

2001

Johnson v. Ramona Merritt Johnson : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

WALTER JOHNSON,	/	
Plaintiff and	/	
Respondent,	/	
-VS-	/	Case No. 14647
RAMONA MERRITT JOHNSON,	/	
Defendant and	/	
Appellant.	/	

BRIEF OF APPELLANT

Appeal from the Judgment of the
District Court of Davis County
Honorable Calvin Gould, Judge

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IN THE SUPREME COURT OF THE
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WALTER JOHNSON,

Plaintiff and
Respondent,

-VS-

RAMONA MERRITT JOHNSON,

Defendant and
Appellant.

Case No. 14647

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an action brought by the Appellant against the Respondent on an Order to Show Cause and Declaration in Re Contempt to show why the Respondent should not be judged guilty of contempt of court and punished accordingly for willfully disobeying an order of the District Court issued on the 12th day of September, 1975.

DISPOSITION IN LOWER COURT

Upon a hearing held in the lower court before a judge who was not the judge that had issued the original Decree

of Divorce in the District Court, the hearing judge denied the Appellant an order compelling the Respondent to comply with the Decree of Divorce granted by the District Court denying relief to Appellant upon the alleged grounds of "Equitably Clean Hands Doctrine."

RELIEF SOUGHT ON APPEAL

The Appellant seeks reversal of the judgment of the lower court, nullifying the order of the hearing judge wherein the court refused to uphold the decree that was granted in the lower court, and compelling the Respondent to comply with the final Decree of Divorce as ordered and to award to the Appellant reasonable attorney fees and costs as to the appealed from denial of an Order to Show Cause.

STATEMENT OF FACTS

Appellant, who was the Defendant in the lower court, will be referred to in this brief as "wife," and the Respondent, who was the Plaintiff in the lower court, will be referred to in this brief as "husband."

A Complaint was filed by the husband on November 15, 1974, seeking a Decree of Divorce from his wife with whom he had been intermarried since August 19, 1948, and with whom five children have been born as the issue of said marriage. (R-3)

At the time of the filing of the Complaint, a son, David, was 17 years of age, and a son, Ronald, were 16 years of age, all of the others having been emancipated and the husband did not seek custody of the children.

(R-2) On December 16, 1974, an Amended Complaint was filed by the husband (R-6) to which the wife filed an Answer and Counterclaim (R-10-13) praying for judgment as against the husband and seeking the sum of \$200.00 per month for child support, and \$150.00 monthly as and for alimony, in addition to payment of debts and a distribution of the assets of the marital estate.

The husband was employed at Hill Air Force Base, Clearfield, Utah, with a net take home pay from his employment in the amount of \$609.57 monthly, plus a Hill Air Force Base retirement sum in the amount of \$346.18, for a net monthly take home sum in the amount of \$955.75. (R-14)

On February 6, 1975, the Honorable Ronald O. Hyde issued an Order on Order to Show Cause requiring that the husband pay \$200.00 per month for support and the obligations of the parties, and further that the husband make the house payments and pay for the utilities on a temporary basis and allowing to the husband the rental from a basement apartment as additional income. (R-21)

On May 23, 1975, a further Order to Show Cause in

Re Contempt was brought by the wife seeking to compel the husband to obey the order of the Honorable Ronald O. Hyde that had previously been issued on February 6, 1975.

(R-57)

The hearing on the Order to Show Cause in Re Contempt was held before the Honorable John F. Wahlquist on June 10, 1975, and an order was entered by the court requiring the husband to pay only \$35.00 on utilities until further order of the court.

The affidavit of the wife evidenced that utilities for the months of February, March, April, and May of 1975, which the court's order of February 6, 1975, had required the husband to pay, was deficient in that the husband had paid only \$136.49, and that the husband had not made a house payment for the month of February for a total deficiency of \$256.14.

On June 18, 1975, the Honorable Calvin Gould issued an Order to Show Cause why the husband should not be compelled to pay the sum of \$256.14. (R-66)

On a hearing before the Honorable John F. Wahlquist on June 17, 1975, the court ordered that the matter of the deficiency be held in abeyance until the beginning of the trial in the divorce matter, and ordering the husband to pay \$35.00 towards utilities until further ordered. (R-66)

