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Mamie Ure Baker v. Richard Mills Baker : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

MAMIE URE BAKER,

Plaintiff,

vs.

RICHARD MILLS BAKER,

Defendant.

Appellant's Brief

FILED

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No. 7433

Clerk, Supreme Court, Utah

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In the Supreme Court of the State of Utah

MAMIE URE BAKER,

Plaintiff,

vs.

RICHARD MILLS BAKER,

Defendant.

STATEMENT OF FACTS

This is an appeal from a decree entered in the District Court of Weber County, State of Utah, on the 27th day of September, 1949, finding the appellant in contempt of court, modifying the decree entered between the parties to the above entitled action on the 30th day of June, 1948, and making other orders relating to the rights of the above named parties and their two minor children (Tr. pages 062-063).

In the decree of divorce entered June 30, 1948, the care, custody and control of Joan Carol Baker and Jean Baker, the two minor daughters, then five and three years of age respectively, were awarded to their mother, the appellant, subject to the right of visitation of the respondent at all reasonable times and places. The respondent was ordered to pay to the appellant at the office of the clerk of the court the sum of \$50.00 per month for the support and maintenance of each child,

or the total sum of \$100.00 per month, payable \$50.00 on the 10th day and \$50.00 on the 25th day of each month beginning with July, 1948 (Tr. 021-022).

A complete settlement of the property rights between the parties was made through an award of certain property to the appellant, and she was given no award whatever for alimony (Tr. 021-023).

In the pleadings for modification, reference is made to alimony for the appellant, but that is a misstatement. The hearing was conducted on the theory that all rights between the parties were settled at the time of the divorce, and the respondent was ordered to make payments for the support of the minor children only.

In the Findings of Fact and Decree as originally entered, the Court found that the respondent is an able bodied man capable of earning \$300.00 or more per month, and fully employed (Tr. 018). In the findings used as the basis for the decree and order herein appealed from, the court found that the respondent is still employed and now receives take-home-pay of \$350.00 to \$400.00 per month (Tr. 095). In the respondent's own testimony given at the hearing for modification, he admitted that at the time of the hearing he was earning approximately \$400.00 per month (B. of Ex. 5), and that the award for the support of the children was based not upon the property owned by the respondent at the time the decree was entered, but upon his earnings (B. of Ex. 6). There was no claim that the sum of \$100.00 for the support of the two minor children is more than they need, or that it constitutes a

burden upon the respondent, who has no other dependents. The claim for reduction was made solely upon the ground that the children had been taken to the state of Oregon where it was difficult for the respondent to visit them. There is no claim at all that the welfare of the children is not promoted through the change of residence to Oregon, or is there any claim whatsoever that the appellant is anything but a kind and exemplary mother, fully deserving of the custody of the children, and one who cares properly for the children. An additional fact is that the respondent at the time of the filing of his petition for modification was admittedly in arrears \$350.00, and at the time the appellant cited him into court he owed an additional \$100.00. Furthermore, he had refused to pay \$250.00 attorneys' fees and costs in the sum of \$56.20 awarded under the original decree (B. of Ex. 10). There is no express provision in the decree against the removal of the children from the State of Utah. For findings in original action see Tr. 017-018.

In the fall of 1948, the appellant sold her property in Weber County and purchased property in Nyssa, Oregon, where she could live in the same community with and receive assistance from her sisters and daughters (B. of Ex. 20 and 24). When the respondent failed to make payments under the terms of the decree, the appellant caused him to be cited into court and thereby initiated the proceedings resulting in this appeal.

The court in the decree appealed from found the respondent in contempt only because of his failure to pay the \$250.00 attorneys' fees and costs awarded under the original decree, and permitted him to purge himself

from contempt by paying the amounts due for attorneys' fees and costs (Tr. 062-063). Although the respondent was admittedly in arrears in the sum of \$100.00 at the time the appellant left the State of Utah and moved to Oregon in November, 1948, and was in arrears an additional \$350.00 before he made any application for a modification of the decree, the court did not find him in contempt on those items. However, the court found the appellant in contempt for removing the children from the State of Utah without the consent of the court, and in effect fined her \$350.00 and rewarded the respondent to the extent of \$350.00 by holding that the appellant could not collect the \$350.00 past due and unpaid at the time the respondent applied for modification. The court further reduced the amounts payable to the children from \$50.00 each to \$30.00 each per month and refused to modify the decree so as to expressly give consent for the appellant to keep the children in Oregon, although by implication such consent is found in the decree. The reduction in effect is an additional punitive measure against the mother for taking the children to Oregon.

STATEMENT OF POINTS RELIED UPON FOR REVERSAL OR MODIFICATION OF THE JUDGMENT OF THE DISTRICT COURT.

