1980

# Linda M. May v. George H. May : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

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LINDA M. MAY,

Plaintiff and Respondent,

vs.

GEORGE H. MAY,

Defendant and Appellant.

Case No. 17079

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# BRIEF OF APPELLANT

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Appeal from judgment of the Second Judicial District Court of the State of Utah, in and for the County of Davis, Honorable Thornely K. Swan, Judge.

FARR, KAUFMAN & HAMILTON
STEPHEN W. FARR, ESQ.
Bamberger Square, Building
205 26th Street, Suite
Ogden, Utah 84401

Attorney for Defendant-Appellant

C. C. PATTERSON
427 27th Street
Ogden, Utah 84401

Attorney for Plaintiff-Respondent

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Bamberger Square, Building 1
205 26th Street, Suite 34
Ogden, Utah 84401

Attorney for Defendant-Appellant

C. C. PATTERSON
427 27th Street
Ogden, Utah 84401

Attorney for Plaintiff-Respondent

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| Defendant and Appellant. | / | |

NATURE OF THE CASE

This is an action in divorce where custody of the parties' minor child was the main point of controversy.

DISPOSITION IN THE LOWER COURT

On March 20, 1980, the matter was tried before the Honorable Thornley K. Swan, sitting without a jury. Findings of Fact and Conclusions of Law, along with a Decree of Divorce were signed April 7, 1980, and filed April 8, 1980. The Decree of Divorce to become final thirty (30) days after entry. The decision of the court as memorialized in the Decree of Divorce incorporated the parties' oral stipulation regarding property division and child support, and further granted custody of the minor child to the respondent.

RELIEF SOUGHT ON APPEAL

Appellent seeks to reverse and remand the decision of the District Court.

## STATEMENT OF FACTS

On or about August 30, 1979, the respondent filed an action for divorce in the District Court in and for Davis County (R. 1-5). In response to the respondent's action, appellant answered and filed a Counter-Affidavit to rebut the allegations of respondent's Affidavit in connection with her Order to Show Cause (R. 8-15).

On October 25, 1979, a Show Cause hearing was held before the Honorable Thornley K. Swan, and the parties orally stipulated as to the necessary terms (R. 20).

On January 28, 1980, the parties and their respective counsel appeared before the Honorable Thornley K. Swan for a Pre-Trial Conference. The minute entry for the conference specifically notes that counsel conferred with the court and stipulated that a home study be made by the Division of Family Services, with each party to pay one-half of the cost of the study (R. 26).

Subsequent to the Pre-Trial Conference, the appellant attempted to contact his attorney on several occasions prior to the trial. Appellant left messages for his counsel to return his telephone calls and none were returned until one day before the trial. On returning appellant's telephone call, his counsel advised appellant that he would not appear in court for the trial due to a fee dispute (R. 41). When the appellant retained counsel he paid Three Hundred ($300.00) Dollars to the attorney after being advised that Three Hundred

($300.00) Dollars, plus costs, was his fee for representation in appellant's case. Later counsel demanded an additional Three Hundred ($300.00) Dollars from appellant and represented he would not attend the trial without payment.

Appellant's counsel indicated to appellant that due to the fee dispute, he would contact the court and seek permission to withdraw from the case and further, seek a continuance to permit appellant to find new counsel. Appellant's counsel did contact the court and was informed that neither requst would be granted (R 31, 47). Appellant, not being aware of the court's decision, attempted to reach his attorney to determine how the matter would proceed. Appellant was unsuccessful in reaching his lawyer; however, late that afternoon, Mr. White's secretary called appellant and advised him that the judge would not allow the continuance and would not allow Mr. White to withdraw from the case. The secretary further informed appellant that she did not know whether Mr. White was going to attend the trial (R. 42).

Upon hearing the representations of Mr. White's secretary, appellant made efforts to reach those witnesses he wished to testify on his behalf, although he had no subpoenas, nor was he familiar with the process involved in their service. During the hectic hours, appellant remained uncertain whether his attorney would attend the trial (R. 42).

The following day, at the time set for the trial, Mr. White did appear, but was reluctant to represent the appellant due to the differences regarding fees. Appellant

informed the court of the problems and sought a continuance based upon the fact that his counsel had not adequately prepared appellant's case in failing to subpoena certain witnesses that appellant desired and that were crucial for the custody issue; further, that counsel was not desirous of representing appellant and that thereby he could not have a fair trial.

The relief sought by appellant was denied and the trial took place without the witnesses crucial for appellant.

Subsequently appellant obtained new counsel. A Motion for a New Trial and Affidavit in support thereof were then filed on appellant's behalf (R. 41-44). Counter-Affidavits were filed by respondent and appellant's former counsel and the matter came before Judge Swan on April 15, 1980 (R. 54). On April 23, 1980, the court denied appellant's Motion and an Order reflecting the decision was filed on April 25, 1980 (R. 62).