Upon trial on the matter of the divorce decree, the Honorable Ronald O. Hyde did on June 30, 1975, grant a Decree of Divorce, granting same to the wife upon her counterclaim, and ordering the husband to pay \$100.00 per month for the support of the one minor child until he reaches the age of majority, and to pay the sum of \$200.00 per month alimony to the wife. The court in addition to other division of the assets of the marital estate further ordered the husband to pay all of the outstanding obligations of the parties, excepting the mortgage on the house which had been awarded to the wife, and also ordered the husband to pay the utility bills that were in dispute. A statement of the income, assets, and liabilities of the parties was sworn to by the wife in June of 1975, and in it was set forth a dental bill to a Dr. Stephen Morgan in the sum of \$275.00, and also an indebtedness to one, Franca Dunham, in the amount of \$250.00. (R-75-76) This affidavit was filed with the court prior to the entry by the court of the Decree of Divorce, which Decree of Divorce was signed and entered by the court on September 12, 1975. (R-83)

The court further in its final decree ordered the husband to pay the utility bills which were in dispute, and to reimburse the wife for any payments of the same made by the wife.

On February 19, 1976, an Order to Show Cause and Declaration in Re Contempt was filed by the wife against the husband alleging that the husband had failed to pay \$28.00 due and owing to Tanner Clinic, \$260.00 due and owing to Dr. Stephen Morgan, \$250.00 due and owing to Mrs. Franca Dunham, property taxes on the family home in the sum of \$239.00, and utilities in the amount of \$23.93, and that the husband was required to pay the sum of \$15.00 to Dr. Broadbent, and attorney fees in the sum of \$400.00 which were due and owing to the wife's attorney and have not been paid. (R-88)

The husband filed an affidavit in answer to the Order to Show Cause making an allegation that when he picked up the camper and truck granted to him in the Decree of Divorce that sugar had been dumped in the gas tank of the truck and other damage done to the upholstery and water lines of the camper alleging that the fault was with the wife in that she had possession of the vehicle previously. (R-84-85)

The hearing was held on the matter on March 19, 1976, before the Honorable Calvin Gould with the court denying to the wife payment of the dentist bill to Dr. Morgan, and the payment of the bill to Franca Dunham, which had been specifically set forth in the affidavit of indebtedness

prior to the Decree of Divorce granted by the Honorable Ronald O. Hyde, and concluding that the damage to the truck and camper having been found when picked up by the husband and the equipment having been previously in the back yard of the premises wherein the wife resided, that the judgment of the District Court in the Decree of Divorce would not be upheld on the basis that the court denied any relief to the wife, based on "Equitably Clean Hands Doctrine."

(R-93-94) The Order to Show Cause thereby being denied and dismissed and thereby denying to the wife the award made by the Honorable Ronald O. Hyde in the Decree of Divorce granted by said court.

ARGUMENT

POINT I

A DISTRICT COURT JUDGE OF CONCURRENT JURISDICTION
CANNOT ACT AS AN APPELLATE JUDGE.

The Decree of Divorce was granted by the Honorable Ronald O. Hyde, a judge of the Second Judicial District Court, on September 12, 1975, awarding a Decree of Divorce on the counterclaim of the wife and ordering the husband to perform as follows:

The husband to pay the sum of \$100.00 a month for the support of the one minor child.

Husband to pay \$200.00 per month alimony to the

wife.

Awarding the wife the house and real property in Layton, Utah, subject to a mortgage thereon.

Awarding to the wife the household furniture and fixtures of said house and real property.

Awarding the husband a double wide mobile home, subject to the mortgage thereon.

Husband being awarded a Vista Liner camper, a pickup truck, a 1969 Ford Galaxy and a 1967 Mustang.

The wife awarded a 1960 Opel.

The contract interest that the parties have in property in Kaysville, Utah, being awarded to the wife.

Husband being awarded a life insurance policy, his own counties insurance, and retirement, and whatever savings the husband had in a credit union.

The husband ordered to pay all of the outstanding obligations of the parties, except the mortgage on the house.

The husband ordered to pay the utility bills in dispute, to reimburse the wife for any payment of same.

(R-82-83)

The other parts of the decree are not pertinent to the matter before the court.

Prior to the rendering of the Decree of Divorce, which occurred on September 12, 1975, affidavit was filed

by the wife before trial in the matter in which was set forth an indebtedness due and owing to a Dr. Thomas Broadbent in the amount of \$15.00; a sum due to Tanner Clinic in the amount of \$28.00; an amount due to a dentist, Stephen Morgan, in the amount of \$275.00; and a sum due and owing to a Franca Dunham, in the amount of \$250.00. (R-75-76)

The order appealed from denied enforcement of the judgment sought by the wife for the payment to Dr. Morgan of the sum of \$275.00; for the payment to Franca Dunham of the sum of \$250.00, which had been loaned to the wife when the husband had failed to provide any funds for the living expense of the wife (R-93-94); the payment of deficiency on the utility payments, among other items which were alleged as deficient by the wife. (R-55-66)

This court previously held in Harward v. Harward, 526 P.2d 1183, Supreme Court of Utah (1974), the order made by a court is binding upon all of the parties unless and until they are reversed upon appeal to the Supreme Court and that a fellow judge cannot set them aside.

