cook, 123 U. 505, 260 P. 2d 544, 547; In re Clift's Estate, 108 U. 336, 159 P. 2d 872, 874; State v. Bartholomew, 85 U. 94, 38 P. 2d 753; Hillyard v. District Court of Cache County, 68 U. 220, 249 P. 806; Ex Parte Gerber, 83 U. 441, 29 P. 2d 932; Parish v. McConkie, 84 U. 396, 35 P. 2d 1001.

Since the order of Judge Leary again requiring delivery of said stock was improperly issued, and the Court should not compound that error by affir-

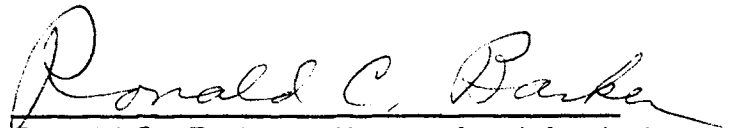
ming a finding by Judge Croft that the defendant in contempt for failure to comply with the erroneous order of Judge Leary and imprisoning him for that contempt.

CONCLUSION

The Court's sentence of defendant to 30 days in jail for failure to comply with a second order for delivery of a trading stock to plaintiff after defendant had been found not guilty of contempt of a prior order requiring delivery of that same stock, particularly without formal findings, conclusions and judgment, and without a finding that defendant was able to deliver that stock was illegal, was not supported by a proper foundation, and must be vacated. The second order (injunctive or extraordinary relief) was improperly issued since plaintiff had a plain, speedy and adequate remedy at law by way of judgment and execution. Punishment for failure to deliver the same stock constitutes double jeopardy. The 30 day sentence was excessive, particularly where the only object of the order was to collect a debt and since no alimony or child support were involved, and where plaintiff herself was guilty of unequitable conduct in failing to sell the house and to pay $\frac{1}{2}$ of the proceeds to defendant as ordered by the divorce decree, failure to deliver to defendant the boat, motorcycle and snow machine awarded to him by the Court, etc., (R. 26-33, R. 38-42, R. 63-65, R. 70-71).

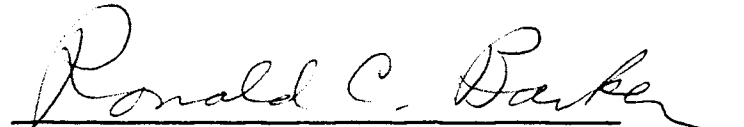
The sentence imposed upon defendant should be vacated and the case remanded, or in the alternative, the sentence imposed should be reduced.

Respectfully submitted this 7th day of September, 1976.

A handwritten signature in cursive script that reads "Ronald C. Barker". The signature is written in dark ink and is positioned above a horizontal line.

Ronald C. Barker, attorney for defendant
2870 South State, Salt Lake City, Utah
84115; telephone 486-9636

I hereby certify that I caused three copies of the foregoing to be
mailed, postage prepaid, this 10 day of September, 1976, to Jay D. Ed-
monds, Attorney for plaintiff, 10 Exchange Place #309, Salt Lake City, Utah
84111.

A handwritten signature in cursive script that reads "Ronald C. Barker". The signature is written in dark ink and is positioned above a horizontal line.

Ronald C. Barker