1982

Bruce Michael Larner v. Mary Lynn Hill : Brief of Appellant

Utah Supreme Court

Brian M. Barnard; Attorney for Plaintiff-Respondent;
Joel M. Allred; Attorney for Defendant-Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

BRUCE MICHAEL LARNER,

Plaintiff and Respondent,

vs. Case No. 18065

MARY LYNN HILL, formerly,
MARY LYNN LARNER,

Defendant and Appellant.

APPELLANT'S BRIEF

Appeal from the Orders of the
Third District Court of Salt Lake County,
Hon. Ernest F. Baldwin, Jr., Judge

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APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

This is an action to enforce the provisions of the Uniform Child Custody Jurisdiction Act.

DISPOSITION IN LOWER COURT

The District Court found that it had jurisdiction to modify a Colorado Decree as to matters pertaining to the custody and support of Stephen Michael Larner and Julianne Michelle Larner. The Court also found that it had no such jurisdiction in the case of a third child, Joseph Scott Larner.

RELIEF SOUGHT ON APPEAL

The Appellant seeks the reversal of the Order as to Stephen Michael Larner and Julianne Michelle Larner and

asks the Court to refer the matter to the State of Colorado for trial.

STATEMENT OF FACTS

The Defendant (Appellant), Mary Lynn Larner Hill, is the custodial parent of Stephen Michael Larner, born March 13, 1968, and of Joseph Scott Larner, born May 29, 1972, under the terms of a Decree of Dissolution of Marriage entered by the District Court of Jefferson County, Colorado, on March 17, 1980. The Plaintiff (Respondent), Michael Bruce Larner, is the custodial parent, under the same Decree, for Julianne Michelle Larner, born May 10, 1969.

The Separation Agreement incorporated in the Colorado Decree required that the Plaintiff and the Defendant should exercise joint custody over the minor children, "Provided, however, that until such time as the parties should agree otherwise, or until further order of this court, the wife shall have the physical care, custody and control of Stephen Michael Larner and Joseph Scott Larner, and the husband shall have the physical care, custody and control of Julianne Michelle Larner" (R. 7, 8).

Joseph Scott Larner came to Utah in "early July" of 1981 (R. 102).[1] On July 3, 1981, the Plaintiff filed a

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1. And was to have been returned to Colorado on August 1, 1981 (R. 102, 103). The child was still in Utah when the matter was heard on August 25, 1981 (R. 107).

Verified Complaint with the Third District Court. The Complaint was signed by the Plaintiff's attorney, Brian M. Barnard, on July 1, 1981 (R. 4) and was verified by the Plaintiff, Bruce Michael Larner, the following day, July 2, 1981 (R. 5). The Verified Complaint asserted that "All three minor children are currently residing with the Plaintiff, Bruce Michael Larner, in Salt Lake City Utah" (R. 3). The Complaint demanded that the Court grant full faith and credit to the Colorado Decree; that it assume jurisdiction; that it enter an order of temporary custody in favor of the Plaintiff, modify the Colorado Decree, grant custody of the children to the Plaintiff and terminate child support. A Notice of Trial was filed on July 10, 1981.

On July 29, 1981, the Defendant entered a special appearance and objected to the jurisdiction of the Utah Court.[2] On August 19, 1981, the Plaintiff mailed a Motion for Temporary Order and Notice of Hearing (R. 30), moving the Court to enter

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2. On July 23, 1981, before the Defendant's special appearance and objections to jurisdiction could be filed, Defendant's counsel appeared before the Law and Motion Division of the Third District Court, Jay E. Banks presiding, to object to the Plaintiff's Order to Show Cause dated July 8, 1981. The Order to Show Cause was filed with the District Court on July 20, 1981 (R. 19) and set for hearing on the civil calendar on July 23rd. The Plaintiff did not appear in support of his claim and the Order to Show Cause was dismissed (R. 27 28).

an Order granting him the temporary custody of the three minor children pending a resolution of the matter on its merits.[3]

On October 1, 1981, after a hearing on August 25, 1981, and over the Defendant's objections (R. 99), Judge Ernest F. Baldwin, Jr., concluded that the two older children were residing in Utah at the time of the hearing (R. 106), and found that Joseph Scott Larner was residing in Colorado (R. 106, 107). The Court ordered that the temporary custody of Stephen Michael Larner be awarded to the non custodial parent, Bruce Michael Larner, and taken from the custodial parent, Mary Lynn Hill. The Court ordered that Joseph Scott Larner be "returned to Colorado" (R. 108) pending "further proceedings" (R. 107).