It is the contention of the appellant that the court erred in modifying the original decree herein reducing the amount payable by the respondent for the support of the children from \$100.00 to \$60.00 per month because no change of circumstances sufficient to warrant said modification was shown. If anything respondent's

earning power has improved since the entry of the original decree. In the second place, the trial court erred in holding the appellant in contempt because the record does not show any intentional violation of a court order. As a matter of fact, there was no express or direct order of the court prohibiting or forbidding the removal of the children from this state. In the third place, the court erred in that it exceeded its jurisdiction in imposing the penalty which was levied against the appellant. In the fourth place, the court erred in depriving the appellant of her right to collect the accrued installments for the support of the children, and allowing the respondent to keep the money in question, and in hearing respondent on his petition for modification while he was in default under the decree. Furthermore, the court erred by taking from the children the money awarded to them under the guise of punishing the mother for contempt. The court erred in granting respondent relief for period before respondent applied to court for modification, and in not giving appellant an opportunity to purge herself from contempt if she were in contempt. The court further erred in refusing to modify the decree so as to give the appellant the express right to change the residence of the children to the State of Oregon when it appears that the move was for the best interest of the children.

The court erred in refusing to enter the findings of fact, conclusions of law and decree submitted by the appellant because they were the only findings, conclusions and decree supported by the evidence.

The court erred in rejecting the evidence offered by the appellant concerning the unfitness of the respondent to be alone with the two minor daughters.

POINT I

THE COURT ERRED IN MODIFYING THE DECREE REDUCING THE AMOUNT OF MONTHLY PAYMENTS TO BE MADE FOR THE SUPPORT OF THE CHILDREN BECAUSE NO CHANGE IN CIRCUMSTANCES SUFFICIENT TO WARRANT MODIFICATION WAS SHOWN.

In *Cody v. Cody*, 47 Utah 456 at 469, the court held that “under the statute, when judicial action is properly invoked, the court, as to orders which relate to alimony, custody of children, and awards for their support, when they are continuing and over which the court retains a continuing jurisdiction, is authorized on a proper showing to modify the decree in such particulars. *But a further essential to such relief, and which is universally agreed upon, is that there must be averments and proof of a change of circumstances or conditions of the parties . . .*”

The Utah court enlarged upon this statement in *Chaffee v. Chaffee*, 63 Utah 261, at 269, by holding “ . . . In 7 Std. Ency. of Proc. at Page 843, in speaking of proceedings to modify a decree of divorce, it is said: ‘A further essential to such relief which is universally agreed upon is that there must be a change of circumstances, or newly discovered facts to warrant such relief, or it cannot be granted.’

“In *Shouler on Divorce* (6th Ed.) Vol. 2, Sec. 1831, the author says: ‘Modification can only be ordered on proof of change of conditions, as the decree is final as to conditions existing at the time, and a slight change is not enough to warrant modification.’ ”

Still again the Supreme Court of Utah held in *Rockwood v. Rockwood*, 65 Utah at 268 and 269, “ . . . The duty of the father to support his children, if he is able to do so, is imposed in this state by positive statute. It would be his duty in any event if there were no statute upon the subject. Defendant has not shown, either in his affidavit or evidence, that he is less able now to contribute to the support of his children than he was when the original decree was entered. He has not shown that the mother of the children is able to support them, and, even if he had, it is not clear that such fact would alter the case. He has not shown that the children now require less for their support than when the decree was entered. In fact, the court will take judicial notice that the children are still mere infants, dependent entirely upon someone else for their maintenance and support.”

The *Rockwood* case presented substantially the same situation as the instant case. There is here no showing of change in the circumstances that existed at the time of the divorce decree except that the children are no longer in the state of Utah. The father's earnings are now better than at the time of the decree.

The original findings were that the “defendant is a strong, able-bodied man, capable of earning \$300.00 or more per month (Tr. 018).

In the proceedings appealed from the respondent testified and the court found that the “Defendant receives at the present time “take home pay” of approximately \$350.00 to \$400.00 per month, the amount varying” (Tr. 059).

Under the Utah decisions above cited it is clear beyond question that this is not a case where change of

circumstances will support a modification of the decree. The modification is just an additional penal measure used against the appellant to the substantial detriment of the children.

POINT II

THE COURT ERRED IN FINDING APPELLANT GUILTY OF CONTEMPT AND EXCEEDED ITS JURISDICTION BY IMPOSING THE PENALTIES LEVIED AGAINST HER.

Obviously, a person must be guilty of some definite act or omission before he can be found in contempt of court. Then if a person is found in contempt, the penalties imposed must be in accordance with law and not arbitrary.

