

1979

Nina Doreen Davis Boyce v. Milan Mack Boyce : Reply to Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

NINA DOREEN DAVIS BOYCE,)	
Plaintiff-Appellant,)	No. 16342
v.)	
MILAN MACK BOYCE,)	
Defendant-Respondent.)	

REPLY TO RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
SUPPLEMENTARY STATEMENT OF FACTS.....	1
ARGUMENT:	
POINT I	
THE CASE OF HANER v. HANER CITED BY RESPONDENT IS INAPPOSITE TO THE CASE AT BAR.....	4
POINT II	
THE LOWER COURT RULED BASED ON THE AFFIDAVIT OF RESPONDENT IN THE FACE OF DIRECT TESTIMONY ADDUCED IN OPEN COURT, AND TO DO SO WAS REVERSIBLE ERROR.....	6
CONCLUSION.....	11

CASES CITED

<u>Haner v. Haner</u> , 13 Utah 2nd, 373 P.2d 577 (1962).....	4
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REPLY TO RESPONDENT'S BRIEF

COMES NOW Appellant in the above captioned case and respectfully submits this reply to Respondent's Brief.

SUPPLEMENTARY STATEMENT OF FACTS

I.

On page 7 of his Brief, Respondent indicates that the lower Court had opened the matter for additional discovery. Both Appellant and Respondent have quoted from the transcript of the hearing of September 8, 1978, both attempting to advance a different position. Both Appellant and Respondent have attempted to cite this Court to those portions of the transcript each considers relevant and informative. Appellant will take this opportunity to supply one final quotation.

At pages 13 and 14 of his Brief, Respondent quotes from pages 787 and 788 of the record herein. Immediately

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following the final sentence quoted by Respondent, the following paragraph is found:

(BY THE COURT): Now, if you want to do it under any--if you want to clean up the record and file a proper Rule 60(b) motion, which is identified as such, now that the Court has accepted your position as far as the dismissal of the appeal. I think you ought to do that, the next step, just so in the event there's an appeal from the order which is subsequently entered that you have that order entered pursuant to an opening under 60(b). (R.788) (Emphasis added.)

Appellant respectfully submits that when the transcript of the September 8th hearing is reviewed as a whole, the only conclusion that can be reached is that the trial court indicated that discovery could be commenced only after the decision was made to reopen the divorce case pursuant to Rule 60(b). Respondent's counsel argued vigorously that discovery could not proceed until the case was so reopened, and it appears from the transcript of the September 8 hearing that the trial court agreed.

II.

Also, on page 7 of the Respondent's Brief is found the statement:

The Court ruled that the Appellant failed to prove the allegations of fraud (which she admits on page 30 of her brief). (R.527-530)...

Respondent makes this statement based on the following found in Appellant's Brief:

The October 17 hearing was not intended to, and it did not, amount to formal proof of common law fraud.

The point being made by Appellant in this statement is that it was not necessary and Appellant did not attempt to put on full-blown proof of all of the elements of common law fraud to the lower court which was sitting not so much as a trial court as a court of equity charged by law to see that substantial justice was done. The only issue before the lower court was whether the matter should be reopened--not what damages Appellant may have suffered. The latter issue awaited a future hearing after the judgment of divorce had been set aside and Appellant afforded the opportunity for discovery. Respondent does not contend, nor could he contend, that it was necessary for Appellant to prove every element of common law fraud by preponderance of the evidence before the lower court would be permitted to set aside the decree of divorce. The analysis presented by Appellant falls far short of an admission that she failed to put on sufficient evidence to warrant a court of equity setting aside the divorce. This point is further buttressed by the fact that Appellant could not have demanded a jury in the Rule 60(b) motion, and it therefore borders on ludicrous to assert that her burden was to prove common law fraud by a preponderance of the evidence.

III.