## ARGUMENT

### POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT CONTINUANCE REQUESTED BY APPELLANT.

It is well settled that the decision on whether to grant a request for continuance is within the discretion of the trial court. In Griffiths v. Hammon, 560 P. 2d 1375 (Utah, 1979), the Utah Supreme Court announced:

> A party is not granted a continuance as a matter of right, but rather as an action of discretion by the court...560 P. 2d at 1376.

In the case at bar the trial court abused its discretion in permitting the trial to take place, and thus denying appellant a fair hearing.

Our legal system is founded upon the notion that everyone is entitled to be heard. An important part of the right to be heard is the right to counsel. Obviously, the right to counsel in civil cases must be viewed differently than in criminal cases; however, proper assistance of counsel is necessary in both realms.

Proper assistance of counsel was not afforded the appellant at the trial of the divorce action and the failure resulted in great loss to the appellant; namely, loss of custody of his child. While it is not appellant's contention that he should be afforded a new trial due to incompetence[1] of counsel, appellant certainly was entitled to have the trial of this matter continued when the trial court was advised of the extreme difficulties between appellant and his attorney, difficulties that would, and did, prejudice appellant.

> It is unquestioned that there is an implied covenant in an attorney's relationship to his client that he will represent the client's interest with competence and diligence. Dunn v. McKay, Burton, McMurray & Thurman, 584 P. 2d (Utah, 1978)

In appellant's case, diligence was not the watchword, and the lack thereof was called to the attention of the trial court. The

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1. The Utah Supreme Court in Maltby v. Cox Construction Co., Inc., 598 P. 2d 336 (Utah, 1979), in dicta announced that incompetence of counsel in a civil case was not the grounds for a new trial.

trial court was advised by appellant that he was not certain whether counsel was even going to attend the trial on March 20, 1980. Appellant's concern was occasioned by the events and conversations before the trial between appellant, his counsel, and his counsel's office.

Appellant was advised by counsel that his fee for representing appellant in the subject matter would be Three Hundred ($300.00) Dollars, plus costs. Pursuant to that representation, appellant tendered the requested sum and assumed he had representation for the duration of the lawsuit. The representation was not always characterized by cooperative effort. Appellant attempted to reach his counsel on many occasions prior to the time set for trial, but was unsuccessful (R. 41, 57). Finally, one day before trial, appellant's counsel returned a telephone call and advised appellant he would not appear at trial without an additional Three Hundred ($300.00) Dollars, and further suggested that the matter be settled (R. 57).

Appellant and his counsel were apparently unable to resolve their differences regarding fees and counsel unequivocally stated he would not appear at trial and would contact the judged regarding a withdrawal (R. 57). In response, appellant indicated he would need time to obtain new counsel and asked Mr. White to request a continuance. Mr. White replied that the trial court would probably grant the continuance and that he would call the appellant later that morning with an answer. Appellant awaited a telephone call throughout the

morning, and later telephoned Mr. White's office several times, all to no avail. Later that evening appellant received a call from Mr. White's office and was told the trial court had refused both the withdrawal and continuance requests. Mr. White's secretary further advised appellant that she did not know if Mr. White would appear in court the following day.

It was not until appellant appeared in court the next morning that he knew whether or not Mr. White would be present to represent him (R. 57). Although Mr. White was present in court, the evidence that appellant sought to introduce was neither prepared nor available. After the Pre-Trial hearing, appellant had advised counsel that he did not wish to rely on the home study evaluation as the sole determinant for custody; rather, he desired to produce evidence at the time of trial which would relate to appellant's fitness as a custodial parent, and the lack of fitness on the part of the respondent. Appellant further communicated the nature of his evidence, and those persons whose attendance should be secured to his attorney.

Appellant advised Mr. White at the original interview that he wished to contest the divorce, particularly the issue of custody. At no time did appellant advise counsel otherwise. Appellant indicated that some witnesses were reluctant to testify, and would probably require a subpoena. Despite appellant's representations, counsel did not discuss witness fees, prepare subpoenas, or converse with the witnesses that did appear in court prior to their testifying.

In Mageary v. Hoyt, 91 Ariz. 41, 369 P. 2d 662 (1962), the Arizona Supreme Court dealt with an action against an attorney for constructive fraud allegedly arising out of the attorney's failure to inform the plaintiffs (his former clients) of a discrepancy in an assignment contract, which plaintiffs claimed caused them to fail to extend a lease. The trial court granted summary judgment on behalf of the defendant-lawyer, but the Supreme Court reversed and remanded, holding that questions of fact existed as to whether the attorney used reasonable skill and knowledge, the nature of the employment contract and the question of proximate cause. In so ruling it was noted that:

> Certainly an attorney owes a duty of utmost good faith to his client, and must inform his client of matters that might adversely affect his client's interest. Sarti v. Udall, 91 Ariz. 24, 369 P. 2d 92 (1962) 369 P. 2d at 665

The logic of the Mageary decision is certainly applicable herein where the failure to advise the appellant whether or not witnesses had been subpoenaed, whether or not additional costs were involved, or whether or not counsel would attend trial, ultimately prejudiced the appellant to such an extent as to deprive him of a fair hearing. This failure to prepare evidence on appellant's behalf, was called to the trial court's attention by appellant at the time that a continuance was requested (T. 14-18). In that vein appellant stated:

> I would like to ask for a continuance in this matter. I haven't had time to seek other legal assistance, and feel that my best interests....

