1982

Jon E. Hales v. Stephanie L. Hales : Brief of Respondent

Utah Supreme Court

J. Franklin Allred; Attorney for Appellant;
Harold R. Stephens; Attorney for Respondent;

IN THE SUPREME COURT

OF THE STATE OF UTAH

JON E. HALES, Plaintiff-Appellant, -vs- STEPHANIE L. HALES, Defendant-Respondent.	:	Case No. 18049

BRIEF OF RESPONDANT

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, THE HONORABLE ERNEST F. BALDWIN, JR., PRESIDING

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an action for divorce commenced by Appellant on February 5, 1981.

DISPOSITION IN LOWER COURT

Appellant filed a Motion to amend his Complaint to request an annulment and to allege that he was not the father of the minor child born to Respondent. The District Court denied the Motion by order submitted at the time of trial after a hearing held December 10, 1981. At trial, the Court dismissed Appellant's Complaint, awarding Respondent a divorce on her Counterclaim and ordering Appellant to pay the sum of $175.00 per month as child support.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the trial court's

Order denying his Motion to Amend and a remand for further proceedings on the issues of paternity and annulment. Respondent seeks affirmation of the trial courts order and requests remand to have appellant pay costs and a reasonable attorneys fee.

STATEMENT OF FACTS

Appellant and Respondent were married in Salt Lake City, Utah, on August 15, 1980.

In February, 1981, Appellant filed a Complaint for divorce. The original Complaint did not dispute the paternity of the child which Appellant and Respondent were expecting at that time.

In March, 1981, while the divorce was pending, the child was born to Respondent. Appellant, at an Order to Show Cuase hearing, did not challenge paternity and allowed the Court to award temporary support pending a final determination at trial.

In July, 1981, several months prior to trial, Appellant informed his attorney and Respondent that he intended to dispute the paternity of the minor child born to Respondent in March, 1981 and to seek blood and tissue tests to confirm that he was not the father.

Counsel for Respondent, after discussion with Appellant's counsel, communicated by letter that Respondent had no objection to his seeking an order of the Court

requiring blood and tissue tests being conducted to determine paternity of the minor child. However, based on Counsel's discussion of the effect of the Supreme Court case of Holder -vs- Holder, 9 Ut. 2nd 163, 340 P2d 761, Appellant's counsel indicated no tests would be sought.

Counsel for Appellant did not seek leave to amend Appellant's Complaint to raise the issues of paternity and annulment nor to seek an Order regarding blood and tissue tests despite requests by Appellant to do so. Consequently, on September 3, 1981, Appellant retained his present attorney, who immediately filed a Motion to Amend requesting an annulment and alleging non-paternity.

The trial court at a hearing on September 10, 1981, relying on the Holder -vs- Holder decision (supra) denied Appellant's Motion to Amend. At the trial held on September 15, 1981, the Court refused again to allow Appellant to raise the issue of paternity and entered its Order to that effect. After hearing Appellant's evidence at the trial, the Court granted Respondent's Motion to Dismiss Appellant's Complaint.

The Court then granted Respondent a divorce on her Counterclaim, finding that the minor child was Appellant's and ordering Appellant to pay $175.00 per month as child support.

ISSUE:

HAS THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO ALLOW APPELLANT TO AMEND HIS COMPLAINT FIVE DAYS PRIOR TO TRIAL TO RAISE AN ISSUE OF PATERNITY.

DISCUSSION

Although the policy of Rule 15(a) of the Utah Rules of Civil Procedure may be to favor allowing amendment of pleadings, that policy does not allow amendment, by matter of right, leave of Court or stipulation in circumstances where as a matter of law no right exists.

In the instant case, Counsel for Appellant indicates that Respondent had no objection to the ordering of blood and tissue tests to determine the paternity of the parties' child. That is supported by indicating that a letter, to that effect, was sent from Respondent's Counsel to Appellant's Counsel. However, although the record cannot reflect this matter fully, it should be stated that Respondent's Counsel's communication merely indicates that there is no objection to Appellants seeking leave of Court for such an Order. Appellant's prior Counsel's decision to not seek such an Order may well have been based on the holding in the Holder -vs- Holder case (supra).

Due to the sensitive nature of the requested amendment the discussion regarding its appropriateness, timeliness and efficacy were held, without a reporter, in the Judge's Chambers and the Order refusing the requested amendment was issued in Open Court.