On page 15 of his Brief, Respondent makes the statement:

In paragraph twelve (12) of her Affidavit of January 22, 1979, entitled "Affidavit of Nina Doreen Davis Boyce in Response to Defendant's Answer and Counter Affidavit," Appellant states that she knew of the transfer of the corporation prior to the April 7, 1978 hearing wherein the stipulation was entered. (R.571-584) (Emphasis in original.)

Indeed, this claimed transfer of assets impressed on Appellant the futility of seeking an award of an interest in this property. It was not until after the financial statement of May 1, 1978 came to light that Appellant knew that Respondent still considered these same assets as his own.

A review of the affidavit referred to discloses the following:

...Affiant was never informed until one or two days prior to April 7, 1978, of the claimed transfer of said corporation or its stock to Insulation Corporation of America or to Milan C. Boyce and/or Noriene Boyce. (R.580)

Thus Appellant has admitted to learning of said transfer at most two days before the April 7 divorce hearing whereas according to Plaintiff's Exhibit 2 herein, the transfer supposedly occurred on December 1, 1975.

IV.

At pages 14 through 20 of Respondent's Brief, various of Appellant's allegations of fraud are paraphrased and "responded to." These responses contain numerous misstatements which Appellant will not here attempt to point out but which are obvious when reference is made to the underlying pages of the record cited by Respondent.

ARGUMENT

POINT I

THE CASE OF HANER V. HANER CITED BY RESPONDENT IS INAPPOSITE TO THE CASE AT BAR

Respondent cites the case of Haner v. Haner,

13 Utah 2nd 299, 373 P.2d 577 (1962), for the proposition that

a decree of divorce can be set aside only for that type of fraud characterized as extrinsic fraud. While it is true that courts have generally made a distinction between intrinsic and extrinsic fraud in determining whether final judgments should be overturned, that distinction is not applicable to an attempt under Rule 60(b), Utah Rules of Civil Procedure, to set aside a judgment. Subsection (3) of that Rule provides that a party may be relieved from a final judgment in cases of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party;..." (emphasis added).

Haner involved a "motion to set aside or modify a divorce decree," and no mention is made anywhere in the opinion that the motion was based on Rule 60(b). (13 Utah 2d at 300.)

Even if the distinction between the two types of fraud could be validly made, the Supreme Court in Haner listed as an example of extrinsic fraud--and hence a proper ground for granting relief from a judgment--"making false statements or representations to the other party--to prevent [him] from contesting the issues..." (13 Utah 2d at 301). Such false statements and representations are precisely the issue in the case at bar, and Appellant's evidence showed that such statements and misrepresentations effectively prevented her from contesting the issue of a fair and equitable property settlement.

It is therefore respectfully submitted that Haner is inapposite to the case at bar.

POINT II

THE LOWER COURT RULED BASED ON THE AFFIDAVIT OF RESPONDENT IN THE FACE OF DIRECT TESTIMONY ADDUCED IN OPEN COURT, AND TO DO SO WAS REVERSIBLE ERROR

Respondent maintains that the lower court based its decision only on the testimony adduced at the October 17 hearing and not on the voluminous affidavit styled "Answer and Counter-Affidavits to Plaintiff's Affidavit in Support of Motion for Relief from Final Decree" or any of the other affidavits submitted by Respondent. A review of the Memorandum Decision of the lower court found at pages 527 through 530 of the record herein reveals the following statement which is the only place in the record approaching a finding of fact:

The Court is of the opinion that all the information contained in the subsequent affidavit and all of the allegations pro and con contained in Affidavits filed by defendant countering affidavits by plaintiff were well-known to plaintiff and her competent counsel prior to the original Decree having been entered into on the 19th of May, 1978, and also prior to the entering into the Stipulation of the 7th day of April, 1978. (R.529) (Emphasis added)

Respondent's "Answer and Counter-Affidavits" is a rambling document some 180 pages in length, and contains, for example, the following information which the trial court apparently charged the Appellant with "knowing."

