

1959

John Shaw v. Frances Shaw Pilcher and Walter F. Pilcher : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Shaw v. Pilcher*, No. 8991 (Utah Supreme Court, 1959).
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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

APR 6 - 1959

JOHN SHAW,

Plaintiff and Appellant,

vs.

FRANCES SHAW PILCHER and
WALTER F. PILCHER,

Defendants and Respondents.

Clerk, Supreme Court, Utah

Case No.
8991

BRIEF OF RESPONDENT

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN SHAW,

Plaintiff and Appellant

vs.

FRANCES SHAW PILCHER and

WALTER F. PILCHER,

Defendants and Respondents :

)
:
)
:
) Case No.
: 8991

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

Respondents essentially agree with the statement of facts in appellant's brief. However, it is to be noted that appellant has digressed from the facts which are actually in the record, i. e. on page 4 of appellant's brief it is pointed out that respondents have left Utah and are now residing in California. Respondents do not contest this going

beyond the record in the statement of facts, but because appellant has done so respondents feel it necessary to point out the following facts: (1) Appellant shows his residence to be California
lant's petition/(Tr. 39), and (2) after the dismissal of this present action by our District Court the appellant instituted an action against respondents in the State of California wherein the appellant is attempting to obtain the care, custody and control of Candace Lee Pilcher. Respondents were served with summons in this action and have employed an attorney to enter an appearance for them.

In addition, respondents would add the following facts: the petition filed by appellant was filed in the original probate proceedings with the same probate number as the adoption proceedings. (Tr. 39); no filing fee was paid by appellant; and a temporary restraining order was obtained ordering the appellant to refrain from acts of harrassment upon respondents. (Tr. 15 & 16) Respondent's

order (Tr. 17) and the instituting of an action against them in California show that this proceeding is more in the nature of harassment by the appellant than a serious attempt to obtain custody of the minor child of the parties.

STATEMENT OF POINTS

I. The lower court correctly held that appellant had not followed Rule 60-B of the Utah Rules of Civil Procedure in attempting to vacate the adoption, in that;

1. The procedure commenced by appellant was not an independent action within the meaning of Rule 60-B.

2. The decision of the lower court is not a strict construction of Rule 60-B, but rather a correct interpretation of a rule which expresses the policy of finally concluding litigation which is essential to the efficient administration of justice.

II. The Utah Rules of Civil Procedure should be followed unless satisfactory reasons are advanced for not complying with them.

III. Respondents could be adversely affected by the procedure adopted by appellant in that a decision of the trial court on the merits might not be held *res judicata* in another jurisdiction if the same question were raised.

IV. The forum of convenience for both parties to this action is the State of California.

V. Appellant never brought the reason for his filing this appeal to the attention of the trial court.

ARGUMENT

I. THE LOWER COURT CORRECTLY HELD THAT APPELLANT HAD NOT FOLLOWED RULE 60-B OF THE UTAH RULES OF CIVIL PROCEDURE IN ATTEMPTING TO VACATE THE ADOPTION, IN THAT;

1. The procedure commenced by

appellant was not an independent action within the meaning of Rule 60-B.

Rule 60-B of the Utah Rules of Civil Procedure expressly distinguishes between independent actions and motions. The rule provides that a motion must be made not later than three months after the judgment, order or proceeding was entered in order to relieve a party on the basis of fraud, misrepresentation or other misconduct of an adverse party. The rule also expressly states that it does not limit the power of the court to entertain an independent action to relieve a party for fraud upon the court.

Appellant admits that more than seventeen months had expired when he sought relief from the order of adoption. (Appellant's Brief Pg.2 &3) Therefore, appellant's procedure was clearly expressed in Rule 60-B to be an independent action for relief from the order of adoption.

Appellant's brief states that the lower

court's holding is contrary to reason and is in direct conflict with the unanimous declarations of the courts and treatise writers. (Pg. 10) In opposition to this statement respondents cite Assmann v. Fleming, 159 F. 2d 332, (C.C.A. 8th) which quoted from Rule 60-B of the Federal Rules of Civil Procedure. The court noted that the proceeding by motion to vacate a judgment is not an independent suit in equity but a legal remedy in a court of law. The case of Maryland Casualty Company v. Waldrep, 126 F.2d 555, held that a motion was not in the nature of a new or independent action or proceeding but merely an additional step in the pending proceeding. Likewise, in the Ohio case of in Re Vanderlit's Estate, 12 Ohio Supp. 123, the court pointed out that a proceeding to vacate or set aside an order or judgment filed in an original suit is not an action in equity.

