1979

Lola B. Mitchell v. Gary A. Mitchell : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

LOLA H. MITCHELL, /

Plaintiff and Respondent, /

vs. Case No. 16177

GARY A. MITCHELL, /

Defendant and Appellant. /

BRIEF OF APPELLANT

Appeal from the Judgment of
District Court of Weber
Honorable L. Kent

C. DeMONT JUDD, JR., ESQ.
2650 Washington Blvd., Suite 102
Ogden, Utah 84401

Attorney for Respondent

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IN THE SUPREME COURT OF THE

STATE OF UTAH

LOLA H. MITCHELL, /

Plaintiff and Respondent, /

vs. Case No. 16137

GARY A. MITCHELL, /

Defendant and Appellant. /

STATEMENT OF THE NATURE OF THE CASE

An action of divorce was filed by the Respondent and first heard by the Court on April 28, 1976, and resulted in the Lower Court granting a Decree of Divorce to both of the parties, which Decree was issued by the Court on January 6, 1976.

That the Respondent has caused several hearings to be heard by a number of Lower Court Judges and several of the interim Lower Court Orders have been appealed to the Supreme Court of Utah, including the Supreme Court Case No. 15790, which was pending before the Supreme Court of Utah.

The present appeal before this Court is based upon an Order entered by the Honorable L. Kent Bachman on or about the 17th day of August, 1978, and again on the 31st day of August, 1978, wherein the Court entered an Order affecting the property awarded to the Appellant herein.

RELIEF SOUGHT ON APPEAL

The Appellant seeks reversal of the Judgment of the Lower District Court for the previously rendered Judgment in this matter.

STATEMENT OF FACTS

That on or about June 12, 1978, the Appellant did file an Order to Show Cause In Re Modification of Decree of Divorce entered on or about January 6, 1976, requesting a modification of the custody order of said Decree, and said Order to Show Cause having been served upon the Plaintiff on or about July 19, 1978, by the Dallas County Sheriff. (R-369) That said Order to Show Cause provided for hearing on August 31, 1978, at 2:00 p.m. (TR-1) That on or about August 15, 1978, Counsel for Defendant served a Notice of Withdrawal of Counsel on the Respondent's Attorney, together with a letter in which said counsel indicated he had received word from the Appellant, that he had left the State and no longer required the services of said counsel. (R-364)

That on or about August 17, 1978, the Attorney for the Respondent filed an Affidavit and Ex Parte Motion indicating that the Appellant had not returned the children to the Respondent, and on information and belief, the Appellant had sold his home in Weber County and was no longer personally present within the State of Utah. (R-364-365)

That the Utah Supreme Court on a decision dated April 23, 1979, case number 15790 affirmed the decision of the Lower

Court holding that title to the property (the subject matter of this appeal) was vested in the Appellant (Husband) subject to the lien of the Respondent (wife).

That said Affidavit and Ex Parte Motion further stated:

> As near as can be determined, Defendant (appellant) continues to own an interest in real property in Davis County from which he draws income and in which Plaintiff has an interest. That with Defendant being out of the State and unwilling to manage the property, the property should be subject to lis pendens and the income from the property should be deposited with the Clerk of Utah Court, first for payment of the child support, second, for payment of the $20,000.00 lien and the Plaintiff, and third, to insure the return of said children to the custody of the Plaintiff. That in the event the Court deems it appropriate for a lis pendens and order requiring the rental to be paid in to the Clerk of the Court, that there also be issued a Bench Warrant against the Defendant for his interference with the custody of the children and for his wilful failure to comply with the appropriate orders of the Court. (R-365)

That there was no evidence to show the Appellant was unwilling to manage said property and no evidence to demonstrate that the Appellant continued to own said property.

That pursuant to said Affidavit and Ex Parte Motion, the Court did enter an Order on or about August 17, 1978, wherein a Lis Pendens was placed upon the property located in Davis County, and that the proceeds from the rental of said property were to be paid to the Clerk of the Court for deposit into a separate account for which the purpose was the payment of child support and to retire the lien presently existing in

the Plaintiff. (R-363)

That on August 31, 1978, the Honorable L. Kent Bachman did grant the Respondent's Motion to continue the hearing on modification of the Decree concerning child custody, and did make permanent the Order of August 17, 1978, concerning the property awarded to the Appellant pursuant to the Decree of Divorce despite the fact that the Appellant was not present nor represented by Counsel. (R-369)

The Order of the Court of August 31, 1978, further provided that the property in Davis County was assigned to a conservator as to all rents, proceeds, and income from said property, and such are to be used for the benefit of retiring the $20,000.00 lien heretofore imposed by the Court, paying child support arrearage of $800.00 as of August 31, 1978, and payment of attorney fees for this hearing in the amount of $250.00 (R370)

That the Appellant did subsequently seek reconsideration and review of the Order of August 31, 1978, and on or about September 29, 1978, before the Honorable L. Kent Bachman, the Court did consider the Appellant's Motion to amend the Decree of Divorce concerning a property description and to further consider the appropriateness of the Lis Pendens. with said Lis Pendens and Conservationship Order remaining in effect.

