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Virginia Rees v. George Archibald : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE

STATE OF UTAH **FILED**

FEB 20 1957

VIRGINIA REES,

Plaintiff and Respondent,

vs.

GEORGE ARCHIBALD,

Defendant and Appellant,

Clerk, Supreme Court, Utah

Case No. 8619

BRIEF OF APPELLANT

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VIRGINIA REES,

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vs.

GEORGE ARCHIBALD,

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BRIEF OF APPELLANT

I.

STATEMENT OF FACTS

The facts giving rise to this action and to the prosecution of this appeal are as follows:

Respondent is assignee of an account incurred at Madison Memorial Hospital in Rexburg, Idaho, as a result of in-

jury sustained by Keith Archibald in an automobile accident. Keith is the minor son of appellant whose custody was awarded to Keith's mother Eva Archibald on Jan. 4, 1946 under a decree of divorce entered in the State of Idaho in the case of Eva Archibald vs. George Archibald, which decree made no provision for support to be furnished by appellant (R 18).

At the time of the accident Keith being 16 years of age was, without the knowledge or consent of appellant, taken to Madison Memorial Hospital, (R 6) whereupon appellant was called to the hospital and was requested by personnel at the hospital to assume the obligation of Keith's being cared for by the hospital which appellant refused to do (R 4). Keith had not been adopted by another prior to the accident (R 5). The decree of divorce entered in said action by which custody of Keith was awarded to his mother was never modified or amended (R 7).

Counsel for appellant and respondent stipulated to the evidence in the case (R 4, 5, 6, 7).

The trial court entered judgment against appellant in the full amount of the claim, being the sum of \$1372.42 principal, \$144.35 interest and \$13.20 costs, for a total sum of \$1529.97 (R 14).

II.

POINTS RELIED UPON

(1) The court erred in finding that the son received reasonable and necessary medical care, and that no part of the charges had been paid.

(2) The court erred in finding that the care and services rendered to the son of defendant (appellant) were

necessary for the preservation of the life and health of the son.

(3) The court erred in denying appellant's motion for dismissal.

(4) The court erred in rendering judgment against appellant.

III.

ARGUMENT

It appears that this case is one of first impression in this state.

Point 1.

THE COURT ERRED IN FINDING THAT THE SON RECEIVED REASONABLE AND NECESSARY MEDICAL CARE, AND THAT NO PART OF THE CHARGES HAD BEEN PAID.

There is no evidence supporting this finding. Appellant through counsel stipulated that the boy was hospitalized at Madison Memorial Hospital as a result of an automobile accident, that he received the medication claimed and that the charges were reasonable for the area (R 4), but the stipulation went no further. There is no evidence to the effect that the services were necessary to the extent that it is claimed they were rendered. Nor is there evidence showing that no part of the charges had been paid. By this argument appellant does not ignore the facts as stipulated to for appellant did not stipulate that medication was necessary to the extent it is claimed it was rendered. The burden of proof was on respondent as to these matters particularly inasmuch as appellant denied the allegations of the complaint paragraph 2 alleging the indebtedness owing by appellant and further

alleging that the services and medication were necessary for the benefit of said minor child (R 1, 2).

In 20 Am. Jur. Sec. 135, page 138, Evidence we find the following statement of the law:

“The fundamental principle is that the burden of proof in any cause rests upon the party who, as determined by the pleadings or the nature of the case, asserts the affirmative of an issue and remains there until the termination of the action.”

foot note 14 to this section cites *Wood v Auburn* 87 Me. 287, 32 A. 906, 29 L.R.A. 376 holding that he who asserts something to be due him, not he who denies a debt, has the burden of judicial action and proof.

Appellant does not here contend that he claims he had paid on the account, his position is that the mother being primarily responsible, having received custody of the boy under the decree of divorce, was first obligated to pay, and no showing was made as to whether any demand had been made upon the mother or whether the mother had paid on the account. This was, as is appellant's position, pre-requisite to any claim or right of action against appellant.

As to the nature of the services rendered by the hospital after appellant had refused to guarantee payment of the account, the account record reflects the fact that the boy remained in the hospital far in excess of two months. Under the circumstances appellant was in no position to consult with representatives of the hospital as to the need or necessity for medication and hospitalization to the extent claimed to have been rendered, the fact is the hospital was in practically the position of having a blank check signed by appellant, provided appellant were to be held on this ac-

count. Nor is there any showing that the mother was consulted as to necessity for the services performed and the expenses incurred. Appellant is mindful of the fact that emergency services come within the implied authority rule, but there is no such showing in this case and if there were the extent of the services for the length of time charged could not be claimed under that rule of law. There is no legal presumption in this case that the services rendered to the extent and in the amount charged were necessary, the presumption of acceptance of benefits does not here apply where one other than he who receives the care is called upon to pay for such services.

Point 2.

THE COURT ERRED IN FINDING THAT THE CARE AND SERVICES RENDERED TO THE SON OF APPELLANT WERE NECESSARY FOR THE PRESERVATION OF THE LIFE AND HEALTH OF THE SON.

The argument contained in our brief under point 1 also applies to point 2. This case might be very different had respondent offered evidence supporting such a finding but there is not a word of evidence to support this finding. Appellant did not stipulate to such evidence nor was appellant requested to so stipulate. It appears that the whole question as to whether appellant can be held liable or whether appellant cannot be held liable for the debt rests on such a finding, but the finding must be supported by the evidence. Of course appellant would not have stipulated to evidence which would have supported this finding, otherwise appellant might have had no defense to the action. Then too, appellant would be entitled to know whether all or what part of the services rendered were claimed to be necessary for the

preservation of the life and health of the son. The record is wholly deplete of evidence showing the necessity for keeping the boy in the hospital for over two months time.

