

1949

Merrill Holbrook v. Louise Holbrook : Brief of Respondent

Utah Supreme Court

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7296

In the Supreme Court of the State of Utah

MERRILL HOLBROOK,

Defendant and Appellant,

vs.

LOUISE HOLBROOK,

Plaintiff and Respondent.

Case No.
7296

FILED

RESPONDENT'S BRIEF

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In the Supreme Court of the State of Utah

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RESPONDENT'S BRIEF

Respondent feels that Appellant has sufficiently and fairly stated the facts of the case in so far as said statement is confined to dates, events and figures, but Respondent differs with Appellant upon his construction of the rulings of the court below as the same are set forth in said Statement of Facts, and differs with Appellant's statement on two points, to wit:

1. Respondent states the fact to be that Appellant was sentenced to the county jail for a period of thirty days;

said sentence to be suspended upon payment of \$645.00 to the Clerk of the Court (Tr. p. 52).

2. Respondent further states the fact to be that the court did consider Appellant's petition for a modification of a decree but did not find facts sufficient to justify a modification thereof (Tr. p. 52).

ARGUMENT

1.

The contention that the court erred in its finding as to Appellant's earnings of \$435.00 per month is without merit.

There isn't any testimony upon which the court must find, based upon a preponderance of evidence, that Appellant's mother owns the home and receives the rents and profits thereof. There is a preponderance of testimony to the contrary. The deed to Appellant's mother was for his accommodation (Tr. p. 53). Appellant will have the home when the mortgage is paid (Tr. p. 43). Appellant has the duty to pay the mortgage (Tr. p. 38). Appellant manages the home (Tr. p. 45). Appellant used rents for car payments (Tr. p. 44). Appellant's employees receive and receipt for the rents at Appellant's place of work (Tr. p. 45). Appellant gets and disburses the rents (Tr. p. 45).

It seems pertinent to point out that Appellant does not cite as error the fact that the lower court found that he was able to pay \$150.00 each month, for it is the law of Utah, or so Respondent believes, that inability to pay the sums provided by the decree is a defense to a contempt action.

Appellant cites only as error the lack of a Finding that he had \$645.00 on January 11, 1949 with which to pay arrears. This implied admission of ability to comply with the decree found in the failure to cite the ruling on ability as error is an admission that Appellant earns more than the \$300.00 he specified to be his salary, or has available for any use he cares to make of it a sum in excess of \$300.00 per month.

All the foregoing, together with the repeated evasions or attempts to evade examination of his actions, as they appear throughout the testimony, justified the court in feeling that Appellant was not entitled to belief and did have the income found by the court which was \$435.00 less house expense.

2.

The court did not err in holding the defendant to be in contempt.

Appellant in his assignment of errors states that the court did not find that Appellant was able to pay the \$645.00 in arrears, and that the contempt order is invalid in the absence of such a finding.

Counsel for Respondent submits that Appellant either reads or states the law incorrectly.

This is not a case where a party is incarcerated until he performs. The order is not to that effect. The order is for a term certain—thirty days—suspended if Appellant wants or is able to secure a suspension thereof.

The order of the court in this matter was punitive rather than purposive—to use the terms of Appellant. At page 51 of the Transcript the court said

“And I hold you in contempt for not having paid.”

At page 53 the court said

“He is in contempt of this court for not living up to the decree.”

The court then imposed sentence and stated terms of suspension.

Respondent believes there is a distinction between cases where a contemnor is lodged in a jail indefinitely until he pays or performs and cases where a contemnor is sentenced to a term certain and subject to suspension on performance of a condition such as payment of a sum due the other party. In the first class the intent is completely purposive and the latter it is primarily punitive—as punishment for a past act.

The cases of *Snook v. Snook*, 188 Pac. 502 and *Watson v. Watson*, 72 Utah 218, 269 Pac. 775, cited by Appellant, are both cases where the contemnor was given an indefinite term to continue until he performed—a term amounting to life perhaps. These cases are entirely purposive and do not seem to be in point here in view of the specific sentence.

Respondent respectfully represents the law applicable to this case to be as follows:

If imprisonment is to continue until payment is made, present ability to pay must be shown. If imprisonment is

for a term certain as punishment for a past act of contempt or for past acts, then present ability to pay is not a consideration. That, even if ability to pay is a necessary adjunct to a valid contempt sentence, a contemnor who voluntarily or contumaciously brings on himself the inability to obey cannot avail himself of such inability as a defense.

Galland v. Galland, 44 Cal. 475, 13 Am. St. Rep. 167

State v. District Court, 37 Mont. 485, 97 Pac. 841

Staples v. Staples, 87 Wis. 592, 58 N. W. 1036, 24 L. R. A. 433

Appellant has not suffered a decrease in earnings, but an increase. He paid nothing on the mortgage on the house nor on repairs in July or August nor for the support of his four children. He thereafter elected to repair, instead of support, as provided by the decree, and after repairs elected to buy a car instead of support his four children as provided by the decree.

Presuming that Appellant earns \$300.00 and no more as he maintains, he obligates himself to pay \$129 per month or 43% of his total earnings on a new Buick car because he has owned a car since he was eighteen and is not going to go without one any longer (Tr. p. 48). He gives no reason why he paid nothing whatsoever in July and August. Such sums as were paid were done so in violation of the decree requiring him to pay the same to the Clerk.

In such cases of past acts constituting a disobedience of a decree and a term certain of imprisonment a punish-

ment for said disobedience, can it be right or logical to say that the punishment is illegal or the sentence invalid if a suspension condition is attached to it?

The burden of proving inability to pay, if ability to pay is necessary to sustain a contempt order under all circumstances, is on Appellant and not on Respondent as maintained by Appellant in his brief at page 7.

