1954

Blanche Zollinger Madsen v. Delbert Murray Madsen : Appellant's Reply Brief

Utah Supreme Court

L. Tom Perry; Ted S. Perry; Attorneys for Plaintiff and Appellant;

In the Supreme Court of the State of Utah

BLANCHE ZOLLINGER MADSEN,
Plaintiff and Appellant,

vs.

DELBERT MURRAY MADSEN,
Defendant and Respondent.

Civil 8151

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the First Judicial District of the State of Utah
In and for the County of Cache

Honorable Lewis Jones, District Judge

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Note: (R) indicates reference to Original Record.
(AR) indicates reference to transcript in Additional Record.

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STATEMENT

It will be remembered by the Court that Appellant had filed her notice of appeal, taken her appeal, designated the record that she desired brought up from the lower court and presented her brief in this matter, and that thereafter Woodrow D. White and C. Preston Allen made a motion that the Court permit Respondent to file additional record on appeal under certain terms; that thereafter this additional record was filed.

It will also be remembered Appellant was permitted to present arguments based on this additional record in either her reply brief or in a supplemental brief.

In general we think the facts of the case have been duly presented in Appellant's statement of facts and in Respondent's statement of facts. But a brief history of the trial of the action which extended from April 27, 1953, to December 7, 1953, would be helpful to the Court in determining this matter.

The trial of the action commenced at 10:00 o'clock a. m. April 27th, 1953. Appellant introduced her evidence in support of her complaint. The evidence showed that Appellant had $1900.00 in cash and bonds at the time of her marriage (AR 3); that defendant and respondent had land which he had valued at $1500.00 (AR 5); that the parties owned a car (AR 4); that the parties had certain household furniture (AR 5, 6); that the defendant was working (AR 13); that he had two jobs (AR 14) with a take home pay from these two jobs of $280.26 per month (AR 41, 42, 43); and that he was getting $95.00 per month from the United States Government for partial disability (AR 15). That Appellant was not working (AR 13).

That while the Defendant was being cross-examined concerning his property at the continuation of the trial of the case, April 29, 1953, the Court took a recess. That after the recess the parties with their attorneys met in chambers and agreed to the following stipulation:

> "Mr. Perry: It's stipulated in open court between the parties and their attorneys and in their presence that if in any event the court sees fit to grant a divorce, he may award custody of the children to the plaintiff, Mrs. Madsen, and as a property and maintenance setttlement, the court may award the plaintiff, Mrs. Madsen, the sum of $1000 payable in six months; for the maintenance of the children, $30 would be best each, wouldn't it?
>
> "Mr. Sjostrom: It wouldn't make any difference, I guess.
>
> "Mr. Perry: Thirty dollars each until how long?

"Mr. Sjostrom: Until further order of the court, and $150 attorney's fees. When does he commence paying alimony? The property settlement here will be in lieu of all other rights of the plaintiff, purported rights, in lieu of all alimony and other property settlements.

"'Mr. Perry: The defendant may have the Plymouth automobile.

"Mr. Sjostrom: That's right.

"Mr. Perry: And the plaintiff may have the . . .

"Mr. Sjostrom: You mean the defendant may have the Pontiac automobile.

"Mr. Perry: Yes, the defendant may have the automobile, and the plaintiff may have the *furniture.*

"Mr. Sjostrom: The defendant may have the lands in Washington County and St. George." (AR 98, 99).

Part of this stipulation was reiterated in the hearing on the 15th day of July, 1953 (AR 5 to 8).

After this stipulation the Appellant relied thereon and introduced no further evidence to assist the Court in determining the amount of alimony and support money to be paid. The case was then continued until July 15th, 1953 (R 25) when additional evidence was taken. On September 28th, 1953 (R 25) the Court announced that Plaintiff was entitled to a judgment dissolving the bonds of matimony between Plaintiff and Defendant. That the parties should have joint custody of the children; that plaintiff should have them nine months and defendant three months out of each year and that the plaintiff was to be awarded $25.00 per month as support money for

each child. On October 13th (R 25) the Court again took up the matter and said that the Plaintiff should be given one-half of the real property and household furniture and defendant the car and that this award should be in lieu of her rights for alimony. That the custody of the two eldest children should be given to the defendant three months out of each year provided he made certain showings. On December 7, 1953, the findings and decree were signed.