ARGUMENT

POINT I

THE ORDER OF THE COURT IMPOSING A LIS PENDENS AGAINST THE PROPERTY OF THE APPELLANT IS INVALID.

That U.C.A., 78-40-1, et seq., provides the methodology and the basis for the filing of a Lis Pendens.

That U.C.A., 78-40-1, provides as follows:

> An action may be brought by any person against another who claims an estate or interest in real property or an interest or claim to personal property adverse to him, for the purpose of determining such adverse claim.

That U.C.A., 78-40-2, as pertinent herein provides:

> In any action affecting the title to, or the right of possession of, real property, the Plaintiff at the time of filing the Complaint or thereafter, and the Defendant at the time of filing his Answer when affirmative relief is claimed in such Answer, or at any time afterward, may file for records with the Recorder of the County in which the property or some part thereof is situated a Notice of the pendency of the action, pertaining to names of the parties, the object of the action or defense, and the description of the property in that County affected thereby.

That the Respondent has not claimed title to such property but merely a lien in the sum of $20,000.00 as set forth in the Second Amended Decree of Divorce Nunc Pro Tunc. (R-389)

The Utah Supreme Court in Hansen vs. Kohler, 550 P.2d 186 (Utah, 1976) held the sole purpose of a Lis Pendens is to give constructive notice of the pending of a proceeding and

that the foundation for the Lis Pendens is the action itself.

Further, that as provided by U.C.A., 78-40-2, and the Courts decision in Hansen vs. Kohler, cited supra, such filing of a Lis Pendens has the effect of giving constructive notice to any interested purchaser in such property and such purchaser would purchase such property at his own risk and has thus deprived the Appellant of his right of alienation of such property.

POINT II

THE APPOINTMENT OF A CONSERVATOR BY THE COURT DOES NOT CONFORM TO STATUTE.

That U.C.A., 75-5-401, et seq., sets forth the provisions for protection of property of person under disability and minor.

That U.C.A., 75-5-401, provides as follows:

> PROTECTIVE PROCEEDINGS - (1) Upon petition and after notice and hearing in accordance with the provisions of this part, the Court may appoint a conservator or make other protective order for cause as follows:***

That the notice provisions are set forth in U.C.A., 75-5-40[illegible] and provides that upon a petition for the appointment of a conservator or other protective order, the person to be protected and his spouse, and if none, then his parent, must be served personally with notice of the proceedings at least ten days before the date of the hearing if they can be found within the state, and if they cannot be found within the state, they

must be given notice in accordance with U.C.A., 75-1-401.

That in the present instance, none of the notice provisions pursuant to U.C.A., 75-5-405, nor U.C.A., 75-1-401, has been complied with, in that the Respondent submitted no proof of giving the required notice as required by U.C.A., 75-1-401(c)(3).

Further, that the appointment of a conservator is for the purpose of protecting disabled persons and/or minors, and the Appellant has not through an appropriate hearing been determined to be a "disabled person".

That the Court did further enter such order for conservatorship without an application for the appointment of a conservator and such "conservatorship" must be obtained through appropriate legal proceedings, none of which are present in the instant case.

The Colorado Court in Nelson vs. Nelson, 497 P.2d 1284 (Colo., 1972) held that in a petition for appointment for recovery of property, a court may appoint a conservator only in accordance with the procedures prescribed by statute.

IN IN RE: O'Hare's Guardianship 341 P.2d 205 (Utah, 1959); the Utah Supreme Court held:

> "A mere allegation in a petition that a natural guardian is an unfit person does not prove the fact, nor does it prove that a minor child, the issue or such person, is either "neglected", "dependent", or "delinquent" as those words are construed, nor does it prove that the juvenile court has exclusive original jurisdiction with regard to custody".

Therefore, the mere allegations of Respondent's attorney that the Appellant was unwilling to manage his property in

Davis County necessitates and should afford the Appellant with an opportunity to respond thereto.

However in this instance the Appellant was not afforded such an opportunity and was thereby deprived of the fundamental rights incident to the taking of property without due process of law.

POINT III

THAT THE AUGUST 31, 1978, ORDER OF THE COURT IS WITHOUT COMPLIANCE WITH THE UTAH RULES OF CIVIL PROCEDURE GOVERNING SERVICE IN AMENDED PLEADINGS.