It is provided by statute in our state that "The following acts or omissions in respect to a court of justice or proceedings therein are contempts of the authority of the court: . . ." (U.C.A. 1943, 104-45-1). Thereafter are set forth acts or omissions which constitute contempt. It is necessary, under this statute, for a person to have committed one of the acts required in order to be guilty of contempt. Such a statute as this is exclusive and it is a definite requirement for a contempt finding to be made that it be made on one of the twelve subdivisions of this statute.

The only subdivision of this section which has any application to the instant case is subdivision 5. It reads as follows, to-wit: "Disobedience of any lawful judgment, order of process of the court." The finding of contempt on the part of the appellant is that she "has

wilfully deprived defendant of the right to visit with his children at reasonable times and places, and has rendered it impossible for defendant to see his said children at or near his place of residence, or within this state, since a date prior to November 25, 1948 . . .” Tr. 062).

There was no court order expressly prohibiting the appellant from removing the minor children of the parties from the State of Utah. The decree stated only that the children “Be and they are hereby awarded to the plaintiff, subject to the right of visitation in the defendant at all reasonable times and places” (Tr. 021). She violated no “lawful judgment, order or process of the court”, therefore, when she took the children to Oregon.

The same situation was before the Alabama court in *Ex Parte Vaughn*, 87 So. 792. The divorce decree awarded a minor child to the mother in these words, “It is further ordered, adjudged and decreed by the court that the care, custody and control of William Dudley Vaughn . . . be and hereby is given to the complainant, with the right of the respondent to see and visit said child at such reasonable times and places as will not interfere with the proper control of said child by complainant. . . .” Both parties remarried. Complainant took the minor child to live in New York without getting a court order permitting her so to do. On a petition by the respondent for custody of the child the complainant demurred. The respondent had the demurrer stricken on the grounds that complainant was in contempt for having taken the child out of the state without a court order. The court held, “Here the

petitioner was awarded the custody of her infant child, and given the right to again contract marriage, with nothing in the decree either directly or indirectly, prohibiting her living in other jurisdictions outside of the state of Alabama, and the right of respondent to visit the child was prescribed for such reasonable times and places as would not interfere with the proper control by complainant. It has been held that the charge of contempt cannot be established for failure to comply with uncertain orders or judgments. 9 Cyc. 11. We think it very clear that petitioner here could not be punished for contempt for disobedience of an order of the court, as was alleged in the motion. . .

“Moreover, in cases of this character it must be recalled that the welfare of the child is of paramount importance, and it may be seriously questioned that a parent when not in willful contempt should be deprived of the right to interpose a defense as to its custody, when brought into court for such purpose by the opposing parent.”

The court here recognizes that the welfare of the children of the parties is being best served by their being in Oregon. Otherwise the court would have had no choice but to have ordered them returned to its jurisdiction in Utah. No such order was made or requested. Tacit recognition is given to our claim that the welfare of the children is best subserved by the appellant in continuing their presence in Oregon by the fact that no finding was made that their welfare would be furthered through their return to Utah.

There is no violation of a court order involved in the finding of contempt against appellant unless it be

that the court found appellant guilty of contempt for failure to allow respondent to visit the children in Utah. The evidence on this point is to the effect that respondent made little effort to see the children for substantial periods of time (Tr. p. 21) and that when he did come his presence upset the children and "made them nervous and irritable" (Tr. p. 22). The welfare of the children once more would demand that they not be upset. Stability and confidence are needed by children of their ages and emotional upsets are clearly contrary to their well-being. Furthermore, there could be no basis for a finding of contempt while appellant resided in Utah because there was no express order of the court violated by appellant.

The view that taking the children out of the state of original jurisdiction without a court order, when there is no express prohibition in the decree of divorce against it, will not constitute contempt is given added authority in the case of *Barnes v. Lee*, 275 P. 661, an Oregon case. A divorce was granted in Oklahoma. Custody of the child was awarded to the father subject to the right of the mother to visit the child at proper times and places and also to have it visit her for one month in each year during school vacation. The father moved to Oregon and took the child with him. The mother attempted to regain custody in Oklahoma and got a court order in that court for custody. This Oklahoma order was then presented to the Oregon court asking that it be enforced, but the Oregon court said, "There was not disobedience of the order of the Oklahoma court in Lee's coming to this state and bringing the child with him, as long as there was no provision

in the order that she was not to be taken from the state. Concerning this feature in the case, in *Stetson v. Stetson*, 80 Me. 483, 485, A. 60, 61; it is said: 'That the result of the decree may cause the removal of the child beyond the limits of the state, is not of itself an objection. This may be the effect in any case. Though the parent receiving the custody may at the time be a resident within the state, there is no authority, except in cases of crime, to prevent an immediate removal.'