Appellant is mindful of the law and authorities which, under ordinary circumstances, make a father liable for the necessities of life furnished his children even though the father is deprived of their custody by a decree of divorce. The evidence in this case does not bring us within the rule laid down by such authorities. Even under those cases decided in jurisdictions which have been called upon to decide cases where necessities are involved without question as to whether the claim is or is not for necessities of life, we find courts holding that an independent action cannot be brought against the father. Such a decision is handed down by the courts of Michigan.

In *Judson v Judson*, 171 Mich. 185, 137 N.W. 103 wherein the court held that a mother who obtained a decree of divorce in another state awarding the custody of a child to her, without providing for their support or for alimony, cannot maintain a suit in equity in Michigan to compel the father to make provision for the future support of herself and the child.

In 20 ALR page 827 we find the following:

“In *Burritt v Burritt* (1859) 29 Barb. N.Y. 124, denying recovery in an action by the mother against the father for the support of an infant child whose custody had been awarded to the mother by a decree of divorce in another state, which made no provision for the support of the child, the court said that the award of the care and custody of the child to the mother must be presumed to carry with it the obligation to support, in the absence of evidence to the contrary; or, at least, to

relieve the father from the obligation to furnish such support upon the call of the mother; *and that to make the father liable in such case there must be special circumstances averred in the complaint or appearing in the evidence, from which the obligation must arise or may be reasonably inferred.*" (Italics ours)

Point 3.

THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR DISMISSAL.

Upon the conclusion of the stipulation of counsel for respondent and appellant and upon respondent resting, appellant moved for a dismissal on the grounds of lack of evidence to prove respondent's case. Appellant pointed out to the court the failure on the part of respondent to show that the mother of the child who was awarded custody had failed and refused to pay the claim or that she had made payment thereon and that demand for payment had first been made upon her. Appellant was entitled to know whether demand had been made upon the mother for payment and whether if demand had been made the mother had failed and refused to pay the account, or whether the mother had made some payment on the account.

In *Harris v Harris*, 5 Kan. 46 it was held that when a woman is divorced from her husband, the latter is not exclusively liable for the support of their children. The duty is as much the mother as the father.

Appellant's motion to dismiss also pointed out the fact that there was no modification of the decree of divorce. There was no showing that there was no other source, except through the father, for the payment of said account, no property real or personal from which payment might be had.

In *Dodge v Keller* (1927) 29 Ohio App 114, 162 NE 750, Annotated 7 ALR2d at page 494 we find the following:

“It was ruled that a divorced father was not liable to an undertaker for the burial expenses of his minor child, the undertaker having been engaged by the mother without the father’s request or subsequent promise to pay for his services, where the divorce decree required the father to pay \$1,000 in stated instalments, for the support of the child, whose custody had been awarded the mother, and the father was faithfully performing this obligation at the time the child died. The court indicated however, that the proper remedy for the mother would be for her to go into the court which had rendered the divorce decree, and ask for a modification of the same.”

It appears that the courts of New York have followed this same principal requiring a modification of the decree of divorce in the case of *Gellert v Gellert*, 219 App Div 737, 219 NYS 820 and in *Simon v Simon*, 170 Misc 420 10 NYS2d 577.

Point 4.

THE COURT ERRED IN RENDERING JUDGMENT AGAINST APPELLANT.

We are mindful of the fact that it appears from the majority rule from other jurisdictions involving the question of support for minor children in a case of divorce between parents where the decree makes no provision for support on the part of the father and complete custody is awarded to the mother, the father is not relieved from support. We have no quarrel with such cases, but we contend the instant case is not such a case. None of the cases so far as we have been

able to find and they appear to be few in number are predicated on facts similar to those of the instant case. Here we have the hospital running up a very sizeable account after the father of the boy had advised its agents that he would not be responsible for payment and then asking the court to hold that the whole of this account comes within what is generally designated common necessities of life.

A distinction might be made in those cases where a child whose custody has been awarded to the mother under a divorce decree, becomes ill or becomes in need of dental care or requires the common necessities of life, and a case such as we have here where the father having been deprived of custody and the society of the boy, has no control whatsoever over the boy who is permitted by the mother who is awarded custody and control to place himself in a position which results in injury to the boy. The father in this case cannot and should not be held under a guise of such care being within those cases requiring the father to provide common necessities of life.

Of course medical care and hospital care under certain conditions are necessities of life but when the father has no control over the instrumentality which brings about the condition requiring such care, then we say it comes within an exception to the general rule.

Now let us examine the account on which the claim is based. It is evident therefrom that the boy was hospitalized from November 18th, 1954 to Feb. 23, 1955 a period of in excess of two months. How much of that time was actually necessary for the boy to remain at the hospital? Had the mother not expected the father to pay the bill would she not have taken the boy to her home and nursed him there?

Or had the boy been under the custody of the father might the father not have taken the boy to his home and nursed him there. This fact is forcefully evident from the charges for surgery as reflected by the account, once on Nov. 18, 1954 the day of entry and once on Jan. 14, 1955 when it appears a cast was furnished. At any rate a part of the time of convalescing might have been at home and not at the hospital.

CONCLUSION

The respondent having failed to show that the services rendered were necessary for the preservation of the life and health of the son, that no source of payment other than from the appellant was available, that demand had been made on the mother of the boy and that the mother had failed and refused to pay the account, the judgment should be reversed.

Wherefore appellant prays that the judgment entered herein be vacated and that appellant have judgment for his costs including costs of this appeal.

Respectfully submitted,
Milton V. Backman of
Backman, Backman & Clark,
Attorneys for defendant and appellant.

Received copies of the foregoing Brief of Appellant
this day of February, 1957.

Attorney for Plaintiff and Respondent.