The Trial Judge refused the requested amendment on the basis of the Lord Mansfield Rule as adopted in the State of Utah and supported by decisions such as Holder -vs- Holder, 9 Ut.2d 393, P3d 761 (1959), Lopes -vs- Lopes, 30 Ut.2d 393,

518 P.2d 687 (1974), Hughes -vs- McCormick, 17 Ut.2d 373, 412 P2d 613 (1966).

That rule is best typified in the holding in the Holder case which provides that:

> "Child born to married woman is presumed to be offspring of her husband and legitimate, and presumption can be rebutted only by showing that husband was incapable of procreation or entirely absent and without access through period during which child must have been begotten, so that it was impossible for him to have been father; and this must be proved with a high degree of certainty; and presumption will not fail unless common sense and reason are outraged by holding that it abides." (Underlining supplies for emphasis)

In this case, Appellant does not allege incapacity or non-access, he has stated in support of his requested amendment that he believes he is not the father, that position had been taken after he fully acknowledged paternity in his original Complaint, and after an Order to Show Cause hearing in which Orders regarding temporary support were issued.

Appellant has not, at this time, met any burden which the Holder decision would place upon him if, as this Court has held, the only way to rebut a presumption of legitimacy is to show incapacity or non-access neither has been ever minimally alleged. Appellant, according to his Motion for the amendment, states that he thinks he is not the child's father. He apparently thought he was the child's father when he filed a Complaint for divorce; he did not at the temporary support hearing raise any question; however, a few

weeks before trial, he determined that he "didn't think" he was the child's father. This Court in the Lopes -vs- Lopes decision (supra), as Appellant has quoted, stated:

> It is those he looks to as parents, who should provide the love, nurture, and protection from the otherwise sufficient vicissitudes of life. If they do not have the sense of propriety and decency to restrain themselves from visiting their own difficulties and maladjustments upon the child, and thus pass them on to yet another generation, the law in its concern for the broader interests of society, and in its sense of justice in protecting the interests of the child, has wisely provided that restraint upon the parents in the Lord Mansfield Rule, leaving the proof of such facts where necessary to come from other sources. 5 518 P.2d at 689.

It seems obvious in this case that the Appellant is attempting to force Respondent and their child through some reverse form of paternity action. There is no evidence presented by Appellant other than some feeling that brings a child's legitimacy before this Court. The Appellant's feeling, after duly acknowledging paternity in his original Complaint, at the time of birth, in an Order to Show Cause hearing, and by making issue of visitation rights now solidly gravitate against the Courts demanding that all parties submit themselves for additional tests as one more proof that the child is indeed the Appellants.

CONCLUSION

Obviously, the Lord Mansfield rule survives as a valid rule of law and the Courts have, as a matter of policy, determined that husbands and fathers should not be allowed to challenge their childrens' legitimacy on a passing whim. In this case, there are no allegations of child paternity testimony

or proof offered which meet the restrictive requirements of the Holder decision. Further there are sound reasons for not allowing a father, to order blood tests or challenge paternity not the least of which is the stigma placed on that child, and the scandal propigated against the non-petitioning spouse.

The Trial Judge in the instant case, familiar with the cases cited above and being fully aware of the basis of the Plaintiff/Appellant's requested amendment, presented five (5) days before a scheduled divorce trial, refused a Motion to Amend to allow the Divorce Complaint to become a Petition for Annulment or to require the Defendant/Respondent mother to submit to blood tests to determine paternity. His decision is fully supported by the clear weight of the case law, and there is no indication that he has abused his discretion in the Order issued.

Defendant/Respondent requests that the Supreme Court consider one additional matter in this regard. The parties to this action bore their own costs, expenses and attorney's fees in the instant action; however, Plaintiff/Appellant's refusal to abide by the decision of the Trial Court has placed Respondent in a position to defend this Appeal which include additional attorney's fees and costs. Respondent, requests that the Supreme Court require Plaintiff/Appellant to bear all costs and a reasonable attorney's fee be determined by remanding to the Trial Court to find the amount of costs and fees reasonably incurred. See Carter -vs- Carter, 584 P2d 904.

DATED this 29th day of January, 1982.

Respectfully submitted,