1980

Linda M. May v. George H. May : Brief of Respondent

Utah Supreme Court

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CASE CITATIONS

IN THE SUPREME COURT OF THE

STATE OF UTAH

LINDA M. MAY, Plaintiff and Appellee	)	CASE NO. 17079
vs.	)	
GEORGE H. MAY, Defendant and Appellant.	)	

RELIEF SOUGHT ON APPEAL

Appellee, pursuant to Rule 73(1), requests this Court to uphold the decision below, together with damages pursuant to the provisions of Rule 73L of Utah Rules of Civil Procedure.

STATEMENT OF FACTS

For the sake of clarity and ease, the defendant is the appellant in this action. However in the Brief the parties will be identified as they were below, i.e., Linda May, plaintiff and George H. May, appearing herein as defendant.

Hornbook law and innumerable Utah cases attest to the fact that in any trial if there are facts upon the judgment can be sustained, it will be sustained. Defendant here attempts to give his version of the facts contrary to the facts the Court found to be true. It is necessary therefore, to separate the facts and argument into just facts.

The Court found, predicated upon the testimony of Mrs. May, that the defendant and the plaintiff had continually

argued, the arguments resulted in the defendant pushing her around physically starting within the first year of the marriage. TR9 and 10. That she was slapped, threatened, choked by the defendant. TR10. That on one occasion he threatened her with a gun. TR10.

The testimony of the plaintiff was confirmed by a witness for the defendant, Janice Faiola, who had known the parties since they were in Junior High School. TR42. She stated that during the entire period of the marriage the relationship between the parties was rocky, TR42, in that they had alot of problems and that there were not very many times when the plaintiff was happy. TR43.

The Brief of defendant raises two questions. One, that the Court abused its discretion in failing to grant a continuance to the plaintiff, and two, that the Court erred in awarding custody of the minor child of the parties to the plaintiff.

Facts relative to the first point disclose that the defendant was in Court at the time of the Order to Show Cause; that he was present in Court on January 28, 1980, for Pre-trial conference, that he knew that the case was set for trial on March 6, 1980. TR17. That he knew of the final trial date of March 20, 1980. That for the first time he advised Mr. White, his attorney, the day before trial that he wanted to get new counsel. TR19. But, when he found out Mr. White was

going to appear anyway, he elected not to get further or additional counsel. TR19. That the idea of changing counsel was predicated upon the desire of the defendant to prevent his wife from leaving him and had no substantive value. TR19. That had the defendant obtained further counsel, the Court would have permitted Mr. White to withdraw. TR20. The defendant produced two witnesses, Janice Faiola, TR41, and Edward Gene Trujillo, TR45.

That his only complaint was that he did not have a police officer present, one Phil Ohlmstead. However, the defendant did not attempt to contact him because of an alleged lack of time. TR48. This witness could only identify certain pictures that had already been admitted into evidence by stipulation. The only witness who was not available was a Jolene Cignetti. TR47. Defendant's testimony was that he tried to call her a few times. He had driven by her home. He didn't know where she was. TR48. There were no representations as to what, if anything, said witness could have testified to. There was no effort made by the defendant to request his attorney to subpoena her or to subpoena her himself and no offer of proof was made as to what she could have testified to, nor was any statement set forth in the defendant's Appeal and/or Brief that her testimony could have had any substantive value relating to any of the issues in this case.

With regard to the defendant's second issue that the Court committed error in applying a repealed statute to the

issue of custody, the only evidence is an Affidavit by the defendant submitted as a part of the defendant's motion for a new trial. The record is devoid of any record which substantiates the defendant's affidavit. However, the parties stipulated to a home study by the Utah Division of Family Services. That report is a part of the record and found that both parties were fit and proper persons to have custody, but recommended that custody should be awarded to the plaintiff.

ARGUMENT

POINT I

THERE WAS NO ABUSE OF DISCRETION

The undisputed evidence in this case is disclosed by the record that the night before the trial in an effort to obtain a continuance, defendant advised his counsel that he wanted to obtain other counsel and that he wanted the continuance. The evidence further disclosed that the only reason for this was his desire to prevent his wife from obtaining a divorce. The defendant's argument would appear to be that the plaintiff was not a fit person because she was nervous and had committed adultry, and that the defendant did not feel that he could trust the plaintiff because she had not told him the entire truth.

TR27. When asked what she had not told him the truth about, his reply was "about the whole situation." TR27. The defendant was asked specifically if he had any witnesses who had observed any immoral acts or if he had been a witness to any such immoral acts and his answers to both questions was in the negative. TR31. Neither of the defendant's witnesses, Janice Faiola, TR41-44 or Edward Gene Trujillo, TR45-46 had any information as to any infidelity on the part of the plaintiff. No claim was ever made by the defendant that any such evidence existed. His sole testimony was that he hoped to find such testimony. This case was filed on the 16th day of August,1979 and tried on the 20th day of March, 1980. If he could not find such testimony during that period of time well knowing for two months, or in excess thereof, that he had to appear in court, it is respectfully submitted that his chance of obtaining additional information by a continuance was nil.

Even if he were able to establish that the plaintiff had committed adultry either prior to or subsequent to the initiation of the divorce proceedings, that fact would not be sufficient to alter a determination of custody. See Sparks v. Sparks, 29 Utah 2d 263, 508 P.2d 531 (1973); Dearden vs. Dearden, 15 Utah 2d 105, 388 P.2d 230 (1964);

Stuber vs. Stuber, 121 Utah 632, 244 P.2d 650 (1962); Knapp vs. Knapp, 73 Utah 268, 273 P.512 (1928). The defendant is in the position of having his belief unsupported by fact and discovery to substitute his belief for a conclusion that standing alone would not warrant the change of custody. There was no representation that the purported adultry in any way had an adverse effect upon the child or came close to that fact situation that would have warranted a different conclusion as to custody. No evidence was introduced, no tender of evidence was ever proffered and none has been claimed even in the Brief of the defendant.