As this case was before the Court for approximately seven months and as testimony was taken at various intervals during that time and as defendant had personally contacted the Court (AR 2, 4, 7, 8 of hearing of July 15) we may excuse the Court for not remembering all that transpired when he finally signed the decree of divorce. But because the Court, in not remembering all the facts, erred in making its decision, this error should be corrected by the Appellate Court who now has a transcript of the record before it.

POINT I

THE PARTIES STIPULATED THAT PLAINTIFF SHOULD HAVE $1000 AND THE HOUSEHOLD FURNITURE IN LIEU OF ALIMONY. THE COURT IS BOUND BY THIS STIPULATION.

It is our contention that the court should be bound by the stipulation made by the parties. This position finds support in the following:

> "Stipulations made by the parties to a judicial proceeding, or by their attorneys, within the scope of

> their authority, are binding upon those who make them, and those who they may lawfully represent, and upon *trial* and appellate courts." (50 Am. Jur. p. 610).

A case very similar to the one at bar is Bloom v. Graff (Md.) 63 A. 2d 313. In this action the plaintiff operated a package liquor store. The defendant's taxicab crashed into the store. The plaintiff sued for damages. During the course of the trial the attorney for the plaintiff stated in open court;

> "Your Honor please, before putting on my first witness I would like to state that it is stipulated and agreed between counsel for the parties to this case that if a verdict is found in favor of the plaintiff it should be in the amount of $896.09."

No objection was made to this statement by the attorney for the defendant. After evidence of negligence had been introduced the Court instructed the jury that they did not have to bring in a verdict for $896.09. The jury rendered a verdict for the plaintiff and fixed the damages at $250.00 and an appeal was taken. In modifying the lower court's decree the appellate court said:

> "Often in the trial of cases certain stipulations are made by counsel in order to save the time of the Court and the expense and difficulty of producing witnesses. Where such stipulation is agreed to by counsel an orderly trial of the case demands that the parties are bound thereby. If the attorney for the defense did not agree to that stipulation made in open court before the trial judge, he should have objected and so advised the court. Silence under such circumstances amounts to consent. . .

> "As the liability of the appellees has been determined by the jury, there is no issue requiring a new trial. Judgment is therefore entered in this court for plaintiff and against the defendant for the sum of $896.09."

Two Utah cases have discussed this problem. In Rickenberg v. Capitol Garage, 68 Utah 30, 249 Pac. 121, the court said::

> "In this connection it should be stated that Respondent's counsel insist that the latter was not guilty of driving the car at the time of his arrest, but assert that the same was driven by a lad about 13 years of age. They have set forth the evidence upon that subject and it supports their contention. We remark, a complete answer to the foregoing contention is that it was stipulated at the hearing in the court below, and the stipulation appears in the record, that the respondent was convicted of the offense of driving an automobile while intoxicated. Respondent is bound by that stipulation and so are we."

In a more recent case, Richlands Irrigation Company v. Westview Irrigation Company (1938) 96 Ut. 403, 80 P. 2d 458, the state engineer had asked for an adjudication of water rights in Sevier River. There had been a former decree whereby the upper water users had agreed to permit the waters to flow to lower reservoirs during the winter time. The Vermillion Irrigation Company did not agree to this decree so the other parties drew up a stipulation with the Vermillion Company in which it was provided that the Vermillion Company should have 37.80 c.f.s of the waters of the Sevier River accumulating between the Annabella and Vermillion dams, provided that whenever the water yielded between the two dams would

not be sufficient to supply the Vermillion Company with the 37.80 c.f.s., then the rights hereinbefore mentioned and set out under Section A shall prorate equally with the said Vermillion Canal Company. The trial court in interpreting this stipulation restricted the rights of the Vermillion Company to the waters that arose in the Sevier River between the two dams. An appeal was taken and the appellate court reversed the decision of the lower court giving a different interpretation to the stipulation and then saying:

> "Where parties litigant, instead of assembling witnesses and putting on their proofs, reduce their respective rights and priorities to writing and stipulate that a decree may be entered in conformity thereto, such contract if lawful has a binding effect on the decree that may be entered. It has all the binding effect of findings of fact and conclusions of law made by the court upon evidence, and more. A court may modify its findings in apt time but it cannot change or modify a contract of the parties. In the particulars pointed out, the court by its findings, conclusions and decree varied the provisions not in harmony therewith. The contract of the parties amounted to a stipulation that all the facts necessary to support such contract and a decree in conformity thereto pre-existed and would be sustained by available evidence, had not the agreement of the parties dispensed with the taking of evidence. . . The agreement in writing is equal to an express court finding of facts to support the year-round water rights described therein."

