

1950

Leile A. Brown v. Thomas E. Brown : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

LEILA R. BROWN,
Plaintiff and Respondent,

—vs.—

THOMAS E. BROWN,
Defendant and Appellant.

Case No.
7475

FILED

MAY 27 1950

Utah Supreme Court, Utah

Brief of Respondent

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Brief of Respondent

STATEMENT OF FACTS

The plaintiff and respondent agrees that the statement of facts in appellant and defendant's brief is true with the following exception: On page 3 of appellant's brief is the statement that defendant had testified "that he did not spend any part of his income on drink or entertainment." Defendant did in fact testify that he went to two or three movies during the month of September, 1949 (R. 52) and possibly some movies during October, 1949 (R. 52) and that he sometimes took his new wife and her family. It is true that he later on testified that

he did not remember going to a movie during October, 1949 (R. 52), but he does not deny going.

The Court must know the following facts also before determining the matter before the Court:

As shown by the judgment upon an order to show cause of the same District Court dated January 6, 1949 (R. 10-12) the defendant had been found guilty herein of contempt of court for failure to pay support money to plaintiff for the support of the two minor children of the parties and defendant had been sentenced to a ten day suspended sentence in jail and plaintiff had been given judgment for accrued and unpaid support money owing to her by defendant in the sum of \$707.50 plus costs and \$50.00 attorneys' fees.

The defendant continued to ignore the order of Court (R. 13-15) and allowed the accrued and unpaid support money owing under the decree to increase to \$1,112.50 plus costs. Thereupon, the second order to show cause dated August 3, 1949 (R. 16, R. 18) was issued. On August 15th, 1949, just a few minutes before the hearing on the latter order to show cause was to commence, Mr. Edward Clyde, defendant's counsel, contacted plaintiff, through her counsel, and advised plaintiff that defendant could never possibly pay the accrued and unpaid support money then due, and made, for his client, the following offer: That defendant pay \$500.00 cash in full payment of the \$1,112.50 unpaid and due support money and in full satisfaction of the outstanding judgment which included costs and attorneys' fees, and that defendant be encouraged to remain current by being given the financial incentive of having the monthly installment decreased from \$60.00 a

month to \$40.00 a month with the provision that if he defaulted and remained in default for thirty days the payments would automatically increase again to the former amount of \$60.00 a month. The offer required the decrease in payments if defendant was to pay plaintiff the \$500.00 cash, so plaintiff reluctantly accepted the offer. Thereafter, appellant's counsel composed and authored the stipulation of the parties dated August 25, 1949 (R. 16-17) and the decree of the same date (R. 18-19). Thereupon, Mr. O'Donnell, in the presence of defendant's counsel, warned the complaining respondent that if she ever allowed defendant to default again and remain in default for more than thirty days without advising her attorneys to commence action, she must find other counsel and defendant's counsel was advised to tell appellant of this warning. (The foregoing was presented in uncontested statements to the court by counsel, but not placed in the transcript by the recorder except as "reading from the files and discussion," R. 40.)

Thereafter, defendant became in default \$40.00 and respondent commenced this action.

STATEMENT OF POINTS UPON WHICH RESPONDENT INTENDS TO RELY FOR SUSTAINING THE JUDGMENT

1. THE DISTRICT COURT DID NOT ERR WHEN IT FOUND AND ADJUDICATED DEFENDANT TO BE IN CONTEMPT OF COURT.

2. THE DISTRICT COURT DID NOT ERR IN MODIFYING THE ORDER ENTERED UPON AUGUST 25, 1949, AND IN REINSTATING THE ORDER ENTERED JANUARY 6, 1949.

3. THE DISTRICT COURT DID NOT ERR IN ORDERING DEFENDANT TO PAY PLAINTIFF A \$50.00 COUNSEL FEE UNDER THE CIRCUMSTANCES.

ARGUMENT

POINT ONE

THE DISTRICT COURT DID NOT ERR WHEN IT FOUND AND ADJUDICATED DEFENDANT TO BE IN CONTEMPT OF COURT.

This point is in answer to "Point I" commencing on page 5 of appellant's brief and entitled, "The District Court Erroneously Found and Adjudicated Defendant To Be In Contempt of Court."

