

1953

Melba Wilcox v. District Court of Salt Lake County et al : Brief of Defendants

Utah Supreme Court

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

MELBA WILCOX, executrix of the
Estate of Don E. Wilcox, Deceased,

Plaintiff,

vs.

DISTRICT COURT OF SALT LAKE
COUNTY, THE HONORABLE
JOSEPH G. JEPPSON, District
Judge and EDNA ABBOTT
WILCOX,

Defendants.

BRIEF OF DEFENDANTS

E. L. SCHOENHALS

Attorney for Defendants

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Defendants.

Civil No.
8114

BRIEF OF DEFENDANTS

F A C T S

There is no question before this court with respect to the service of process. Process had been completed. The court had jurisdiction of the subject matter and the persons. This is a proceeding supplemental to or subsequent to process to wit: an order to show cause after the court has jurisdiction. Plaintiff and defendants do not

dispute this point. The only question is, did the death of the defendant invalidate process and cause an abatement of the action requiring process to be again served upon the executrix.

ANSWER TO POINT I

In Utah an action and proceedings thereinunder do not abate upon death.

This is not the commencement of an action. Plaintiff concedes the action was commenced in 1928, and that the court had jurisdiction of the persons, of the subject matter and the matrimonial res.

Why does plaintiff cite *Pennoyer v. Neff* which case involves only the issue of the commencement of an action by service of a summons on a non resident. Had Edna Abbott commenced an action after death which is not the case, and served process, *Pennoyer v. Neff* would have application and defendants concede the rationale under such circumstances.

The other citations submitted by opposing counsel all concern the commencement of an action, and not the substitution of a personal representative in an action when the court not only has jurisdiction but statutory authority to maintain *continuing* jurisdiction with respect thereto.

REPLY UNDER AFFIRMATIVE DEFENSE

POINT I OF DEFENDANTS ON REPLY

WHERE THE COURT HAS JURISDICTION OF THE PARTIES AND THE SUBJECT MATTER AND IS GRANTED POWER BY THE LEGISLATURE TO RETAIN CONTINUING JURISDICTION FOR SUBSEQUENT ACTION, REMOVAL FROM THE STATE OR DEATH DOES NOT DIVEST THE COURT OF JURISDICTION WITH RESPECT TO SUBSEQUENT PROCEEDINGS AND ONLY SUCH NOTICE AS MAY BE PRESCRIBED BY THE COURT IS NECESSARY TO BIND THE PARTIES OR PERSONAL REPRESENTATIVE IF A PARTY DIES.

This is not the commencement of an action, it is proceedings subsequent to jurisdiction over the subject matter, matrimonial res, and persons.

This is the same question as where process has issued and parties have submitted to the jurisdiction, the issues drawn and then defendant has moved out of the jurisdiction. Now, must plaintiff again serve defendant with process, or is service of a notice of hearing all that is necessary?

When an order to show cause is issued after jurisdiction of the person is acquired Rule 65 A (b) requires only notice to the party of the hearing.

Rule 5 B (1) prescribes notice to be sufficient merely by mailing or serving the same upon a party or his attorney. The rule also gives the court discretion to prescribe notice by service upon a party.

In the case at bar the court exercised discretion and ordered that service of a copy of the order on executrix would be sufficient. This matter is res adjudicata. The Rule gives the court DISCRETION to do this. Can the plaintiff under this extraordinary writ seek to restrain the trial court from acting on a discretionary matter? The maxim of the law that lower courts will not be subjected to action on extraordinary writs where the lower court is in exercise of a discretionary function has been ignored by plaintiff.

Plaintiff by appearing admits notice was given in the trial court. Plaintiff also conceded in the trial court that had defendant Wilcox survived, and had he been served with notice, though outside the state, he would be bound by proceedings had pursuant to notice in the case at bar. Plaintiff having conceded this counsel shall not burden the court with authorities.

Plaintiff claims that death of Wilcox changes the situation. The authorities and statutes do not sustain such position. Plaintiff has cited no authority which requires the commencement anew of an action by service of process where the defendant dies. None can be found and the statutes and authorities do not so hold.

75-11-5 UCA, 1953 permits the maintenance of actions against decedents the same as they might be maintained against the testate. Moreover, rule 25 (a) (1) provides:

“If a party dies and the claim is not thereby extinguished, the court upon application made within two years after the death, shall order substitution of the proper parties. The motion for substitution may be made by * * * any party.”

