

1965

Dennis Earl v. Lanette Winder Earl : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

DENNIS EARL,

Plaintiff-Respondent,

vs.

LANETTE WINDER EARL,

Defendant-Appellant.

}
Case No.
10313
}

BRIEF OF APPELLANT

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STATEMENT OF THE KIND OF CASE

This is an action for divorce brought by the plaintiff husband against the defendant wife. The defendant filed an Answer and Counterclaim requesting custody of the child, alimony and support money and property distribution.

DISPOSTION IN LOWER COURT

Plaintiff and defendant in this case acting by their attorneys of record made an appearance on the date set for trial and stipulated that the plaintiff could be granted

a divorce provided the grounds thereof were approved by the court and pursuant to stipulation made orally and into the record, the substance of which is contained in the Minute & Entry & Order dated April 8, 1964, a copy of which is on file in this case. The plaintiff testified and was granted a divorce pursuant to the said stipulation. Plaintiff was represented in this matter by John Moore Williams, who died before a written Decree was prepared and signed. Subsequent thereto, plaintiff employed other counsel, namely, Robert McRae, who filed the Motion to Amend the Findings and Conclusions as represented by the Minute Entry. Upon hearing said Motion the proposed Findings & Conclusions were amended by the court and the Decree as finally entered granted to the defendant support money in the amount of \$50.00 per month only so long as the defendant was a resident of the State of Utah, and made the minor child of the parties available to the plaintiff for visitation purposes. The original stipulation was further amended, reducing defendant's alimony to \$50.00 per month for a period of six months. Subsequent to the entry of the Decree, defendant moved the court for a rehearing and written briefs were submitted to the court on the point of the right of the court to deny the defendant support money so long as the child was outside of the State of Utah. Defendant's motion for reinstatement of the support money was denied.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the Decree of the court as finally entered and reinstatement of the Decree pursuant to the oral stipulation of the parties in open court.

Defendant further seeks an order granting reasonable attorney's fees to her for the use and benefit of her attorney for the bringing of this appeal.

STATEMENT OF FACTS

Plaintiff and defendant are a young couple married in American Fork, Utah, June 7, 1962. One child was born as issue of the marriage, Timothy Lee Earl, age one at the time the divorce was granted. Plaintiff and defendant separated sometime before the divorce was granted and defendant and minor child were and are receiving aid from Salt Lake County Welfare. Plaintiff represented during discussion just prior to the divorce that he was to be employed by U. S. Steel, making in excess of \$400.00 per month. Stipulation of the parties entered into was fair and reasonable under the circumstances. The only fact shown at the time of plaintiff's petition for amendment of the Findings & Conclusions as evidence by the Minute Entry of the court, were an admission by defendant's counsel that defendant had moved to Springfield, Missouri with her parents, since the hearing of the divorce. The plaintiff's motion to amend Findings of Fact & Conclusion of Law was not accompanied by any affidavit as required by Rule 59 (c), URCP, nor was any additional evidence taken upon which to support an amended findings and judgment.

ARGUMENT

Point 1. The unsupported statements of plaintiff's counsel, made in his motion for amendment of Findings of Fact & Conclusions of Law, and proposed Decree of

the court, are not sufficient upon which to set aside the stipulation of the parties. URCP 59 (a) (c). Subsection (c) of this rule requires that such a motion be supported by affidavit.

Point 2. If the admission by defendant's counsel that the defendant had moved to Missouri with her parents was the basis for the court setting aside the stipulation of the parties and amending the Findings and Decree, to deny the defendant child support for the time she was outside of the State of Utah, such action by the trial court is contrary to the law as expressed by this court in several cases. *Baker vs Baker*, 119U 37, 224 P2d 192; *McLure vs. Dowell* 15U 2d 324, 392 P2d 624.

There was no statement in the Minute Entry or otherwise that the defendant was barred or in any manner ordered by the court to remain in the State of Utah.

To relieve the father of the duty to support his children is against public policy. 39 AM JUR, *Parents & Child*, Section 42, *Murrey vs Murrey*, 216 Cal. 707, 16 Pac. 2d, 741.

The duty of support is independent of the right of visitation. *Addey vs Addey*, 240 Iowa 265, 36 NW 2d, 352; *Bartlett vs Bartlett*, 175 Or. 215, 152 P 2d 402.

Where the Decree is silent on the removal of the child from the State, or where the party is not strictly prohibited from removing the child from the State, but grants the opposing party rights of reasonable visitation, this does not by implication prohibit the removal of the child from the State. *Barnes vs Lee*, 128 Or. 655, 275 P 661 annotated 154, ALR 553.

Point 3. If the removal of a child from the state of common habitat is sufficient grounds to relieve a father of the duty to support said child then some interesting consequence would follow. The Uniform Reciprocal Enforcement of support act would become valueless in many cases. All a father would have to say is his defense was that the wife removed the child from the state. On this basis no order of support could be entered against him. This would be a good defense whether or not a divorce had been entered or even if the parties were never married. It would further be a good defense regardless of the circumstances prompting the move by the wife and/or mother.

The reciprocal support act was passed by all the states after much effort and to meet a pressing problem. The only possible way to enforce the father's duty to support his children is to make it absolute.

It would further make those states to which a Utah resident might send a request for help under the reciprocal support act most unwilling to cooperate, as the chances of one of their residents obtaining similar relief from a father residing in Utah could be easily thwarted.

Point 4. Defendant and appellant may be granted counsel fees which may be determined in the supreme court. *Dahlberg vs. Dahlberg* 77U 157, 292 P 214. Appellants should be allowed the minimum fee of \$500.00 recommended by the Utah State Bar Advisory Hand Book for appeals to the Supreme Court for use and

benefit of her attorney in this section if she prevails. Parish vs. Parish 84 U 390, 35 P 2d 999.

CONCLUSION

For the foregoing reasons, judgment of the trial court should be reversed and the trial court order to modify the Decree to reflect the original stipulation of the parties granting to the defendant and appellant the benefits accorded her in said stipulation and in the original judgment as evidenced by the Minute Entry of the court, allowing in substance that the defendant receive 50.00 a month alimony until such time as she can become employed and \$50.00 a month child support for said child, and property settlement. Defendant and appellant should further be allowed the counsel fees as recommended the Utah State Bar for this appeal.

Respectfully submitted,

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