Appellant admits on page 5 of his brief that defendant did not comply with the District Court order entered August 25, 1949 in that he failed to make the payments in October and November as required and in that he was in default in the sum of \$20.00 at the time of the hearing. We agree that defendant's failure must be willful, intentional or contumacious as he argues on page 5 of his brief. However, the record shows ample evidence for the Court making the finding of fact as follows:

"That defendant has willfully refused to comply with the Order of this Court." (R. 27.)

The record shows that from October 1, 1949 until, and including, the day of the hearing on November 15, 1949 defendant was continuously in default in the payments of

the support money for his two children, then age 9 years and 8 years respectively, under the terms of the decree dated August 25, 1949 in sums ranging from \$40.00 to never less than \$20.00 (R. 41-44). Although defendant knew since at least November 4, 1949 (R. 24-25) that he must appear before the District Court and testify as to why he had failed to comply with the order of Court dated August 25, 1949 (R. 18-19) requiring him to pay \$20.00 on the 1st and 15th day respectively of each and every month, and although defendant was a veteran at such hearings, and although defendant had the advice of competent counsel who also knew that he must testify regarding his earnings and expenditures, defendant appeared at the hearing without any records of accounts and without any useful knowledge as to his finances and unable to testify exactly as to anything pertaining to his finances. All of his testimony as to earnings was based upon his own guessing and vague estimates (R. 46, R. 48-49). The defendant knew the terms of the order (R. 17, R. 43) and, therefore, it is incumbent upon him, since he admits (R. 41-43) that he did not pay in accordance with the terms of the order, to show an inability to pay as a matter of defence.

“If the petitioner had knowledge of the contents of the decree, then it must follow as an unanswerable conclusion that he knew that he had not complied with the order. Having knowledge of the contents of the decree, it was incumbent upon him to show that he had complied therewith if such were the fact. Where it is made to appear in the affidavit that the party whose duty it was to pay the alimony had knowledge of the order requiring such payment, the fact of payment or inability to pay is a matter of defence.” *Hillyard vs. District Court of Cache County*, 249 Pac. 806 (Page 807); 68 Utah 220.

We submit that defendant failed to prove an inability to pay by such vague testimony as the following sample:

MR. WHITE: "How much money did you make in November, up to the present time, (that is, the 1st to the 15th of November)?"

MR. BROWN: "I don't have those figures. I haven't a summary up the present time."

MR. WHITE: "What would you *estimate* your income to be, since the first of the month?"

MR. BROWN: "*About* one hundred dollars to date."

MR. WHITE: "Is that your gross income?"

MR. BROWN: "That is the *net*." (R. 46).

and this typical sample of testimony regarding his expenses:

MR. WHITE: "What other expenses?"

MR. BROWN: "I do not have a full summary. I would have to go over my books to get the amounts." (R. 49)

Defendant must be found guilty of willful failure to comply with the order of the Court, since he knew the terms of the order and admits that he did not comply with such terms and failed to affirmatively prove his claimed defense of an inability to pay. Not only did defendant fail to prove his only defense, but his very testimony showed that he had the ability to pay, not only more money than he did pay, but in accordance with the terms of the order.

The defendant testified that he had re-married since he was divorced from respondent (R. 46), that he has no children by his new wife (R. 54), that his new wife has

three children of her own by a previous marriage (R. 54), that he is not obligated for the support of his new wife's children (R. 55), that he does buy the groceries for his new wife and her children (R. 55), that his grocery bill varies but amounts to approximately \$20.00 a week (R. 48), that he went to two or three shows in September (R. 49), that it is possible that he went to some movies during October (R. 52), and that he sometimes takes his wife and her children with him to movies (R. 52). Under the terms of the Court order (R. 18-19) defendant was to pay respondent \$20.00 support money on October 1st and \$20.00 more on October 15th, but defendant made only one payment during the entire month of October (R. 41)—a \$20.00 payment on October 30th. Therefore, defendant became in default in his payments on October 1st and has never been current since that day. Defendant by his testimony, consequently, admits that it is possible that he went to some movies during October (R. 52) while in default in his payments, and only later after some thought does he become even more vague than usual by testifying that, "During October I *can't remember* going to a movie." (R. 53). If defendant had given respondent only one half of the said eighty dollars a month grocery money for the use of his own children, he would have been current under the terms of the order. If defendant had given respondent the money he spent on shows he would have conformed more to the terms of the decree than he actually did. The District Court made findings of fact as follows:

"That defendant has paid money on other expenses and costs that he could have paid as support money for said minor children; and that defendant has refused and failed to support said minors to his maximum ability." (R. 27.)