The legislature having spoken, it follows that the appointment of an executrix and the substitution with notice has supplied the only item necessary to provide continuing jurisdiction over the personal representative, whether the defendant Wilcox was alive or dead. Such application was made within two years after death.

30-3-5 UCA, 1953 with respect to divorce actions has been construed to give the court continuing jurisdiction over the persons upon death and to extend beyond the person and include the personal representative upon death of defendant and also the subject matter and the properties of the defendant or his estate, and to even permit the party plaintiff to pursue in a divorce action a judgment against the substituted administrator, and to determine on an order to show cause not only the amount of the judgment but to also require payment directly from the estate to a plaintiff in a divorce action and foreclosure of a lien. See:

Murphy v. Moyle, 53 P. 1010, 17 U. 113.

Please also note in the above case that Section 2606 upon which the court at 17 Utah, page 120 claims authority to interfere in the administration of the estate is precisely the same as our section 30-3-5, U.C.A., 1953.

The fiction of custodia legis extended to administrators has no application where the parties have already submitted their matrimonial res and themselves to the jurisdiction of the court or voluntarily vest the court with jurisdiction over themselves and such of their property as the court may determine necessary for child support. The court's attention is invited to section 30-3-5, U.C.A. 1953, wherein the court is expressly given jurisdiction of the property of the parties and a continuing jurisdiction thereof. *Murphy v. Moyle*, supra, is the same as the case at bar in that it was a divorce action with substitution of the administrator and an order to show cause. Moreover, the authorities in other jurisdictions sustain the position taken in the *Murphy v. Moyle* case: See 2 Bancrofts Probate Practice, 2nd Edition, page 556, permitting the substitution in pending action of the decedent's representative.

21 CJS 113-114.

"A nonresident over whose person jurisdiction has been acquired is in court for every purpose connected with the suit, and is charged with notice of any action the court may take pending the same; and having acquired jurisdiction, the court will retain it for the purpose of administering justice to resident citizens, and will not send them to foreign jurisdictions to seek redress."

Here defendant seeks to send plaintiff in the court below to California.

21 CJS 144.

“So, where jurisdiction of the person or of the res has once attached, it is not defeated by a removal of the person or the res beyond the jurisdiction of the court.”

The matrimonial res and res necessary for support of the minor child attached by consent in the case at bar.

21 CJS 146.

“The court does not necessarily lose jurisdiction by the death of some of the petitioners, and a statute may authorize continuation of the action, as by the substitution of a representative of the decedent.”

27 CJS 652.

“Where a nonresident defendant appears and answers and all other elements of jurisdiction are present in general the court has jurisdiction for all purposes.”

27 CJS 1225.

“Where a divorce decree becomes absolute, the court nevertheless retains jurisdiction of the subject matter so far as to compel compliance with the decree as to the maintenance and support of minor children.”

27 CJS 1239.

“The decree may also be amended to give the provisions for the child’s maintenance the effect of a lien on the deceased father’s estate, with priority over the right of the widow and heirs.”

We have not asked for this, only determination of the sum due.

27 CJS 1248.

"Time of making application. The jurisdiction of the court being continuous, statutes limiting the time within which judgments may be modified have no application to the modification of divorce decrees awarding a sum for the support of minor children."

West vs. West, 217 N.W. 925.

"So solicitous is the law for the welfare of the child that the decree for such support survives the death of the father and may be amended to give the provision for the child's maintenance the effect of a lien upon the estate with priority over rights of the widow and heirs."

15 ALR 629.

"In *White vs. White* (1903) 65 N.J. Eq. 741, 55 Atl. 739, it is held that where a court has acquired jurisdiction over a defendant in divorce proceedings it retains jurisdiction for the purpose of subsequent proceedings to alter the amount paid to plaintiff for the maintenance of the children, in accordance with the terms of the decree providing for such alteration; and that the court may use its *discretion* in prescribing the measures necessary to *notify* the defendant of such proceedings. And where personal service is prescribed by the court, it is *immaterial* that it is *served without the state*.

It is apparent that other courts recognize it is a discretionary matter with the court to prescribe notice.

What is plaintiff doing before this court on an extraordinary writ?

Let the writ be dismissed and the lower court directed to proceed to determination as prayed.

Respectfully Submitted,

E. L. SCHOENHALS,
Attorney for Defendants.