On October 16, 1981, after a hearing on the Defendant's Objections to Jurisdiction on October 1, 1981, the Court entered an Order holding it had jurisdiction to modify the Colorado Decree, with regard to the custody and support of Stephen Michael Larner and Julianne Michelle Larner. The Court found that it had no jurisdiction to modify the Colorado Decree in the case of Joseph Scott Larner (R. 43).

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3. On August 4, 1981, the Plaintiff filed a Notice of Hearing that purported to continue the Hearing on the Order to Show Cause set for July 23, 1981, until August 25, 1981. The Order to Show Cause had been dismissed before the Plaintiff's Notice was filed.

The Court overruled the objections of the Defendant to its jurisdiction, and ordered the Defendant to file an Answer to the Plaintiff's Complaint within ten days. The Defendant filed an Answer and Counterclaim and a Petition for an Intermediate Appeal.

ARGUMENT

POINT I

THE PROCEEDINGS IN THE LOWER COURT VIOLATED PROCEDURAL REQUIREMENTS.

The Notice of the Hearing on Plaintiff's Motion for Temporary Custody (R. 30, 31) did not give the notice required by the provisions of 78-45c-5 U.C.A., or by the provisions of Rule 6, subsections (d) and (e), of the Utah Rules of Civil Procedure. Furthermore, the Motion violated the requirements of Rule 4 of the Rules of the Third District Court, effective July 1, 1981. The Notice of the Hearing was insufficient, whether the opposing party was out of state or in, and the matter belonged on the trial calendar and not on the Order to Show Cause calendar. It was improper, under the rule, to raise the issue of temporary custody by means of an Order to Show Cause.[4] The Motion for Temporary Order (R. 30) was a

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4. Rule 4 (h), "Orders to Show Cause in the Domestic Relations Division may be used only for enforcement purposes, not modification. Any matter which will require longer than 15 minutes for evidence and argument shall not be placed on the regular Order to Show Cause Calendar. Counsel must obtain a setting on the regular domestic trial calendar as a special setting from the Domestic Relations Judge for such hearings."

Motion in place of the previously dismissed Order to Show Cause (R. 19), and, in effect, a Petition for the Temporary Modification of a Foreign Decree.[5]

When it awarded the Plaintiff the temporary custody of Stephen Michael Larner, on August 25, 1981, and asserted jurisdiction (R. 102, 106), the District Court made a precipitous decision, on minimal facts, without sufficient consideration. The Court ruled on the issue of temporary custody, asserting that it had jurisdiction to do so, before it heard argument on the Defendant's Objections to Jurisdiction, more than a month later, on October 1, 1981. No testimony was taken before the Court awarded temporary custody to the Plaintiff,

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5. The Motion did not comply with the Rule of Court. Rule 4 (g),

"Whenever a change or modification in the terms and conditions of a Decree of Divorce is sought, the issue shall be raised by the filing of a Petition for Modification and service of said petition upon the opposing party. Counsel shall take steps to have the matter set for hearing on the regular Domestic Relations trial calendar, if it can be tried in one-half day or less, or on the civil trial calendar if more than one-half day is required. No Petition for Modification shall be placed on any Order to Show Cause calendar without permission from the judge presiding in the Domestic Relations Division. No request for a change or modification of a Decree shall be raised by way of an Order to Show Cause. Any modification issues improperly included in an Order to Show Cause will be summarily stricken by the Court."

The Complaint of the Plaintiff (presumably the equivalent of a Petition for Modification), had been noticed for trial on December 9, 1981 (R. 18).

or at any time before, although the Defendant was physically present in the courtroom (R. 107). The preliminary ruling on the issue of temporary custody, before the Court heard the Defendant's objections to the exercise of its jurisdiction, was in effect a modification of the Colorado Decree.[6] The Court failed to take the time to accord the matter a factual hearing on the right calendar, and to render a decision after a hearing on the merits.