In the matter of the Estate of Charles H. Mecham v. Mecham, 537 P.2d 312, Supreme Court of Utah (June 1975), in a case where a judge handling the calendar had jurisdiction to act on a motion and where he vacated the first

order, and the judge's order was not changed or appealed from, it became the effective order in the case, and that a third judge could not vacate the order of the second judge, specifically holding that a judge of one division of the same court cannot act as an appellate court and overrule another such judge.

In the instant matter before the court we are concerned with a specific Decree of Divorce in which the second judge of the same concurrent jurisdiction while denying any motion for modification of the judgment of the previous court of competent jurisdiction that granted the Decree of Divorce, did in effect hold that the court could punish and in effect change the judgment of the previous original judge upon the basis that the wife seeking enforcement of the order of the Decree of Divorce ordered by the court of competent jurisdiction did not have clean hands, based upon allegations that damage had been to a trailer and motor vehicle by the wife.

The evidence before the court evidenced that the day after court wherein the divorce was granted on the counterclaim of the wife, that the wife went to Salmon, Idaho, and was there for two and one-half weeks (TR-9), and that the truck and camper, which was kept in the back yard of the residence wherein the wife resided, had

not been damaged by her in any way, was in good condition prior for her leaving for Idaho (TR-10), and that the husband removed the truck and camper from the premises of the wife while the wife was in Idaho. (TR-10)

Testimony of the son, David Johnson, was to the effect that he was present at the home when the husband and Mr. Hansen came to the house to pick up the truck and camper, that he had observed the condition of the units a week previous to it being picked up, and he did not notice at that time any damage or injury to the interior of the camper or the truck, and that he had no knowledge of any damage, nor had he himself done any damage to the truck and camper. (TR-48)

Testimony as to the alleged damaged, which was the basis of the attempt by the husband to evade the conditions of the Decree of Divorce issued by the Honorable Ronald O. Hyde was based upon the affidavit of the husband, in his affidavit and answer to the Order to Show Cause (R-84-85), but was at no time supported by direct testimony in court by the husband in the Order to Show Cause hearing before the Honorable Judge Calvin Gould, but was testified to by Clinton Hansen, who alleged that he was the brother-in-law of Walter Johnson prior to Hansen's divorce from the wife's sister. (TR-43)

Mr. Hansen testified that the camper was located in the back yard of the wife's residence, that he observed the damage inside the camper and to the motor vehicle, and his general testimony was vague and indefinite (R-44-R-46), and he did not testify to any personal knowledge as to who might have done the damage, if in fact there was any damage done.

Based upon the affidavit only of the husband and the indefinite testimony of the husband's friend and ex-brother-in-law of the wife, the court found that the testimony of the wife and that of the son was not credible, and on that basis held that the wife did not have clean hands.

In Peterson v. Peterson, 530 P.2d 821, Supreme Court of Utah (December 1974), this court held that an action by a judge of concurrent jurisdiction, wherein one district court judge vacated the order of his colleague that such conduct cannot ordinarily be done, and specifically stated:

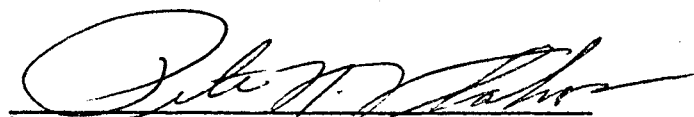
To accomplish this feat would require such a procedure as appeal, or an unusual, independent procedure of some kind, - but not in virtue of the ordinary motions, orders to show cause and the like, - all of which leads us to the conclusion that the decision must then be reversed.

CONCLUSION

It is submitted to this honorable court that the final Decree of Divorce as rendered by the Honorable

Ronald O. Hyde was not subject to reversal by means of a colleague of a court of concurrent jurisdiction, denying to the wife the right to the enforcement of the order of the court issuing the Decree of Divorce, and that the Doctrine of Clean Hands cannot apply where the alleged aggrieved party does not testify under oath and his credibility tested by direct and cross-examination before the court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Pete N. Vlahos", written over a horizontal line.

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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, Steven C. Vanderlinden, Esq., 131 East State Street, Farmington, Utah 84025, on this 15th day of September, 1976.

Jeanette D. Heslop
Jeanette D. Heslop, Secretary