On the other side, Division of Family Services did not find that there was anything in either party that would warrant the conclusion that either party was an unfit person. The investigation concluded and recommended that the plaintiff be awarded custody.

For the defendant to contend that the Court abused its discretion, it was incumbent upon defendant, if he desired to win, to produce some evidence supported by the record, not by statements that are not substantiated either in the record or on any other basis, as a justification for an abuse. Defendant has not done this. It is submitted that he cannot do so or he would have done so.

By reason of the defendant's failure to state any grounds or facts or witnesses of an adultry, forces one to the conclu-

sion that the purported missing witness, if present, would only have resulted in the obtaining of cumulative evidence. It is a long-standing rule of all Appellate Courts that the refusal to admit merely cumulative evidence is not error. Hassing vs. Mutual Life Insurance Company of New York, 108 Utah 198, 159 P.2d 17 (1945). The most that can be claimed for the defendant's position is that he contends that the Court erred in not granting a continuance so that he could present cumulative evidence. The problem of abuse of discretion was dismissed in Foley vs. Foley, No. 16921, decided August 19, 1980. The ruling does not help the defendant. It is respectfully submitted that no grounds exist to substantiate a finding that the trial court committed an abuse of discretion in refusing to authorize a continuance.

POINT II

THE TRIAL COURT DID NOT COMMIT ERROR IN APPLYING A REPEALED STATUTE TO THE ISSUE OF CUSTODY

Examination of the entire transcript of the testimony of the trial discloses that the trial court did not make any statement attributed to it by the Affidavit of the defendant in his motion for a new trial. The Affidavit had to have been prepared by present counsel, who was not at the trial, and is outside the scope of any testimony and/or statement made during the course of the trial. It can only be deemed to be self-serving and, contrary to the evidence. It constitutes an effort on the part of this defendant to cast aspersions upon the integrity and the intelligence of the

trial court and was based not on fact, but solely upon a desire to inject argument into this record that is unwarranted, unjustified and constitutes further evidence that the defendant did not file this Appeal on the basis of any law and/or fact that would justify the reversal of the trial court's ruling, but was motivated solely by his desire to continue to stretch out and prolong the ultimate decision and disposition of this matter. In quoting Bingham v. Bingham, 575 P.2d 703, defendant's Brief omits the following statement:

> "We agree as a general proposition: that it is presumed to be for the best interests and welfare of the child of tender years to be with the mother."

It is quite true that the Court did recognize that that presumption is subordinate to the higher rule that the paramount concern in such cases is the best interest and welfare of the child.

The fact is the Court's decision that the plaintiff should be awarded custody is supported by the opionion of the Department of Family Services.

The further fact is that the defendant introduced no evidence other than his desire for custody to demonstrate that the best interest and welfare of the child would have been served by awarding custody of his daugher to the

defendant. Defendant concedes custody determinations are as related to divorce, a matter of equity. That the Court is necessarily clothed with great discretion. Henderson vs. Henderson, 576 P.2d 1298, Utah (1978).

As was stated in Dyson v. Aviation Office of America, Inc., Utah 1979 593 P.2d 143 at 146, the Court held was precluded from substituting its judgment for that of the trial court on the issue of fact if the judgment was based upon substantial, competent, admissable evidence.

Rule 73L of the Utah Rules of Civil Procedure provides:

> "On the trial of the cause on appeal, if it appears to the Court that appeal was made solely for delay, it may add to the costs such damages as may be just, not exceeding 25% of the judgment appealed from.?

The record in this case discloses that there was and is substantial, competent evidence upon which the trial court rendered its judgment.

The record does not disclose any justifiable grounds for finding for a conclusion that the Court's finding was incorrect. They cite neither fact nor law upon which it can be argued that the Court erred and/or abused its discretion. Neither is there any fact or legal conclusion in the record to indicate the Court applied a repealed statute in coming to its conclusion. On the other hand the record clearly discloses the complaint was absent of any admissable fact

or conclusion that would warrant the granting of any of the grounds enumerated by the plaintiff and compels the conclusion that the only reason for the appeal was spurious and to attempt to prolong the final granting of the divorce to the plaintiff and conclusion of this prolonged unnecessary litigation.

The record discloses the defendant was granted an equity in the home of the parties in the amount of approximately $25,000.00. The Brief of the defendant discloses a complete want of merit. As a result the Coiut overburdened with justifiable cases that require solution is now further burdened with a spurious, unnecessary and futile appeal. Plaintiff is required to pay counsel and undergo unwarranged harrassment and should be compensated. See Dyson v. Aviation Office of America, Inc., supra.

CONCLUSION

The appeal of the defendant-appellant here is frivilous, and fostered solely by a desire to delay the conclusion of these proceedings and should be dismissed and plaintiff-appellee should be entitled to damages pursuant to the provisions of Rule 73L of the Utah Rules of Civil Procedure.

Dated this 5 day of October, 1980.

Respectfully submitted,

C. C. PATTERSON

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the above and foregoing Brief of Appellee was mailed to Defendant-Appellant's attorney, Stephen W. Farr, Esq. 205 26th Street, Suite 34, Ogden, Utah 84401, postage prepaid, this 31st day of October, 1980.

Secretary