That money defendant *possibly* spent on a movie while in default could have been used to apply on his support money payments then in default and would have bought his own two children at least a quart of milk. The defendant, by the testimony we have quoted heretofore, testified that he made \$100.00 net during the first fifteen days of November (R. 45), but he only paid respondent, from the \$100.00 net that he earned during November up to the day of the hearing, the sum of \$20.00 on November 7th (R. 42) although he was in default at all times during said month. The District Court had no choice but to believe that the respondent was entitled to a larger share of that \$100.00 in order to support defendant's two little children, and that defendant was capable of paying respondent a larger share of his November earnings.

On pages 6 and 7 of appellant's brief, defendant's attorneys have made the assumption that defendant's new wife and her three children were in financial straits, but there is no evidence to substantiate this belief. There is no evidence as to the ages of the new wife's children or as to their respective income or as to whether they are dependent upon anyone. Defendant testified that his present wife's children are not obligated to him for their support (R. 55). The only evidence he offered regarding the finances of his present wife, is that she owns an automobile (R. 53) and that she is not employed (R. 53). Defendant did testify that he buys groceries for his present wife and her children (R. 48) and that his grocery expenses are about \$20.00 a week (R. 48); but even five persons can eat on that much money and not have "hungry mouths" (page 6 of his brief). Appellant is right in the admission that in legal contemplation his first duty is to support his own two children. He had no right to place himself in a position

deliberately where he could not comply with the order of the Court, if he is unable to support his own children as a result of marrying another wife who already had three children of her own. *Van Hoosear vs. Railroad Commission of California*, 207 Pac. 905; 189 Cal. 233 (cited with approval in *Hillyard vs. District Court of Cache County*, *supra*).

The defendant testified (R. 45) that there is no regular day upon which he receives any income and that he is self-employed. Under such circumstances it is incumbent upon defendant to arrange his financial affairs in such a manner that he is able to pay his support money obligations as each becomes due by keeping some money in reserve from higher income months over into lower income months. Instead of arranging his affairs in this manner during September, defendant spent, according to his testimony, all of the money that he earned. Thus, he testified that on October 1st, 1949 he had no money with which to pay the support money payment that became due on that day (R. 43).

Appellant has the audacity on page 6 of his brief to state that he demonstrated his "good faith" by borrowing \$500.00 from his father to pay the accrued and unpaid support money owing to respondent prior to the order dated August 25, 1949. Defendant had been hailed into Court on an Order to Show Cause, he had previously been found in contempt of Court at another hearing (R. 10-12), he had previously been given a suspended jail sentence (R. 10-12), he was in default under the terms of the decree in the sum of \$1,112.50 (R. 13-15), he might well go to jail this time, he saw an opportunity to settle \$1,112.50 unpaid support money plus court costs including a judgment for attorneys' fees by paying the comparative pittance

of \$500.00, and he persuaded respondent to take \$20.00 a month less support money by promising to remain current thereafter (R. 16-17, R. 18-19). The defendant made one of the best bargains for himself by that day's work that he will ever make. Although respondent was enticed to accept his offer, when he waived the promise of \$500.00 before her eyes while knowing how badly their children needed the money, she certainly was not satisfied with any part of the transaction. If defendant had shown good faith at that time, he would have borrowed the \$500.00 and paid it to apply upon the judgment standing against him (R. 10-12), and not required that the payments be diminished as an incentive to support his own flesh and blood in a lesser manner than the Court had previously adjudicated that he was capable of paying.