POINT II

THE ORDERS OF THE LOWER COURT VIOLATE THE EXPRESS PROVISIONS OF THE UTAH UNIFORM CHILD CUSTODY JURISDICTION ACT.

The Utah Uniform Child Custody Jurisdiction Act, section 78-45c-15, provides as follows:

> "(1) If a court of another state has made a custody decree, a court of this state shall not modify that decree unless (a) it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this act or has declined to assume jurisdiction to modify the decree and (b) the court of this state has jurisdiction." (Emphasis supplied.)

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6. And a "custody determination" under the Uniform Child Custody Jurisdiction Act. See: In Re Custody of Bechard (1978 Colo App) 577 P.2d 778. (In Bechard a modification of visitation rights was held to be a custody determination under the Act.) See also: Bahr v. Golonski (1977) 80 Wis 2d 72, 257 N.W. 2d 869.

The language of section 78-45c-15 (1) is mandatory. The legislature, which passed the Uniform Act, made it so. The statute, as applied to the facts in this case, provides that our Court shall not modify the Decree entered by the District Court in Jefferson County, Colorado, unless Colorado lacks jurisdiction, or declines to assume jurisdiction to modify its own decree, and unless Utah also has jurisdiction.

While our Court does not appear to have interpreted the provisions of 78-45c-15, Colorado, which has the Uniform Act, has ruled on the provision a number of times. Colorado would not permit the Plaintiff to do what Judge Baldwin permitted him to do in Utah, if the circumstances of these parties were reversed; if Mrs. Larner lived in Utah and a Utah Decree had entered. The Colorado Supreme Court held that the Uniform Child Custody Jurisdiction Act attempted to limit custody determination jurisdiction to only one state. The Act, it said, reflects a general policy in favor of the court rendering the original custody decree.[7]

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7. See: Fry v. Ball (1975 Colo) 544 P.2d 402; Brown v. District Court of Denver (1976 Colo) 557 P.2d 384; Young v. District Court of County of Boulder (1977 Colo) 570 P.2d 249; Woodhouse v. District Court of Seventeenth Judicial Dist. (1978 Colo) 587 P.2d 1199; Re Custody of Glass (1975) 36 Colo App 91, 537 P.2d 1092; In Re Custody of Thomas (1975) 36 Colo App 96, 537 P.2d 1095; In Re Custody of Zumbrun (1978 Colo App) 592 P.2d 16.

The Colorado Decree was entered on March 17, 1980, only slightly more than one year before the Plaintiff filed his Complaint in these proceedings (R. 2). Colorado has jurisdiction under jurisdictional prerequisites that are in accordance with Utah's Uniform Act. The Defendant is a resident of the State of Colorado (R. 2). Colorado is the home state of Joseph Scott Larner (R. 106, 107). The "Family Residence" was located in Jefferson County, Colorado (R. 10, 11), and the original divorce proceedings were filed there (R. 6).

Judge Baldwin concluded that Colorado and Utah had "joint jurisdiction," and said the issue involved was one of "venue." The Plaintiff's counsel, Mr. Barnard, agreed that that was so (R. 106). It would appear that the Court and Plaintiff's counsel misunderstood the implications of that conclusion insofar as it pertained to the application of the principles of the Uniform Child Custody Jurisdiction Act.[8]

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8. The dialogue is in the Record at page 100.

"MR. ALLRED: He has that custody in violation of the Colorado Court, Your Honor. The youngest child, Scott, was sent here on approximately July 1... The agreement of the parties was that on August 1st all of the children would return...a request was made for his (Joseph Scott Larner's) return. It was never honored, so he is here at the present time in violation of the terms of his visitation agreement which is of course a violation of the Uniform Child Custody Act. Now the second...
THE COURT: Are you proceeding under the Uniform Child Custody Act?
MR. BARNARD: I have not pled that in my Complaint, at all, Your Honor.
THE COURT: I didn't think so." (Emphasis supplied).