> Well, I haven't had a chance to represent my best interests in this matter. I haven't had time to prepare a case myself personally. Mr. White, more or less, wasn't allowed to withdraw, and under the circumstances between him and me I don't feel we were able to get together what was needed, as far as evidence by today. (T. 14 to 15).

A lengthy discussion on the record followed between counsel, the trial court and the appellant, including the testimony of the appellant, wherein appellant represented to the court, in detail, the difficulties he had encountered with his attorney and the lack of key witnesses crucial to his case. (T. 14 to 41)

The court had been made aware of the difficulties prior to the time of trial, and still failed to grant the continuance to the appellant. The minute entry of March 20, 1980, specifically notes that Mr. White contacted the trial judge one day prior to the trial and requested permission to withdraw (R. 31-32). The decision reached by the trial court deprived appellant of a fair hearing and worked a great injustice.

The judiciary is naturally concerned with the administration of a great number of cases and the need to complete hearings as scheduled; however:

> .... a myopic insistence upon expeditiousness in the fact of a justifiable request for delay can render the request to defendant with counsel an empty formality. Ungar v. Sarafite, 376 U.S. 515, 589 (1964) referring to Chandler v. Fretag, 348 U.S. 3

While Ungar[2] involved a criminal contempt matter, the language quoted above is equally applicable to the case at bar. The trial court, in an attempt to administer its case-load, rejected a justifiable request for continuance.

> There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be formed in the circumstances present in every case particularly in the reason presented to the trial judge at the time the request is denied. Nilva v. U.S., 352 U.S. 388 Ungar v. Sarafite, Supra at 589

The facts in this case show a justifiable request for a continuance that was denied through abuse of discretion, causing the appellant to be denied a fair hearing.

## POINT II

## THE TRIAL COURT COMMITTED ERROR IN APPLYING A REPEALED STATUTE TO THE ISSUE OF CUSTODY

Prior to the 1977 revision, 30-3-10 of the Utah Code authorized the court, in its decision of custody in divorce matters to consider the "natural presumption that the mother is best suited to care for the young children". The legislature's decision to remove that presumption from the law is part of a societal attempt to remove the badges of sexism in considering such matters. This

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2. Ungar v. Sarafite, Supra, involved a defendant charged with criminal contempt for his conduct as a witness in a state criminal trial. The Supreme Court found no abuse of discretion in denying the defendant's request for a continuance, even though his claim was that evidence was not available; however, the evidence was easily obtainable within a matter of hours and defendant had already received numerous continuances.

court has announced its support of the change in the law and stated:

> ....under the modern trend of social thinking away from former fixed rigidities, towards equality of the sexes and greater flexibility in considering the qualifications of the parents on an individual basis, that presumption is subordinate to the higher rule that the paramount concern in such cases is the best interest and welfare of the child. Bingham v. Bingham, 575 P. 2nd 703, 704 (Utah, 1978)

In appellant's Affidavit in support of his Motion for New Trial (R. 41-44), appellant states that ".... the court advised me, following the trial that 'Utah Statutes show the woman preference over the man in custody cases'". While the court did not make such a comment on the record it is a matter properly before this court for review, in light of appellant's Affidavit. Obviously, the trial court committed error in reaching its decision on custody based upon a repealed section of the Utah Code.

Custody determinations, being a matter related to divorce, are matters of equity and the court is "necessarily clothed with great discretion".[3] That great discretion does not permit the court to base its decision on erroneous interpretations of the law. Therefore, the trial court's determination was must be overturned.

## CONCLUSION

The trial court abused its discretion in failing to grant the requested continuance and thus committed error

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3. Henderson v. Henderson, 576 P 2d 1289 (Utah, 1978)

in rendering its decision on custody.

For the foregoing reasons, the decision of the trial court should be reversed.

Respectfully submitted
FARR, KAUFMAN & HAMILTON

By: _____
STEPHEN W. FARR
Attorney for Defendant-Appellan

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing Brief of Appellant was mailed to plaintiff-respondent's attorney, C. C. PATTERSON, Attorney at Law, 427 27th Street, Ogden, Utah, postage prepaid, this 22 day of September, 1980.

_____
Secretary

203 26th STREET SUITE 34
BAMBERGER SQUARE, BUILDING 1
OGDEN, UTAH 84401