"Although the foregoing may be stating the rule rather strongly, we are clearly of the opinion that, unless either the terms of the decree or its necessary implications forbids the removal of the child from the state, there is no violation of the order."

In the instant case it would be necessary for the court to torture words to the extent of saying that the "necessary implications forbid the removal of the child from the state" in order to have grounds for a contempt holding. That the right of reasonable visitation, as applied by the court of this state, goes that far is straining far past the meaning of the words.

The annotation in 88 A.L.R. at 200 cites the case of *Campbell v. Campbell*, 37 Wis. 206, as follows: "In *Campbell v. Campbell* . . . it was held that where the judgment of divorce awarded the custody of the child of the parties to the wife, reserving to the husband the right to visit it once a week, but did not expressly prohibit the wife from taking the child to another jurisdiction for good cause did not constitute even a technical contempt of court, and did not bar her from obtaining

a modification of the decree for alimony in her favor as provided by statute, or from recovering the alimony already accrued.”

This decision is in line with our thinking that the right of reasonable visitation is not violated by the removal of the children from the state in the absence of an express or implied order of the court not to remove children from its jurisdiction, and that if they are removed there is no taint of contempt in the removal. The removal of the children from the state in the instant case was a reasonable exercise of the right of control by the appellant. She acted as she felt the best good of the children required (Tr. P. 20).

In the absence of an express provision in the divorce decree or in the statutes of this state, it was not contempt of the court for the mother to whom custody was awarded to remove the minor children awarded to her from the jurisdiction. Even where such a practice is frowned upon, the husband is not relieved of his duty to support the children because they are no longer in the state, and his right of visitation has been circumscribed. At common law and by statutory enactment in many states it was and is the duty of the father to support his minor children.

The Supreme Court of Michigan in *Kane vs. Kane*, 216 N. W. 438, pointed out the problem in saying, “Access to the child by the parent denied custody is an important right. It is recognized that awarding custody to a non-resident parent may render the privilege of visitation impracticable in many cases. That privilege is not an absolute right, but one which must yield to

the good of the child. *Waldref v. Waldref*, 159 N.W. 1068; *Bedolfe v. Bedolfe*, 127 P. 594; 19 C. J. 348. Its feasible exercise should be safeguarded by the decree, but only to the extent it may be done without opposing the best interest of the child. Where the proofs are convincing, the welfare of the child demands that course be taken, its custody may and should be awarded to the non-resident parent, notwithstanding the effect may be the defeat of visitation by the resident parent.

“That a father is deprived of access to his child by a divorce decree does not relieve him from obligation to support it. Whether he is refused the right of visitation because found unfit, or its exercise is obstructed by permitting the residence of the child in a foreign jurisdiction, he may nevertheless be charged with its maintenance. A contrary rule would be preposterous. It would mean that a husband and a father, who applied for and obtained a divorce in this state from his wife residing with their child, in for example a country of Europe, or against whom a divorce is granted on the cross-bill of the nonresident wife is to be relieved of all obligation to contribute to the support of the infant unless it is brought across the ocean to facilitate his right of visitation.”

In the instant case the court has found, for all intents and purposes, that it is proper for the appellant to retain custody of the minor children and that this can be done by retaining residence in the state of Oregon. Yet, the court also held that the appellant was in contempt of court for having taken the children to the state of Oregon without a court order because the removal of the children to the state of Oregon restricted

the respondent in his rights of visitation. This proposition is "preposterous" under the doctrine of the Kane case. If the welfare of the children is best served by their continued residence in the state of Oregon, that is the important matter for the court to consider. There was no wilful intent on the part of the appellant to disobey any court order in moving with her children to Oregon (Tr. 20). As a matter of fact, there was no court order to prevent her from so removing the children.

"Unless the decree expressly or impliedly forbids removal, there is no violation of the order by removing the child from the state . . . A father is not entitled to have alimony payments suspended because the children are outside the jurisdiction if he has no right to see the children or if their welfare does not demand that they be returned." 27 C.J.S. at 1180. So in this case the welfare of the children is best served by remaining in the state of Oregon. On that there can be no dispute.

In the case of *Altschuler v. Altschuler*, 284 N.Y.S. 93 at 94, the court said, "Order modifying an order entered August 19, 1934, punishing plaintiff for contempt for failure to pay alimony, by eliminating therefrom the provisions requiring him to pay current alimony of \$30.00 a week during the time that his right of visitation of the children is denied him, reversed on the law . . . The decree, as amended, provides that the plaintiff have the right to visit his children at all reasonable times and places. While the defendant, in removing the children to California, violated this provision of the decree, nevertheless the court was without power, on this motion, to relieve the plaintiff from his obligation to pay for the support and maintenance of his children

until he first secured a modification of the final decree. Dube v. Dube 245 N.Y.S. 287, Gibson v. Gibson, 143 N. Y.S. 37.”