The appellant on page 7 of his brief complains that the District Court was harsh when it sentenced him to jail for the reason that such action would not help his children. What other and milder means of enforcing its orders had not been exhausted by the Court to no avail? The Court had previously found defendant guilty of contempt of court (R. 10-12), it had hailed him before the Court on three occasions by orders to show cause (R. 10-12, R. 18-19, R. 20), it had given him a suspended jail sentence (R. 10-12), and it had given him a financial incentive to keep current by consenting that he pay \$20.00 less each month provided he did not default for thirty days (R. 18-19). The District Court had exhausted all other coercive means of forcing defendant to comply with its orders, and because defendant still was in contempt of its orders it reluctantly ordered him incarcerated.

“Even in an equity case we do not overturn the judgment unless it is fairly against the preponder-

ance of the evidence. The writer believes that every intendment should be in favor of the trial court, for not only does he in a divorce case have the parties before him, enabling him to test credibility by demeanor, but the conduct and manner of the parties in the court room sometimes gives much aid in solving who really is at fault." Pinion vs. Pinion, 67 Pac. (2nd) 268; 92 Utah 262. Huber vs. Newman, 145 Pac. (2nd) 780; 106 Utah 363. Limb vs. Limb, 195 Pac. (2nd) 263; _____ Utah _____.

POINT TWO

THE DISTRICT COURT DID NOT ERR IN MODIFYING THE ORDER ENTERED UPON AUGUST 25, 1949, AND IN REINSTATING THE ORDER ENTERED JANUARY 6, 1949.

This point is in answer to "point two" commencing on page 7 of appellant's brief and entitled, "The District Court Erred In Modifying the Order Entered August 25, 1949, And In Reinstating the Order Entered January 6, 1949."

Paragraphs 3 and 4 of the order dated August 25, 1949 (R. 18-19) read as follows:

"3. That the order of the Court entered in the above entitled case on the 27th day of June, 1947, as modified by the order of the court entered in the above entitled case on the 6th day of January, 1949, requiring the defendant to pay to the plaintiff the sum of \$60.00 per month for the care and support of the two minor children of the plaintiff and the defendant be and the same is hereby modified and henceforth the defendant shall be required to pay to the plaintiff the sum of \$40.00 per month in two

installments, to-wit: \$20.00 on the 1st of each month and \$20.00 on the 15th of each month, with the first payment to be made on or before September 1, 1949.

"4. It is further ordered that in the event the defendant shall default in the payment of the sum of \$40.00 per month as herein provided, and shall remain in default for a period of thirty days, then the provision of the decree heretofore entered requiring the defendant to pay to the plaintiff the sum of \$60.00 per month for the care and support of the two minor children of the parties shall be automatically reinstated."

The intent of the parties, the intent of the Court and the meaning of paragraph 4 was that if defendant defaulted in the payment of the support money under the terms of paragraph 3 of the order, and remained in default even one cent for thirty consecutive days, the provisions of the previous decree requiring defendant to pay \$60.00 a month be reinstated. Since appellant and defendant's attorneys worded the written stipulation and order, they are responsible for any ambiguity in the same.

The plan was suggested by Mr. Clyde for the sole purpose of providing the consistently-defaulting defendant with an incentive to remain current in his support money obligations, and Mr. Clyde "sold" the plan to respondent by assuring her that he had used it successfully on other defaulting fathers and by pointing out that she was not receiving \$60.00 a month anyway due to the defendant's failure to pay and due to the expense of collecting default payments by legal action. However, the interpretation that appellant and his counsel now wish to use for paragraph four would certainly encourage defendant to remain in

default \$39.99 at all times, and would absolutely defeat the very intent of the plan to encourage defendant to remain current.

The defendant was current on September 30, 1949 in his payments under the terms of the order dated August 25, 1949, and, as shown by the stipulation of the parties in open Court (R. 41-42) he only made two payments thereafter, one for \$20.00 on October 30th and the other for \$20.00 on November 7th, 1949. Consequently, on October 1st, under the terms of paragraph three of the order, defendant became in default that payment of \$20.00; he remained thus in default until the October 15th payment also became due so that he then owed \$40.00; on October 30th he paid \$20.00 on the debt leaving a balance of \$20.00 owing; on November 1st another payment became due and he again owed \$40.00; and, after this action was commenced and he was served with a citation, he paid the other \$20.00 leaving him in default in the sum of \$20.00 at the time of the hearing, since the November 15th payment, due on the day of the hearing, was not in default until the last second of that day. On page 8 of his brief appellant argues that "defendant was never in default in any amount for a period of thirty days." We in turn ask, at any time in what single day between October 2nd, 1949 and the time of the hearing on November 15th, 1949 was defendant not in default at least \$20.00? The defendant himself answered this question at the hearing as follows:

MR. O'DONNELL: "You have been in arrears at all times since October 1 until now?"