Respondent distinguishes the two federal

cases cited by appellant's brief in that these cases

were decided primarily because of the nomenclature used. In addition, federal Rule 60-B is more liberal than Utah Rule 60-B. It provides that a motion may be made not more than one year after the entry, in contrast with the Utah rule allowing only three months, and it provides an additional situation where a court may set aside a judgment through the procedure of an independent action.

The lower court's interpretation is in accord with the common understanding of the term "independent". Independent means not resting on something else for support, not dependent, self-sustaining, not subject to control, restriction, modification or limitation from a given outside source. Hoagland v. Rost, 126 F. Supp. 232; Yenter v. Baker, 248 P. 2d 311, 126 Colo. 232.

Thus the procedure commenced by appellant was not an independent action within

2. The decision of the lower court is not a strict construction of Rule 60-B, but rather a correct interpretation of a rule which expresses the policy of finally concluding litigation which is essential to the efficient administration of justice.

The case of Warren v. Dixon Ranch, 260 P. 2d 741, had this to say about Rule 60-B of the Utah Rules of Civil Procedure; "The allowance of a vacation of judgment is a creature of equity designed to relieve against harshness of enforcing a judgment, ***. Although an equity court no longer has complete discretion in granting or denying relief it may exercise wide judicial discretion in weighing the factors of fairness and public convenience, and this court on appeal will reverse the trial court only where an abuse of this discretion is clearly shown."

In a dissenting opinion in the United States Supreme Court case of Klapprott vs. U. S., 335

opinion Chief Justice Vinson and Justice Jackson joined, noted that in attempting to obtain relief from a judgment the party must qualify under one or more of the provisions of Rule 60-B of the Federal Rules of Civil Procedure. Justice Reed stated that he did not think that the petition filed in this case met the requirements of Rule 60-B for vacating a judgment. Justice Reed had this to say about the rule: "The limitations imposed by Rule 60 (B) are expressions of the policy of finally concluding litigation within a reasonable time. Such termination of lawsuits is essential to the efficient administration of justice."

II. THE UTAH RULES OF CIVIL PROCEDURE SHOULD BE FOLLOWED UNLESS SATISFACTORY REASONS ARE ADVANCED FOR NOT COMPLYING WITH THEM.

In the case of Holton v. Holton, 243

P. 2d 438 the respondent moved to dismiss an appeal because the appellant had failed to serve

upon him a designation of record within the time required by Rule 75A of the Utah Rules of Civil Procedure. The designation of record had been filed with the District Court. The court dismissed the appeal stating: "Although the New Rules of Civil Procedure were intended to provide liberality in procedure, it is nevertheless expected that they will be followed, and unless reasons satisfactory to the court are advanced as a basis for relief from complying with them, parties will not be excused from so doing."

The Holton Case was followed in McCall v. Kendrick, 2 Utah 2d 364, 274 P. 2d 962. In this case the court refused to consider unobjected to instructions or refusals of a request for instructions where the plaintiff had failed to comply with Rule 51 of the Rules of Civil Procedure. The court said: "Normally the rules themselves must govern procedure and are to be followed unless some persuasive reason to the contrary invokes

the discretion of the court to extricate a person from a situation where some gross injustice or inequity would otherwise result. The burden of showing special circumstances which would warrant a departure from the rule rests upon the party seeking to vary it."

III. RESPONDENTS COULD BE ADVERSELY AFFECTED BY THE PROCEDURE ADOPTED BY APPELLANT IN THAT A DECISION OF THE TRIAL COURT ON THE MERITS MIGHT NOT BE HELD RES JUDICATA IN ANOTHER JURISDICTION IF THE SAME QUESTION WERE RAISED.

The two federal cases cited by appellant limit their liberal construction of Rule 60-B to the situation where the other party is not adversely affected by the procedure used. Appellant has instituted an action against respondents in the State of California. Rule 60-B of the Federal Rules of Civil Procedure is based upon

Section 473 of the Code of Civil Procedure of

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California. Fiske v. Buder, 125 F 2d 841, 844.

Cal Jur 2d Volume 29 Sec. 112 at page 24 states

"A judgment may be attacked in four ways:

- (1) By motion for a new trial; (2) By appeal;
- (3) By motion for a relief pursuant to Code of Civil Procedure, Sec. 473; and (4) By independent suit in equity."