Though the appellant were guilty of contempt, which is not admitted, the court exceeded its authority in ordering that appellant be “deprived of the right to enforce payment by defendant to her of the sums accruing upon support moneys, under the terms of such Decree, from November 25th, 1948, to the end of February, 1949 . . .” (Tr. 062). There is error in three respects in this order. First, the support money was for the support and maintenance of the minor children of the parties and not for the appellant, so that the order made by the court withholding payment of \$350.00 and reducing monthly payments was a penalty on the children rather than on the appellant. Second, the installments had already accrued and the payment of them could not be modified by the court. Third, the penalty imposed is in direct violation of statute.

The first two errors are either self explanatory or covered elsewhere in this brief. (Points I, II, III, IV, and V)

“The law punishes the contemner out of no personal consideration for the judge, or the litigant, but only when the best ends of justice will be subserved thereby. Punishment may be either punitive, to vindicate the authority of the law, or remedial, to compel the performance of some order or decree which, although in his power to perform, the person refused to obey, and to accomplish its object punitive punishment for contempt may extend to acts of past disobedience.” 13 C.J.

at 86. The question is raised by this citation as to whether or not "the best ends of justice will be subserved" by the punishment imposed by the court against the appellant. Actually the appellant is not the one punished. The two minor children of the parties are the ones on whom the burden of the punishment falls. There has been a court order made in their interest because of a need shown to exist for the support of the children. They are the ones injured by the ruling of the court in that support money on which they rely for necessary subsistence has been taken from them and the natural duty of the father to support his children, as recognized at common law and by statutes, is abrogated.

The statutes providing for the punishment of contempt, U.C.A. 1943, 104-45-10 and 104-45-11, are exclusive as to the punishment which can be imposed. They provide for three types of punishment, to-wit: a fine, imprisonment, or both fine and imprisonment, or, if an actual loss or injury to a party prejudicial to his rights is caused by the contempt, the court may, in addition to the fine and/or imprisonment, order the person proceeded against to pay the aggrieved party a sum of money sufficient to indemnify him for the loss suffered. No other punishment is mentioned either directly or indirectly. As is set forth in 12 Am. Jur. at 432, "Any punishment set out in the statutes is exclusive . . ." That being so the court has exceeded its authority by penalizing the appellant in a manner not authorized under statute.

Furthermore, the maximum fine provided by statute is \$200.00 (Sec. 104-45-10 U.C.A. 1943).

POINT III

THE COURT ERRED IN DEPRIVING APPELLANT OF THE RIGHT TO COLLECT PAST DUE INSTALLMENTS OF SUPPORT MONEY FROM THE RESPONDENT AND IN HEARING RESPONDENT ON HIS PETITION FOR MODIFICATION WHILE HE WAS IN DEFAULT UNDER THE DECREE

The support and maintenance allowed to the appellant by the decree of divorce was solely for the benefit of the minor children of the parties. Nothing was awarded to the appellant in the form of alimony or support money. The court was without power in any way to modify the original decree of divorce as to payments of support past due. Yet the court in this case has expressly "deprived" appellant of her legal right to collect from the respondent that which was already vested in her.

As set forth in 27 C.J.S at 1239, the law is, "Payments exacted by the original decree of divorce become vested in the payee as they accrue, and the court, on application to modify such decree, is without authority to reduce the amounts or modify the decree with reference thereto retrospectively, unless some reservation is made in the decree itself; the modifying decree relates to the future only and from the time of its entry. *Defendant's application to set aside order for maintenance of children or reduction of the award will not be considered until he pays all arrears due the original decree.*"

The Utah Supreme Court has held that to be the law. *Meyers v. Meyers*, 62 Utah 90, 218 P. 123, 30 A. L.R. 74.

See also *Adair vs. Superior Court (Ariz.)* 33 P. 2nd 996; 19 C.J. 359; *Wassung vs. Wassung*, 286 N.W. 349; *Kell v. Kell*, 161 N.W. 636; *Delbridge v. Sears*, 160 N.W. 218; *Craig v. Craig*, 45 N.E. 155; *Pottinger v. Pottinger*, 182 So. 763; *Van Loon v. Van Loon*, 182 So. 205; *State v. Hall (Ore.)* 55 P. 2nd 1105.

POINT IV

THE COURT ERRED IN TAKING FROM THE CHILDREN THE MONEY AWARDED TO THEM UNDER THE GUISE OF PUNISHING THE MOTHER FOR CONTEMPT.