MR. BROWN: "Yes." (R. 44.)

We compute that there are forty-five days that defendant

was in default before the hearing, from October 2nd to November 15th, 1949.

Appellant first argues in his brief that he must be in default \$40.00 before the prior decree can be reinstated and at the end of this particular point two he apparently argues that he must be in default one particular installment for thirty days before said order is to be reinstated. However, paragraph four of the order never mentions installments, nor did the Court or the parties consider such a fatuous plan when the order was rendered. Paragraph four was planned to provide the parties' children with necessary money, and the children cannot eat by accounting entries. This latter version of the appellant's interpretation of paragraph four would also encourage him to remain in default one installment at all times, and thus again defeat the very purpose of the plan.

The District Court properly ruled as follows (R. 55-56) :

"The Court is further of the opinion that paragraph 4 of the Decree, entitled "Order," dated August 25, 1949, signed by Judge Roald A. Hogen-son, covers this situation, and that the meaning of it is that on the failure to pay a sum of forty dollars per month over a period of time, as the evidence shows here, is enough to revive the old provision, and reinstate the requirement that he pay sixty dollars per month. The Court finds that the Defendant is in default, and the old Decree is reinstated, to pay sixty dollars per month—thirty dollars December 1, and thirty dollars December 15, and each 1st and 15th thereafter."

and the District Court made the following finding of fact (R. 28) :

"That the proper interpretation of the Order of this Court herein dated August 25th, 1949 and designated as paragraph four is that the former Decree requiring defendant to pay \$60.00 a month instead of only \$40.00 shall be reinstated provided defendant remains in default in the payment of any part of the support money payments for thirty days and not merely if defendant defaults in the payment of \$40.00 for thirty days. That defendant has been in default in the payment of support money for a period in excess of thirty days."

THE DISTRICT COURT DID NOT ERR IN ORDERING DEFENDANT TO PAY PLAINTIFF A \$50.00 COUNSEL FEE UNDER THE CIRCUMSTANCES.

This point is in answer to "point three" commencing on page 9 of appellant's brief and entitled, "The District Court Erred In Ordering Defendant To Pay Plaintiff A \$50.00 Counsel Fee Under the Circumstances."

The parties stipulated, through their counsel, in open Court that \$50.00 was a reasonable attorney's fee for the Court to order defendant to pay plaintiff for the use and benefit of her counsel for their services at the hearing, providing that it was proper for the Court to order the defendant to pay plaintiff any attorney's fees therein R. 55).

Contrary to appellant's argument on page 9 of his brief, he was \$40.00 in arrears, instead of \$20.00, when this action was commenced and when he was served with a citation on November 4, 1949 (R. 25, R. 41-42); but he paid \$20.00 on November 7, 1949 (R. 42), or three days after service of the citation upon him, and thus was in

arrears \$20.00 at the time of the hearing. The citation would have been properly brought though at the time it was issued he had been only \$20.00 in default.

The respondent was deprived of over \$650.00 by delaying in pressing her rights in Court in the past, as we have heretofore explained. When respondent allowed the unpaid support money to increase and accumulate, defendant required her to settle for much less than half the amount due by arguing that he could never possibly accumulate sufficient money to pay the accrued debt. Now, that respondent has learned her lesson, defendant has the audacity to complain that she should wait for him to get right back in the same hopeless condition that she relieved him from before.

Next appellant complains that he was not given the courtesy of a letter (Pages 9 and 10 of his brief) before this action was commenced. Defendant had been sent letters on previous occasions, had been telephoned, had been served with orders to show cause, had been hailed into Court, had been found in contempt of Court, had been given a suspended jail sentence, all to no avail. Further, defendant's counsel had heard Mr. O'Donnell warn respondent to find new attorneys if she allowed defendant to default more than thirty days without advising them to commence an action, and defendant's attorney had been told to tell defendant of this advice. From past experience respondent and her counsel knew that letters have no effect on defendant. We do not need to apologize for not sending defendant a letter, for the law does not require one to do a useless act. The defendant's past history must be considered while judging whether the respondent and the District Court acted harshly herein.