California has long recognized a distinction between procedures No. 3 and 4 above. In the case of Ede V. Hazen, 61 Cal. 360, the plaintiff filed a complaint commencing an independent action for relief from a judgment. The court held that the assistance of equity in an independent suit could not be invoked by plaintiff so long as the remedy by motion exists. In the case of Sontag v. Denio, 23 Cal App. 2d 323, 73 P. 2d 248, the court said: "The remedies for relief from a judgment procured by alleged fraud provided by Sec. 473, as amended, and an ordinary suit in equity are entirely distinct and

cumulative. The failure to resort to the first mentioned remedy does not necessarily bar the right to maintain an equitable action under the circumstances of this case."

Likewise the case of Amestoy Estate Co. v. The City of Los Angeles, 5 Cal. App. 273, involved an action to vacate a judgment; the court held that the complaint may disclose a ground for relief under Sec. 473, yet when the time for the motion elapses no cause of action for relief will be granted in equity. The court said: "A different rule obtains when proceedings are under Sec. 473, Code of Civil Procedure. ***The broad provisions of that section are available, however, only to those seeking relief thereunder. It cannot be construed as an attempt to broaden the powers of a court of equity in determining its jurisdiction in an independent proceeding. The reason for applying different rules is obvious. In one case, the motion is directed to

the discretion of a trial court, within a limited time and before the judgment has become final; in the other, it is the exercise of equitable powers by an independent court based upon established rules."

The Supreme Court of California has followed the Amestoy Case in the case of Wattson v. Dillon, 6 Cal. 2d 33 wherein it said: "The application for relief under this statute is addressed to the discretion of the trial court within a limited time and before the judgment has become final. The institution of an independent action to vacate a judgment calls for the exercise of equitable powers by an independent court based upon established rules."

Thus it can be seen that the State of California treats the proceeding by way of a motion distinct from the proceeding by way of an independent suit when a judgment is being attacked. One is directed to the discretion of

a trial court, and the other is based upon equitable powers of an independent court. If respondents were to succeed in the trial court on the merits under the procedure used by appellant, the courts of California might still allow appellant to pursue the independent suit in equity provided by California law in order to set aside the Utah adoption. Indeed, in the California case of Merriman v. Walton, 105 Cal 403, 38 P. 1108, the plaintiff had made a motion to set aside a judgment which he alleged was obtained by fraud and the trial court denied relief. The California Supreme Court said: "The denial of that court to grant relief gives to the court of equity the same authority to interfere as if the other court was powerless to render aid."

Respondents do not argue that the California court would necessarily rule that a decision of our trial court in this matter on the merits would not be res judicata. However, the fact

that the above cases show that California treats the motion and the independent action as a separate and distinct procedures--the motion being directed to the discretion of the trial court--and the independent action calling for the exercise of equitable powers--raises the possibility that respondents could have to fight this matter twice on the merits under the procedure used by appellant in the State of Utah. (Once in Utah and once in California which might construe the present procedure used by appellant as similar to their motion under § 473). This possibility with its resulting harassment and cost of litigation thrust upon respondents is of a sufficiently adverse nature that appellant should not be relieved from complying with Rule 60 (b).

IV. THE FORUM OF CONVENIENCE
FOR BOTH PARTIES TO THIS ACTION IS THE
STATE OF CALIFORNIA.

Both appellant and respondents

presently reside in the State of California.

Appellant has instituted an action against respondents there in which he seeks to gain the care, custody and control of the minor child.

Under the California procedure pointed out in Point No. III of this brief, appellant will be in a position to ask for everything that he is seeking in this suit. California is the forum of convenience for both of the parties. Any further action by appellant in Utah courts is in the nature of harassment and constitutes expensive litigation for the respondents.

V. APPELLANT NEVER BROUGHT
THE REASON FOR HIS FILING THIS APPEAL
TO THE ATTENTION OF THE TRIAL COURT.

Appellant's brief states: "When appellant attempted to institute a new independent action it was discovered that respondents had left Utah and were residing in California. Since it was thus impossible for appellant to obtain

new service of process over respondents, the present appeal was taken challenging the lower court's construction of Rule 60-B."

Appellant never brought the above fact to the attention of the trial court. The place of respondent's residence is not in the record. Appellant now asks this court to consider a matter which was not presented to the trial court. In all fairness to the trial court this court should not reverse a decision where the reason for the appeal was never made known to the trial court.

CONCLUSION

It is respectfully submitted that the trial court's dismissal of appellant's petition should be affirmed by this court.

Respectfully submitted,

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