(R.373) "Further, while the Defendant loved his wife and would have shared any and all things with her had she been genuinely interested and wanted to know, the Defendant felt that he had at the same time, been cheated and swindled so much, so many times, and in so many ways by the Plaintiff's father, the monetary total running in dozens of thousands

of dollars, and because there had developed a competition and bitter jealousy and even a hatred between them, it is true that in the last year or so of marriage the Defendant was somewhat guarded as to what he shared with the Plaintiff about his business affairs. This was because of her lack of genuine interest and in lieu thereof of the second-hand interest of her skeeming [sic] father (whom the Defendant over the years grew to despise because of his lyings and cheatings and psudo-religious unfairness to the Defendant)."

(R.386) After much coaxing by the Plaintiff and her parents, the Defendant did at one point consider and say he would move into the Plaintiff's parents' home while they were away on their missions; but after thinking of all the bad experiences the Defendant felt he had had with the Plaintiff's father, Wendel A. Davis, which included on one occasion having been cheated and swindled out of \$19,975.00 (please see Appendix 5 attached hereto and made a part hereof), and having believed he had been cheated and swindled on numerous other occasions, another one of which was also for a large amount of money (please see Appendix 1 attached hereto and made a part hereof and which is a copy of just one of hundreds of pages of printing the Defendant printed for Wendel A. Davis, the Plaintiff's father, representing thousands of dollars in labor and materials which the Defendant feels he was also cheated out of by the father of the Plaintiff)--and after careful reconsideration, the Defendant did not want to move into the Plaintiff's home. (Emphasis in original.)

(R.392) Further, after a considerable amount of therapy, both from the marriage counselor and the psychiatrist, the Defendant realized that to continue in this so-called marriage would be foolish and impossible, and that divorce would be better than to continue in the mental torment created by the Plaintiff's "sick family system."

(R.408-409) So, since the Plaintiff and her parents say (even over the objection of the Bishop and Stake President) that this divorce is inspired, Church-authorized, and Priesthood approved, the Defendant is now, after considerable marriage counseling and therapy, willing to let them (that is, the Plaintiff and/or her father) or even God (at some

future time) be the judge of that.

The Plaintiff's father took her (the Plaintiff) to the law firm of Backman, Clark & Marsh, her initial lawyers, because he didn't like the attorney she had picked--if the Defendant's memory serves him correctly, the Plaintiff's father said (in the same conversation at the kitchen table) that it was because the attorney she had picked was suing him or handling some action against him (the Plaintiff's father, Wendel A. Davis) or one of the businesses he is affiliated with. The defendant had a note in which he had written the details of this conversation; but, (at the time of the preparation of this affidavit) he can not locate the note. But, in any event, the Defendant has always felt that Backman, Clark & Marsh was used as an unholy and improper way of going around the Stake President to Brother Backman, the Regional Representative of the Twelve, who would be the next higher man in the Priesthood line of authority. (Prima facie evidence of this is the fact that after Brother Backman's Church assignment was changed, the Plaintiff changed law firms to Mr. David A. Goodwill, who's office is located in the same building with attorneys who are the general counsel for the Church of Jesus Christ of Latter-Day Saints, indicating even further Church climbing.) Further, the Defendant also thought the unholy and improper Church climbing might even go as high as Brother Delbert L. Stapley, a relative of the Plaintiff's father, and the man who married the parties hereto; or maybe even as high as Brother N. Eldon Tanner, a personal acquaintance of the Plaintiff's family. While this Church climbing is wrong and not the order of the Church and would not knowingly be condoned by any of these three good brethren, (two of whom are General Authorities of the Church), it was apparently engaged in by the Plaintiff and/or her parents, because the Stake President told the Defendant he had received a telephone call asking him, the Stake President, if he knew what was going on in his Stake. The Stake President added that the call was not from Brother Stapley, but he did not say whom the call was from. So the Defendant knows that, contrary to the order of the Church, some improper Church climbing had to be going on for anyone higher than the Stake President to have called down to the Stake President, and if any

deduction can be made from what the Stake President said about it not being from Brother Stapley, then the unholy and improper Church climbing went quite high up in the Church.