There is nothing in the decree in this action which indicates that the payments for the support of the children are conditioned on the right of visitation awarded to the respondent. The two rights are independent of each other. The New Jersey case of *Hatch v. Hatch*, 192 A. 241, in such an action held that an order entered in a divorce action requiring payments by a father for maintenance of the child was not conditioned on the right of visitation granted the husband in a decree where custody of a child was awarded to the wife.

Nothing which we have found in the Utah law makes the two rights dependent on each other. Certainly the right of visitation to a natural parent of children is important. None will deny that. But more important is the right of the children to have proper care. This

cannot be given without adequate financial assistance, and that assistance in this case, as in most instances, must come from the father, the respondent in this action.

The New Jersey court in the case of *Feinberg v. Feinberg*, 66 Atlantic at 611 held, "It is clearly contrary to the terms of Section 7 of the act concerning the custody and maintenance of minor children (L.L. 1902, p. 259) for defendant to remove the minor in question out of the jurisdiction of this court, without first obtaining the consent of the petitioner or an order of this court for that purpose. I am unable, however, to relieve against the payment of such moneys as have accrued under the existing decree during the period in which no complaint has been made to the court touching such removal. It is not the privilege of petitioner to refuse payments accruing pursuant to the terms of the decree. When new conditions arise, which in the opinion of petitioner, entitle him to a modification of the decree, he should make application to the court for such modification, if he desires to avail himself of rights arising from the new conditions."

In the foregoing case the child was moved from New Jersey to Pittsburg. No reduction in payments was allowed as no changes in the condition of the parties were shown except as to the convenience involved in exercising the right of visitation. Utah has no statute similar to that of New Jersey expressly forbidding the removal of children awarded in a divorce action from the state. The New Jersey court felt that even in the face of such a direct law, the duty of the father to support the children was paramount. That is the only reasonable conclusion to draw. The daughters of the parties in the instant case are too young to be left alone,

and that makes it impractical, if not impossible, for the appellant to obtain full time employment to support the children. The duty of support rests with the respondent regardless of the residence of the children.

In *Zirkle v. Zirkle*, 202 Ind. 129, 172 N.E. 192, the defendant was ordered, under the decree of divorce, to make weekly payments to the plaintiff for the support of their child, the custody of which had been given to plaintiff. In that case, as in this one, the defendant had been given the right to visit the child at all reasonable times. In holding that the fact that plaintiff had removed the child to another state, thus depriving defendant of his right of visitation, did not constitute a defense to an action to recover the weekly payments, the court said: "It must be presumed that the order as to custody and support of the child was made for the benefit of the child. The child was and still is entitled to have the order executed. The order has not been modified or set aside. The decree did not provide that the child should be kept in the state. It does not appear that appellee (defendant) ever attempted to have the order modified, or ever made any effort through the court to have the child returned to the court's jurisdiction or to this state. If the appellant, without the consent of the court, or without right, took the child out of the state, that act did not give the appellee any reason for refusing to make the weekly payments which the court had ordered."

To hold otherwise would be to punish children for the errors of the parent over which they had no control. A child must do as directed by the parent and cannot dictate to the parent where the residence shall be. The

child must go with its parent-custodian. Without a choice in the matter there can be no reason presented to punish the child for any fault that might lie with a parent in whose custody the child is.

The matter of the state of residence of the child is not the question of fundamental importance. That which is important is the well being of the child.

“In judicial appointments of custodians for children, the residence, actual or prospective, of the appointee, is now a factor of minor importance—a subordinate consideration. Although residence is not wholly ignored, it has become, in modern times at least, altogether a secondary element, influencing the court in deciding whether or not to appoint an applicant. The primary questions to be answered before that of residence arises, when a child’s custodian is to be named, relate to the conservation and promotion of its interests; the safety of its estate; its welfare and happiness in a changed environment; the fitness, ability, and suitability of the proposed custodian to be entrusted with the child’s care, education, and maintenance; the age, sex, and circumstances of the child, and the comparative claims of kinship to it among those from whom the choice of custodian must be made. It is only when all these questions have been satisfactorily answered in favor of the applicant that the question of residence is considered by the court, in the light of its advantages and disadvantages as a dwelling place for the child. If, then, these are favorable, the mere fact that the home is located outside of the state seems to be immaterial.” 20 A.L.R. 838.

A note in 88 A.L.R. at 200 states the law as follows:

“In *Helmbold v. Helmbold*, 217 N.Y. Supp. 379, it was held that the failure of a wife to observe the provisions in a divorce decree in her favor, relating to the right of the defendant to see and visit his children, was no excuse for refusing to pay the alimony awarded, where the payment of alimony was not made conditional upon the observance of the provision in the decree in regard to the children. The court said that the defendant had a remedy under the decree to compel observance of such provision, just as the plaintiff might pursue her remedy to compel the payment of alimony.”