Colorado has never declined to assume jurisdiction to modify its own Decree, and proceedings relating to the custody of the children are pending there, in the District Court for Jefferson County. The pendency of the proceedings in Colorado was called to the attention of Judge Baldwin, at the Hearing on August 25, 1981, by Mr. Barnard (R. 102).

The Colorado Court has jurisdiction. That fact is conceded here by all of the principals, including Plaintiff's counsel. The Colorado Court expressly reserved the power to modify the Decree by further Order (R. 7, 8). Given the facts in this case, the statute provides that a court of this state "shall not modify" a foreign decree.

POINT III

THE DEFENDANT DID NOT "VOLUNTARILY" SUBJECT HERSELF TO THE JURISDICTION OF THE COURT BY FILING AN ANSWER AND COUNTERCLAIM.

The filing of an Answer and Counterclaim (R. 49) was involuntary. The District Court ordered the Defendant to file an Answer, within ten days, and the Defendant ran the risk of being defaulted in the proceedings before the District Court, if she failed to file one.

The Appellate Advocacy Handbook for the Utah Supreme Court provides that, "The effect of the granting of an interlocutory appeal is to stay action in the trial court that would be inconsistent with the appeal until the Supreme

Court's disposition." (See page 6) Nothing, however, pertains to the period between the filing of the Petition and the granting of the Interlocutory Appeal. Furthermore, at that point in time, before the Supreme Court has determined whether or not to entertain the appeal, the matter is still squarely before the District Court.

It cannot be said that because the Defendant complied with an Order entered over her objections, and those of her counsel, that she has "voluntarily subjected" herself to the jurisdiction of the Third District Court. The Answer and Counterclaim is, moreover, not to be considered a matter of record on this appeal. That was the judgment of this Court when it entered an Order on January 18, 1982, correcting the record on appeal.

POINT IV

THE ORDERS OF THE LOWER COURT VIOLATE THE PURPOSE AND POLICY OF THE UNIFORM CHILD CUSTODY JURISDICTION ACT.

The District Court's assumption of jurisdiction violated the general purpose provisions of 78-45c-1 of the Utah Uniform Child Custody Jurisdiction Act and subverted the policy of the uniform legislation.

The Uniform Act meant to avoid jurisdiction competition in matters of child custody. The Act was designed to deter

the unilateral removal of children from one state to another, in order to obtain custody awards. The legislation attempted to avoid conflict between the courts of different states in matters involving child custody.

The lower court acted in total disregard of the provisions of the Uniform Act, and the mandatory requirements of the new law were violated with impunity. The rulings of the court encouraged jurisdiction competition and created a judicial conflict that has not been resolved. The lower court failed to facilitate the enforcement of the Colorado Decree. It encouraged the litigation of a custody decision made in Colorado, by the parties, and ratified by the Colorado Court. It violated the policy that favors the court that rendered the original decree, and extended custody determination jurisdiction beyond the parameters of the Act. The court failed to ensure that the litigation take place where the "Family Residence" was, where all of the children and their parents lived together as a family, and where the family shared a social, educational,employment, religious and domestic history.

The parties initially agreed on a forum, Colorado,[9] (R. 7, 8) which was a more appropriate forum than the State

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9. For the legal implications of that agreement, see 78-45c-7 (d).

of Utah was, for the resolution of the pending controversy.[10] If the action of the trial court had not been enjoined by reason of the mandatory provisions of the Uniform Act, the lower court should have declined jurisdiction for reasons related to venue. See: 78-45c-7.

CONCLUSION

The rulings of the lower court should be reversed. A reversal would obviate the necessity for further proceedings dealing with the same subject matter in two separate jurisdictions. A ruling for the Defendant would save time, eliminate expense, reduce inconvenience and avoid the duplication and retrial of the same legal and factual issues. It would also eliminate the jurisdictional conflict that now exists between the courts.

This case raises questions pertaining to the Uniform Child Custody Jurisdiction Act that are of general concern, and the decision may be expected to have broad application. The facts afford the Court an opportunity to uphold the provisions and policy of the Uniform Act.

Respectfully submitted,

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10. At the time the Colorado Decree was entered, the Plaintiff was already a resident and a domiciliary of the State of Utah (R. 7).