THE DEFENDANT HAS STATED AND SET FORTH THE FOREGOING TO SHOW THE COURT THE KIND OF "ANYTHING AND EVERYTHING" THE PLAINTIFF AND HER FAMILY HAS PARTICIPATED IN TO CREATE AND INFLICT MENTAL DISTRESS, PSYCHOLOGICAL CRUELTY, AND EVEN PSYCHIATRIC DAMAGE UPON THE DEFENDANT. THE FOREGOING IS ALSO RELEVANT BECAUSE THE DEFENDANT BELIEVES THAT THIS "MOTION FOR RELIEF FROM THE FINAL DECREE OF DIVORCE" IS A FORM OF LEGAL HARASSMENT SIMILAR TO THE FOREGOING EXAMPLES OF RELIGIOUS HARASSMENT, ALREADY CARRIED OUT BY THE PLAINTIFF AND HER FAMILY. Further, they have always tried to inflict this type of thing upon the Defendant (and others as well) by their pseudo-religious, self-righteous, and very "sick family system", as the therapists put it. (Emphasis in the original.)

By its quasi-finding, the trial court would also apparently charge Appellant with "well knowing" the statements in an affidavit elicited by Respondent from the teenage son of the parties to the effect that mother (Appellant) "lies," and "Grandpa Davis" (Appellant's father) was a thief. (R.428-434.)

These are but a few examples illustrative of all of the affidavits submitted by Respondent in this case. Appellant points out in passing that there are several extremely grave defects in Respondent's "Answer and Counter-Affidavits." For example, all of the sub-affidavits attached thereto and found in the court file are copies; not one is an original. Furthermore, several of the copies show no sign of originally bearing a notary seal. The main affidavit itself was executed October 16, 1978 while a further affidavit of Milan Mack Boyce attached thereto as Exhibit "E" (R.446-460) was executed on November 30, 1978.

The Affidavit of Craig M. Strom attached as Exhibit "K" (R.481-483) and the Second Affidavit of Craig Marvin Strom attached as Exhibit "N" (R.490-492), bear two different signatures.

A further example is found in Respondent's Petition to Set Aside the Temporary Order of the Court and to restore the Decree of Divorce Herein (R.307-335). In said Petition Respondent represents that in order to borrow money it was necessary for him to enter into an "Agreement" with Zions First National Bank. Respondent attached Exhibit "E" (R.322-324) as evidence of said "Agreement." That document was never signed by Noall J. Bennett on behalf of Zions and a representative of Zions was prepared to so testify on October 17, 1978, but was not permitted to do so because the hearing was terminated.

Even a cursory examination of these "documents" reveal a presentation to the lower court almost beyond belief, and yet all of this was not only considered by the lower court but, according to its Memorandum Decision, formed the basis of its ruling. Not one shred of Respondent's "evidence" was subject to cross-examination by Appellant. The lower court basing its decision on said "documents" in the face of direct evidence adduced in open court by Appellant constitutes reversible error.

It is respectfully submitted that the lower court's Memorandum Decision makes it clear that the lower court relied solely on the affidavits of Respondent in coming to its decision even though Appellant had presented evidence both oral and documentary in open court. For the lower court to have done so was prejudicial to Appellant and constitutes reversible error.

CONCLUSION

The foregoing analysis along with Appellant's Brief to this Honorable Court show that the lower court erred in refusing to grant Appellant's Motion for relief from the Decree of Divorce. It is respectfully submitted that this court should therefore reverse the lower court and order the lower court to set aside the Decree of Divorce and permit full discovery so that the full extent of the fraud perpetrated by Respondent can be presented, or in the alternative to require the trial court to permit full discovery preparatory to a hearing on a motion to modify the decree as it pertains to property distribution, child support and alimony.

Respectfully submitted,

BAYLE, CHILD & RITCHIE

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MAILING CERTIFICATE

Mailed two true and correct copies of the foregoing
Reply to Respondent's Brief, first-class postage thereon
prepaid, on this ____ day of September, 1979, to the
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