The same citation further says:

“Thus, where a provision in an order for alimony pendente lite, that the defendant husband should be allowed to visit and see his child twice a week during the pendency of the action in New York, as might be agreed upon or as the court should thereafter direct, was not made a condition precedent to the payment of the alimony ordered, it was held in *Schweig v. Schweig*, 107 N.Y. Supp. 905, that the failure of the plaintiff wife to obey such provision would not furnish justification for the nonpayment of the alimony and counsel fee allowed, so long as the order remained unreversed.

“As bearing on the possible distinction between the effect of a violation by the wife, of a divorce decree, on her right to recover alimony as such and her right to recover payments ordered to be made for the support of a minor child or children, it is of interest to note that it was declared in *Thomas v. Thomas*, 233 Ill. App. 488, that, even if a mother were in contempt of court for failing to comply with the provisions of a

divorce decree whereby the father was to be allowed to visit the minor child placed in her custody, the father was still liable for the child's support, and the court should compel the performance of such duty."

This last holding is just and equitable. Any other ruling results only in the punishment of the children.

POINT V

THE COURT ERRED IN NOT GIVING THE PLAINTIFF AN OPPORTUNITY TO PURGE HERSELF FROM CONTEMPT IF SHE WERE IN CONTEMPT.

The appellant asserts that there was no proper or legal ground upon which the court order finding her in contempt can be based. However, if it be assumed for the sake of argument that the appellant was in contempt by removing the children to the State of Oregon, surely unless the court felt that the children were better off in Oregon than they would be in Utah, it should have directed their return to Utah. The fact that the respondent made no request to have the children returned to this jurisdiction, and that the court made no order to that effect, show that in the opinion of the respondent and of the court the children were better off where they are. If the court felt that the children properly belonged in Utah, it should have directed their return to Utah, and have permitted the appellant to purge herself from contempt by complying with the order to return the children. But the court gave the appellant no alternative whatever. It took from her and the children the \$350.00 which had accrued and which was payable at the time the respondent applied for modification of the decree, and further reduced the

sum payable for the support of the children from \$50.00 each to \$30.00 each per month without any showing whatever that the amount of \$60.00 is adequate for their support, and in the face of the positive showing that the \$100.00 originally awarded is necessary. Again the court did not give the appellant any opportunity to avoid the penalty of that drastic reduction by returning the children to Utah, or by doing anything else although the reduction must be considered as nothing but an additional penalty against the appellant and the children. It is unprecedented for a court to make such fast and hard orders without providing any means for the appellant and the children to escape the severe penalties imposed.

It will be recalled that the respondent while obviously in contempt was in effect rewarded for his contempt by being permitted to retain \$350.00 past due support money, and although found in contempt for his deliberate refusal to pay over \$300.00 in attorneys' fees and costs awarded under the original decree, he wasn't even "slapped on the wrist", but was permitted to purge himself merely by paying part of that which he already owed.

POINT VI

THE COURT ERRED IN REFUSING TO MODIFY THE ORIGINAL DECREE SO AS TO GIVE THE APPELLANT THE EXPRESS RIGHT TO CONTINUE THE RESIDENCE OF THE CHILDREN IN THE STATE OF OREGON.

In her petition to the court the appellant expressly requested that the decree be so modified as to permit her to keep the children with her at her place of residence in Oregon (Tr. 044).

The evidence shows that it is for the best interests of the children to remain in Oregon (B. of Ex. 19, 20, 23 and 24). There was no evidence at all introduced or before the court indicating that the children are not happy, well cared for and generally well situated where they are now living. The whole theory of the respondent's case has no relation to the welfare of the children, but relates only to his own desires and convenience. It is really based on his desire to escape the payment of all support money. That he is a harsh, domineering, profane and vulgar man appears definitely from the findings of the court in the original decree (Tr. 017-018).

Finding No. 4 made by the court in the original action (Tr. 017) among other things set forth "that frequently and more or less continuously defendant has displayed toward plaintiff a mean and disagreeable nature and disposition and a violent and explosive temper, and has on occasion hit and struck plaintiff violently and in anger without any provocation whatever, and has become angry at the children of the parties hereto, and has abused them with angry terms and has on occasions hit them without good reason and without justifiable provocation; that defendant abuses plaintiff with vile and obscene language and epithets, and curses and swears at her and at the children; that the defendant at times evidences to plaintiff a morose and sullen disposition; and at times defendant has threatened plain-

tiff and the children with such violence as to put plaintiff and said children in great fear and terror of the defendant; that defendant dominates plaintiff and the children and the household of the parties hereto or seeks to dominate them; and insists on making all decisions of any consequence with respect to plaintiff and the home of the parties hereto, without consideration of plaintiff's views and despite her protests or objections; that defendant assumes toward plaintiff an attitude of great superiority and arrogates to himself the right to make all family determinations in the full expectation on his part that his views should be carried out unquestioningly."