That Rule 5 of the Utah Rules of Civil Procedure provides that pleadings asserting new or additional claims for relief against a Defendant shall be served upon such Defendant in the manner as provided for service of Summons under Rule 4 of the Utah Rules of Civil Procedure.

That the institution of a Lis Pendens and the appointment of a conservator is certainly a new and additional claim for relief by the Respondent and it is uncontroverted and admitted by the Respondent, that no service has been effectuated on the Appellant.

Therefore, the entry of the Order of August 31, 1978, by the Court where no notice had been served on the Appellant, that such matters would be considered should be considered invalid and the Court erred in considering and making an Order regarding claims not properly before the Court.

POINT IV

THAT ENTRY OF THE ORDER OF AUGUST 31, 1978, WITHOUT NOTICE DEPRIVED THE APPELLANT OF PROPERTY WITHOUT DUE PROCESS OF LAW.

The Utah Supreme Court in McGrew v. Industrial Commission, 85 P.2d 608 (1938), considered the term "property" under the Due Process clause of the Constitution.

That the Utah Supreme Court in McGrew held:

> Property is the right of any person to possess, use, enjoy, and dispose of a thing. The term "property" is often used to indicate the res, or subject of the property rather than the property itself. Rigney v. Chicago, 102 Ill. 64, 77. "The words 'life', 'liberty', and 'property' are constitutional terms and are to be taken in their broad sense. They indicate the three great subdivisions of all civil rights. The term 'property' in this clause, embraces all valuable interest which a man may possess outside of himself; that is to say, outside of his life and liberty. It is not confined to mere tangible property, but extends to every species of vested right." Campbell v. Holt , 115 U.S. 620, 6 Sup.Ct. 209, 214, 29 L.E.d 483; The Board of Education v. Blodgett, 155 Ill. 441, 40 N.E., 1025.***

The Utah Supreme Court further held in the McGrew case, that certain other qualities relating to "property" which are fundamental include the right of the individual to use and enjoy such property exclusively and the absolute power to sell and dispose of such property.

The Utah Supreme Court further in McGrew v. Industrial Commission incorporated the definition afforded "Due Process" by Mr. Justice Field in Hagel v. Reclamation District, 111 U.S.

701, 4 Sup.Ct. 663, 28 L.E.d. 569.

Mr. Justice Field in Hagel case stated in defining "Due Process" as follows:

> It is sufficient to observe here that by "Due Process" is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the Judgment sought. The cause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights.

That in the instant case the Appellant was at no time given notice by the Respondent, that the realty upon which the Lis Pendens was an issue. Therefore, the Appellant has been deprived of his property, in that said Appellant was not afforded the opportunity to be heard relative to such issue.

Similarly, in Christiansen v. Harris, 153 P.2d 314, (1945), the Utah Supreme Court again had the opportunity to consider the phrase, "Due Process of Law", and sets forth certain requirements which must be afforded an individual of Due Process in civil cases.

The Utah Supreme Court in Christiansen held the essentials of Due Process are:

> (a) The existence of a competent person, body, or agency authorized by law to determine the questions;

(b) An inquiry into the merits of the question by such person, body, or agency;

(c) Notice to the person of the inauguration and purpose of the inquiry at a time at which such person should appear if he wishes to be heard;

(d) The right to appear in person or by counsel;

(e) A fair opportunity to submit evidence, examine and cross-examine witnesses;

(f) Judgment to be rendered upon the record thus presented.

That in the instant case, the Appellant was not afforded the essentials of Due Process as set forth in (c), (d), (e), and (f). Set forth as essentials of Due Process in Christiansen supra.

Consequently, the Appellant has wrongfully been deprived of his property without the fundalemtals of Due Process having been afforded to him.

CONCLUSION

The Appellant respectfully submits to this Honorable Court, that the failure of the Court to provide the Appellant with the foundational essentials of Due Process has deprived the Appellant of property without Due Process of Law, and especially so in light of the fact that the Appellant was not afforded notice, and the relief sought was not before the Lower Court either through a Petition or Order to Show Cause Application.

The Appellant further respectfully submits that the Judgment and Order of the Lower Court should be reversed, the Lis Pendens removed and the Receivorship terminated until such time as the Appellant is afforded the essential prerequisites of Due Process.

Respectfully submitted this 26 day of April, 1979.

STEPHEN W. FARR
Attorney for Appellant

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Attorney for Appellant

CERTIFICATE OF MAILING

A copy of the foregoing Brief of Appellant was posted in the U. S. Mail postage prepaid and addressed to the Attorney for the Respondent, C. DeMont Judd, Jr., 2650 Washington Boulevard, Suite 102, Ogden, Utah 84401, on this 26 day of April, 1979.

Winnie Joyce Archambo
Secretary