The defendant on pages 9 and 10 of his brief argues that the \$500.00 that he paid respondent in August should have sufficiently satisfied respondent so that she should not have commenced this action. The defendant maintains that the payment of \$500.00 places the respondent in a position to pay her own legal expenses. The \$500.00 paid in accordance with the aforesaid agreement satisfied \$1,-112.50 unpaid support money and thus paid over eighteen months accumulated unpaid support money and brought the payments current to the end of August, 1949. Surely the defendant cannot expect the same \$500.00 to support the two children for a longer period of time than the said eighteen months, nor can defendant expect respondent to have sufficient of that money left to pay Court costs and legal expenses made necessary by his further delinquencies. The respondent had been temporarily unemployed, one of the parties' children has a heart ailment, and the respondent has other expenses which have been set forth in her affidavit in support of a motion to require defendant to pay attorneys' fees and certain costs. The respondent commenced this action by an affidavit of impecuniosity (R. 32), because she had no money with which to pay even the costs in the District Court. However, the appellant frequently concedes in his brief that the respondent and their children are in financial need, so we shall not further stress to the Court the impossibility of respondent paying her own expenses. Davidson vs. Munsey, 180 Pac. 743; 29 Utah 181.

Appellant was in arrears \$40.00 under the terms of the order (R. 18-19) when the action was commenced, he was \$20.00 in arrears at the time of the hearing, the District Court found that his default was willful, so it properly ordered him to pay the costs and expenses incurred, which

includes a reasonable attorneys' fee. *Foreman vs. Foreman*, 176 Pac (2nd) 144; 111 Utah 72.

What did respondent's attorneys accomplish by instituting this action? By instituting this action, defendant (1) was probably persuaded to pay that \$20.00 payment three days after he was served with the citation; (2) the prior order was reinstated and the defendant was ordered to pay \$20.00 a month more support money than he had been paying; and, (3) most important of all, perhaps the defendant will be convinced finally that the respondent and the Court insist that defendant consistently and regularly help support his two children.

The appellant suggests that the Supreme Court discourage mothers from commencing actions to require fathers who default in support money payments to comply with the order of the District Court, until such time as the unpaid installments accumulate to an important amount. The policy suggested by appellant would encourage laxity upon the part of the mothers, by affirmatively discouraging them from enforcing their rights. The appellant does not suggest how the children are to eat during the interim while the unpaid installments accumulate to an important amount. Unfortunately, too many fathers are presently using the plan of the appellant, and allowing the unpaid support money payments to accumulate to an amount which they can not possibly pay, then settling the accumulated account for a much smaller lump sum payment. From the experience of respondent's counsel, we can collect \$20.00 from any one much easier than we can collect \$1,112.50 from the same person.

The respondent has been too lenient in the past and this attitude cost her over \$650.00. Furthermore, why

should the defendant be allowed to continue to pay a lesser sum each month as support money, when he fails to remain current which was the "consideration" for these lower payments? The respondent agreed to accept a lesser sum in the expectation that defendant would pay consistently and regularly thereafter.

Respondent's counsel resent the implication on page 10 of appellant's brief that the expectation of counsel fees might have influenced them to commence this action so promptly. We remind appellant that in the past he has never paid respondent's attorneys one cent in attorneys' fees, although he was twice ordered to do so by the Court (R. 10-12; R. 29-30). Further, we have commenced and pressed this matter without receiving any compensation from respondent. The respondent has no money or reasonable means of paying her counsel for defending this appeal, and appellant should be required to pay a reasonable attorney's fee in the amount of at least \$100.00 for the services of respondent's counsel in defending this appeal, and also costs incurred herein.

CONCLUSION

We, therefore, respectfully conclude that the judgment of the District Court should be sustained, and that the respondent should be awarded costs and attorneys' fees herein.

Respectfully submitted,

ELDRED J. WILDE

JOHN HAYS O'DONNELL,
Attorneys for Respondent.