The appellant pointed out to the court that when the respondent visited the children he made them nervous and irritable, and at times acted like a maniac (B. of Ex. 2).

Furthermore, the appellant has disposed of all her holdings in Utah, has established a home in Oregon, and is able to carry on her home life more advantageously with her children where she is now situated (B. of Ex. 17 et seq.).

The court, of course, found in effect the children should remain in Oregon by making no order that they should be returned, but still left the appellant dangling as to her position in the eyes of the court, under the decree, through refusing to modify the decree so as to permit the change of residence.

POINT VII

THE COURT ERRED IN REFUSING TO ENTER
THE FINDINGS OF FACT, CONCLUSIONS OF LAW

AND DECREE SUBMITTED BY THE APPELLANT BECAUSE THEY ARE SUPPORTED BY THE LAW AND THE EVIDENCE AND THE FINDINGS, CONCLUSIONS AND DECREE AS ENTERED ARE NOT.

The appellant submitted to the court after the hearing on the application for modification her proposed findings of fact, conclusions of law and decree (Tr. 049-055). The trial court rejected them in their entirety and signed the findings, conclusions and decree as submitted by counsel for respondent after making two changes to correct some obvious mistakes in computation.

It is submitted that the findings and decree proposed by the appellant are in accordance with the evidence and law in the case, and that the findings, conclusions and decree submitted by the respondent and signed by the court are not supported by the evidence or by the law.

The 5th finding (Tr. 059) is wholly immaterial to the issues involved because it does not relate to the earnings of the respondent and does not show any change of circumstances taken into consideration by the court at the time the amount for support of the children was fixed.

Finding No. 4 (Tr. 059) is not supported by the evidence except as to the fact that the respondent now earns \$350.00 to \$400.00 per month "take home pay".

There are no facts and there is no evidence to support conclusions of law Nos. 1, 2, 3, and 4 (Tr. 060 and 061).

The decree is not supported by the evidence or by the findings, and that part of the decree finding the

appellant in contempt is void in that the court is without jurisdiction and power to impose the penalty provided in the second paragraph of the decree (Tr. 062).

As argued in other parts of this brief, the decree of the court is wholly in variance with the law.

POINT VIII

THE COURT ERRED IN REJECTING THE EVIDENCE OFFERED BY THE APPELLANT CONCERNING THE MORAL UNFITNESS OF THE RESPONDENT TO BE ALONE WITH THE CHILDREN.

The appellant offered to prove that the respondent had made indecent advances toward a daughter of the appellant by a former marriage, and had told the appellant's son by a former marriage that he was a fool if he didn't have intimate relations with his slster, and if the brother didn't the respondent would; that the respondent further wanted to take indecent liberties with his own infant daughters (B. of Ex. 34).

In the entire record in this case there is not an iota of evidence that the appellant at any time has been anything except a clean, wholesome, virtuous wife and mother while the record abounds in evidence against the fitness of the respondent.

The original case didn't go by default, but was a contested case, and the court's findings are based upon an open airing of issues in court.

It is submitted that in a case involving the welfare of two infant girls the scope of inquiry as to the fitness of a man like the respondent to be alone with these little girls should be much greater than on ordinary occasions.

CONCLUSION

In conclusion it is respectfully submitted that the decree of the lower court appealed from cannot be upheld. There cannot be found in the record support for the court's order reducing the amount of the payments for the maintenance of the children. The court exceeded its jurisdiction in refusing to permit the appellant to collect the past due installments of support money for the children, finding the appellant in contempt and imposing upon her excessive and unprecedented penalties. The court in effect punished the children in whose welfare the appellant was acting, and rewarded the respondent for his meanness and his wilful refusal to comply with the court decree. The court erred in letting the respondent be heard at all until he had paid into court at least all his past due delinquent installments under the original decree and erred in refusing to give the appellant an opportunity to purge herself from contempt if she were in contempt. It is further submitted that the court erred in refusing to put an express provision into the decree permitting the appellant to retain the residence of the children in Oregon; that the court erred in rejecting evidence offered by the appellant and in refusing to adopt the findings of fact, conclusions of law and decree submitted by the appellant.

It is respectfully submitted that the court should reinstate the terms of the decree as they relate to support and direct that the respondent pay the accrued sums in full; that the decree should be modified so as to per-

mit the children to remain in Oregon, and that the appellant should be purged for the alleged contempt; that the court should award to the appellant attorneys' fees for prosecuting this appeal together with her costs.

Respectfully submitted,

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