This is appellant's position in this matter. The parties having agreed on a fixed sum of $1000 plus the household

furniture in lieu of alimony and having agreed on $30.00 per month for each child for support and maintenance, the lower court had no power to modify this agreement and where the conclusions of law or the decree varied from the stipulation, they must be set aside and a judgment entered in accordance with the stipulations.

While it may be true that there was some evidence in the record that the defendant was in poor health and that he did not always have regular employment and while it may also be true that there was a lack of evidence that appellant needed the $1000 and while it may be true that the property given to her was the equivalent of $1000 (which we deny), the court is not concerned with evidence that found its way into the record which may or may not support its decision. Such evidence and facts do not control the decision in this case. The decision should be based entirely upon the agreement made by the parties in open court.

POINT II

THE PARTIES LIKEWISE AGREED ON THE SUM OF $30 PER MONTH FOR THE SUPPORT AND MAINTENANCE OF EACH CHILD. THE COURT IS LIKEWISE BOUND BY THIS STIPULATION.

The same rule should hold with respect to the monthly allowance to plaintiff for the support of her three minor children, for it is stipulated that this sum should be $30 per month and the court gave only $25 per month for each child. As this stipulation has not been set aside both parties should be bound by it. Plaintiff would like to

contend that $30 is an insufficient amount, but her hands are tied by the stipulation. In a like manner, the respondent should be bound.

Respondent further argues that plaintiff should be bound by the judgment of the court because "there is no affirmative evidence which would support appellant's position that a greater sum is necessary for the support and maintenance of the children" (Respondent's Brief, page 7). We agree to this lack of evidence. When Respondent stipulated that he would pay to the Plaintiff the sum of $30 per month for the support of each child, Plaintiff relied on this stipulation and withheld her evidence as to the amount necessary for their support. Respondent cannot now take advantage of plaintiff's position. He led her to believe that he would pay $30 per month for each child. He cannot now complain that there is insufficient evidence to support such an award. His stipulation admitted that no evidence was necessary to prove the amount of the award. He cannot now complain.

POINT III

AS THE PARTIES AGREED ON THE CUSTODY OF THE CHILDREN THERE WAS NO NEED OF LEAVING THIS MATTER OPEN FOR FURTHER HEARING, BUT A JUDGMENT SHOULD HAVE BEEN ENTERED IN ACCORDANCE WITH THE STIPULATION.

The rights of the custody of the children have likewise been fixed by stipulation and unless the stipulation is against public policy it should be upheld. The trial

Court in modifying the stipulation does not take the view that the stipulation is against public policy, but it contends that it would be against the *interests of the father* to give exclusive custody of the children to the mother. It is clear from the evidence that the parties agreed that plaintiff should have custody of the children and during the three vacation months of June, July, and August the father should have the right to take the children for a visit twice each summer for one week each time (AR 100-102).

The record is not clear as to the duration of the visits during the non-vacation period. Mr. Sjostrom, attorney for Respondent inquires (AR 101): "And then, say if he comes up on short visits, would it be okeh with you Mrs. Madsen, that he take them a day or two out around this valley, to, say, a show or something like that?" To which Mrs. Madsen replied "Yes."

As this part of the stipulation is not clear the appelate court should definitely fix the time and number of such non-vacation visits.

Plaintiff does not think the father should be given any privileges of custody of the third child who is ill. This child should remain with the mother. Plaintiff likewise contends that frequent custody of the child for forty-eight hours at a time is detrimental to the interest of the children who attain the age of 36 months. The time is too long. In fixing the time of the visits the Court should consider what is best for the child and not what is convenient for the father.

We cannot resist respondent's contention that the father should have visiting privileges for all his children. But those privileges should be conditioned on his prompt payment of the amount awarded for the maintenance of his children and for alimony. If he does not pay, the visiting privileges should be denied.

CONCLUSION

We think the judgment of the trial court should be modified to comply with the stipulation of the parties. The plaintiff should be given $1000 and the household furniture in lieu of alimony. The plaintiff should likewise be awarded the sum of $90 each month for the support and maintenance of her three children. Plaintiff should have custody of the children and the decree should be made final in that it should not contain a provision permitting respondent to seek more liberal terms. The court should fix the times of defendant's visits. Such visits should be permitted only when defendant is not delinquent in payment of alimony and support money. These times should not be more than twice during vacation periods of one week duration each and not more than once each month for defendant to take his children to a show or for a ride around Cache Valley. These are the terms the parties agreed upon and these should be the terms of the decree.

Respectfully submitted,

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Attorneys for Appellant.