State v. Cook, 66 Ohio 566, 64 N. E. 567, 58 L. R. A. 625

Fowler v. Fowler, 61 Okla. 280, 161 Pac. 227, L. R. A. 1917 C 89.

Further, that present lack of money as a defense for failure to pay past installments is not available to a party if there has been any material income during the period of failure to comply with the decree.

Staples v. Staples, 87 Wis. 592, 58 N. W. 1036, 24 L. R. A. 433

Tolman v. Leonard, 66 App. D. C. 224

Barclay v. Barclay, 184 Ill. 471, 56 N. E. 821

Deen v. Bloomer, 191 Ill. 416, 61 N. E. 131

Lake v. Judge, 172 Mich. 660, 138 N. W. 249

Shaffner v. Shaffner, 212 Ill. 492, 72 N. E. 447

Cahzin v. Cahzin, 112 N. Y. S. 525.

3.

Reasonably construed, the order of the trial judge is to the effect that changed financial circumstances of the wife is not such a change in this case as to be considered sufficient for a modification of the decree.

Appellant in his brief appears to complain of the lower court on the following items:

1. The court refused to hear evidence regarding change in financial circumstances of wife.

2. That the court held that change in financial condition of wife was not a matter to be considered at all in determining whether there should be a reduction.

Respondent contends that the court did not refuse to hear evidence. The court did refuse to hear irrelevant evidence (Tr. p. 21) on the purchase of a home and type of home (Tr. p. 22). Respondent was aware that a petition for reduction was being heard concurrently and opened the question on direct examination of Respondent (Tr. p. 9 et seq.). Appellant did not ever pursue the subject on his cross examination of Respondent. The testimony shows that the court was fully informed on the earnings of Respondent.

A reasonable interpretation of the lower court's views as set forth on page 23 of the Transcript does not appear to support the construction placed on it by Appellant. The court stressed the needs of the children, then the earnings of Appellant, and held that, in the absence of a change of either of these factors, he would not consider change in the circumstances of the mother, Respondent. Respondent contends that the court, by inference, held that if the only change to be shown was the change in financial circumstances of the mother no reduction would be made. That in his discretion such a change, and nothing more, would not warrant a reduction.

Respondent contends that such a position is a correct one and is supported by law.

Respondent admits that a change in the financial circumstances of the mother is a factor that a court may consider on questions of modification of decrees for support money, but Respondent hasn't found a case that holds that the decree must be modified when the mother becomes employed after the entry of the decree. The citations of Appellant are significant, not for that they hold but for what Appellant has withheld from them in his discussion of them in his brief. In *Lines v. Lines*, a minor child reaching majority, a remarried father and a decree providing for a graduated scale were matters in addition to mother's employment; In *Sullivan v. Sullivan* the father's health had become impaired, he was unemployed, a male child was of age and self supporting, were factors in addition to mother's employment; in *Caprio v. Caprio* the mother had remarried, had income, and her husband had consented to share support of child with her were also factors considered in addition to wife's employment; In *Kavanaugh v. Kavanaugh* the mother was employed, children were grown and employed, father had remarried a woman who couldn't work. The facts in the cases cited by Appellant are so different from the case of Appellant that they serve the Respondent and take this case out of the scope of the principle contended for.

Respondent contends that a principle has no application to a matter unless the facts upon which it is based are analogous to those at hand. Respondent also contends that

employment of the mother, as the sole fact or factor constituting a change of circumstances between the parties subsequent to the decree, is not such a change in circumstances and conditions as to permit, as a matter of law, a modification of the decree pursuant to the provisions of Section 40-3-5, Utah Code Annotated 1943. Remarriage of mother is not such a change permitted by Section 40-3-5. To society and to women, marriage and employment are synonymous, each being the two most frequent means of existence to women with the less fortunate employing the latter means. An unmarried employed mother received a monthly sum in cash. A remarried unemployed mother receives the equivalent but not in cash. It seems to be a distinction without a difference to arrive at a different result in the two cases.

In the case of *Rockwood v. Rockwood*, quoted by Appellant, a careful reading of that case leads to the conclusion that the ability of the mother to support is not such a change that would warrant a modification. Appellant contends and Respondent agrees that it is probably an open question in this state as to whether or not the mother's ability acquired subsequently to the decree is such a change as to warrant a modification. Respondent questions the reasonableness of the Appellant's interpretation of the *Rockwood* case set forth in his brief at page 13. It is submitted that the court in the *Rockwood* case meant to say that the mother's employment, if shown, would not have inured to the benefit of the father by way of reduction of support money.

Respondent submits that the duty of the father to support is measured by his financial and social status after

the decree and not by the financial or social status of wife, nor by their combined financial condition before the decree, *Butler v. Butler*, 265 S. W. 415; that the responsibility for rearing and training children rests with the mother and the duty to provide means for maintenance and education is with the father, *Cowley v. Cowley*, 202 Pac. 10, 59 Utah 80; that there may be departures from the aforesaid rules, but each departure therefrom must stand on its own merits, *Kavanaugh v. Kavanaugh*, 35 A. (2d) 691; that subsequent employment of former wife may be a circumstance that might justify a modification of allowance for support, as a matter of judicial discretion, if there were appealing equities in former husband's situation, *Morris v. Morris*, (Neb.) 290 N. W. 720; and that no such appealing equity is present in the instant case as to warrant the modification requested.

CONCLUSION

Respondent says that this matter is one of equity and the whole record may be viewed, and when so viewed the judgment and orders of the lower court should be affirmed as correct in the result reached by said court.

Respectfully submitted,

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