1981

Joyce Shirley Christensen v. J. Clayde Christensen : Reply Brief of Appellant

Utah Supreme Court

Robert C. Cummings; Gordon A. Madsen; Romney, Madsen & Cummings; Attorneys for Plaintiff and Appellant;
George S. Diumenti; DIumenti, Harward & Nelson; Attorneys for Defendant and Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

JOYCE SHIRLEY CHRISTENSEN,)
Plaintiff and Appellant,)
vs.) Case No. 17084
J. CLAYDE CHRISTENSEN,)
Defendant and Respondent.)
)

REPLY BRIEF OF APPELLANT

Appeal from Order Modifying Decree of Divorce of
Third Judicial District Court In and For Salt Lake County
The Honorable Homer F. Wilkinson, Judge

Robert C. Cummings
Gordon A. Madsen
ROMNEY, MADSEN & CUMMINGS
320 South Third East Street
Salt Lake City, Utah 84111
Attorneys for Plaintiff
and Appellant

George S. Diumenti, II
DIUMENTI, HARWARD & NELSON
505 South Main Street
Bountiful, Utah 84010
Attorneys for Defendant
and Respondent

TABLE OF CONTENTS:

CASES AND AUTHORITIES CITED:

SCOPE OF REPLY BRIEF

Defendant does not appear to take issue with any of the authorities cited by plaintiff in her initial brief herein. Defendant does, however, appear to take issue with the facts to some extent, and plaintiff desires to respond briefly to that matter.

POINT 1. PLAINTIFF'S STATEMENT OF THE FACTS IS AN ACCURATE SUMMARY THEREOF.

At page 5 of respondent's brief he states:

> "Counsel for plaintiff has attempted to consolidate some 259 pages of testimony in his 35 page brief, which summary after a thorough perusal of the record does not fairly characterize the basis for Judge Wilkinson's determination."

It is true that plaintiff has attempted to consolidate 259 pages of testimony in a 35-page brief, and we believe that is what appellant is supposed to do. Furthermore, although defendant states that the aforesaid summary does not "fairly characterize" these events, he does not indicate in any respect wherein it does not. We respectfully submit that plaintiff's summary of the facts, uncontradicted by the defendant, must be taken as correct. Furthermore, we invite perusal of the full 259 page record and believe that plaintiff's presentation of the facts in her brief is a fair and accurate summary.

POINT 2. DEFENDANT HAS FAILED TO IDENTIFY IN HIS BRIEF ANY SUFFICIENT CHANGE OF CIRCUMSTANCES.

Plaintiff has asserted on this appeal that the defendant failed to allege or prove in the lower court any sufficient change of circumstances. Defendant responds to this matter on pages 5 and 6 of his brief. He there states:

> " . . . plaintiff has failed to overcome the clear changes of circumstances appearing in the record."

Defendant, however, fails to cite or identify any change of circumstance whatever. In fact, he treats this entire point with a total of four lines.

The record fails to disclose any significant change of circumstances in this case.

POINT 3. FINDINGS OF FACT TO SUPPORT THE COURT'S JUDGMENT ARE NECESSARY.

In his brief the defendant cites the case of Wright v. Union Pacific Railroad, 22 Ut 338, 62 P 317 (1900). That case merely stands for the proposition that findings of fact are not required on a motion for a new trial. It should be noted, however, that a motion for new trial does not normally involve evidentiary matters, and therefore we certainly do not take issue with that holding. It is plaintiff's position in this case, however, that where an extensive evidentiary hearing takes place,

findings, or at least some indication of the basis for the Court's decision is required.

In Wright v. Union Pacific the Utah Supreme Court noted at page 319 that:

> "On a motion for a new trial supported and resisted, as in the case at bar, on ex parte affidavits, those making the affidavits are not subject to cross-examination, and, not being before the trial judge, his opportunity to judge of their credibility and the weight of their statements is no better than the appellate court. In all such cases, and in equity cases where the evidence consists exlusively of depositions, the reason upon which the decisions quoted are based fails, and the rule established by them has no application to such cases."

The Court thus makes clear that where a trial on the merits takes place, findings of fact are required because the trial judge is, and must be, judge of the credibility of the witnesses as they appear personally before him. Where a matter is determined on affidavits or depositions, and witnesses do not personally appear before the trial judge, he is in no better position to determine credibility than the appellate court.

In the instant case, although the proceeding was initiated by a "motion" for modification, the proceeding was indeed a trial on the merits, and we respectfully submit that findings are required.

It should also be noted that Rule 52(a), Utah Rules of Civil Procedure, requires findings "In all actions tried upon the

facts without a jury . . . " This language is found in the first sentence of said rule, and we do not believe that the last sentence thereof discussing Rule 12, Rule 56, "or any other motion" was intended to change the clear meaning of the first sentence. Motions under Rule 12 and Rule 56 for the most part deal with matters of law, and we believe that the language "or any other motion" was intended to cover motions similarly dealing with matters of law.

We refer the Court to a discussion of this matter at 5A Moore's Federal Practice, Section 52.08, at pages 2738-2739, which appears to support plaintiff's position.

If evidence was adduced which supports the ruling of the Court, findings of fact should have been made thereon. It is, of course, the Court's responsibility to make these findings, but in practice counsel designated by the Court to prepare documents normally undertakes that assignment.

In this case defendant's counsel was designated by the Court in its Memorandum Opinion to prepare the decision of the Court.

It should be noted that it is plaintiff's principal position that there was no evidence which would support the decision of the Court, but to the extent the Court or counsel for the defendant felt that there were such facts, those should have been included in findings of fact.

POINT 4. THE TRIAL COURT'S DEFINITION OF "FULLTIME STUDENT" WAS INAPPROPRIATE INASMUCH AS THE MATTER WAS NOT BEFORE THE COURT.

Plaintiff has asserted that the pleadings of the defendant fail to raise the issue of fulltime student and the defendant fails to cite or identify where in defendant's pleadings that issue is raised. Furthermore, during the trial, the testimony of the plaintiff started to get into the area of defendant's having failed to pay child support money, claiming that one of the children was no longer a fulltime student. (See pages 20 and 21 of the transcript of the second day of trial.)(2T.20-21)

The Court refused to get into that matter and ruled that the question was not before the Court (2T.23). Having precluded treatment of that subject at the trial, it was improper for the Court to attempt a definitation of "fulltime student" in the abstract without testimony or argument by the parties.

Defendant appears to take the position that Judge Wilkinson "heard evidence, considered evidence," but again the defendant fails to indicate where that took place in the record.

CONCLUSION

The plaintiff respectfully prays that the decision of Judge Wilkinson of April 8, 1980, be reversed.

Respectfully submitted:

GORDON A. MADSEN
ROBERT C. CUMMINGS
Attorneys for Plaintif-Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Reply Brief to George S. Diumenti, II, attorney for defendant and respondent, at his address, 505 South Main Street, Bountiful, Utah 84010, postage prepaid, this _____ day of March, 1981.

_____