Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1965

Dennis Earl v. Lanette Winder Earl : Brief of Respondent

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.Robert M. McRae; Attorney for Respondent

Recommended Citation
Brief of Respondent, *Earl v. Earl*, No. 10313 (1965).
https://digitalcommons.law.byu.edu/uofu_sc2/3580

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT

of the

STATE OF UTAH

UNIVERSITY OF UTAH

OCT 15 1965

LAW LIBRARY

DENNIS EARL,
Plaintiff-Respondent,

vs.

LANETTE WINDER EARL,
Defendant-Appellant.

Case No. 10313

BRIEF OF RESPONDENT

Appeal from the ruling of the Third Judicial District Court for Salt Lake County

Honorable Joseph G. Jeppson, *Judge*

FILED
MAY 27 1965
Clerk, Supreme Court, Utah

ROBERT M. McRAE,
516 Boston Building
Salt Lake City, Utah
Attorney for Respondent

RICHARD WOOLEY
Atlas Building
Salt Lake City, Utah
Attorney for Appellant

TABLE OF CONTENTS

STATEMENT OF THE KIND OF CASE 1

DISPOSITION IN THE LOWER COURT 1

RELIEF SOUGHT ON APPEA L 2

STATEMENT OF FACTS 3

STATMENT OF POINT S 5

POINT I—ALLEGATIONS OF AN ATTORNEY DULY SIGNED BY HIM NEED NOT BE SUPPORTED BY AN AFFIDAVIT UNLESS THE RULES OF PROCEDURE SO PRESCRIBE AND THE MOTIONS FILED BY THE RESPONDENT IN THE LOWER COURT, AND THE RELIEF GRANTED THEREUNDER, ARE NOT CONTRARY TO THE RULES OF PROCEDURE. 6

POINT II—IT IS WITHIN THE DISCRETION OF THE TRIAL COURT TO MAKE SUCH REASONABLE AND PROPER RESTRICTIONS ON VISITATION RIGHTS AND SUPPORT PAYMENTS AS MAY BE JUST AND PROPER UNDER THE CIRCUMSTANCES. 8

POINT III—ATTORNEY'S FEES SHOULD BE DENIED APPELLANT BY THIS COURT. 12

CONCLUSION 13

CASES CITED

Baker v. Baker, 119 Utah 37, 224 P.2d 192 .... 8, 9

Dahlberg v. Dahlberg, 77 Utah 157, 272 P. 214 12

Daly v. Daly, 39 NJ Super. 117, 120 A.2d 510, affirmed 21 NJ 599, 123 A.2d 3 11

Jackson v. Jackson (1960), 107 App. DC 255, 276 F.2d 501, Cert. denied, 364 US 849, 5. L. Ed. 2d 73, 81 Sup. Ct. 94 11

Larsen v. Larsen, 5 Utah 2d 224, 227, 300 P. 2d 596 9

McClure v. Dowell, 15 Utah 324, 392 P.2d 624 10

Peters v. Peters, 15 Utah 2d 413, 416, 394 P.2d 71 12

Price v. Price, 4 Utah 2d 153, 154, 289 P.2d 1044 9

Richards v. Richards, 5 Misc. 2nd 46, 157 NY Supp. 2nd 874 11

Riding v. Riding, 8 Utah 2d 136, 139, 329 P.2d 878 9

IN THE SUPREME COURT

of the

STATE OF UTAH

DENNIS EARL,

Plaintiff-Respondent,

vs.

LANETTE WINDER EARL,

Defendant-Appellant.

Case No. 10313

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

This is an action in which a divorce was brought by the plaintiff husband against the defendant wife. A stipulation was entered into for purposes of settling the divorce action. The matter was heard in the lower court without findings and a decree having been entered.

DISPOSITION IN THE LOWER COURT

The parties and their attorneys of record on the date

set for trial appeared and stipulated as to the distribution of the property, the custody of the child involved, and generally, as to visitation rights and support for the child, as well as alimony, and that the plaintiff could be awarded a decree of divorce upon proper testimony to the trial judge evidencing that grounds for same existed. The respondent was granted a divorce and a minute order was entered with the clerk of the Third Judicial District Court, dated April 8, 1964 (R. 12). Subsequent thereto and prior to filing the findings and decree, plaintiff's then attorney, John Moore Williams, passed away after which time present counsel was retained. Alternatie motions were filed pursuant to Rules 59, 60 and 61 of the Utah Rules of Civil Procedure. The basis of these motions was to seek permission of the court to file findings and a decree based on respondent's understanding of the explicit terms of the stipulation and to seek relief on the vagueness of certain points of the minute order not explicitly set forth. In view of wife's leaving the State of Utah prior to hearing, the plaintiff husband also sought discretionary relief on the visitation rights, which was granted in the form of abatement of support.

From granting of this motion, defendant has appealed.

RELIEF SOUGHT ON APPEAL

Respondent seeks to uphold the ruling of the lower court in conditionally denying appellant child support,

and further petitions this court for a denial of appellant's attorney's fees.

STATEMENT OF FACTS

Respondent, through attorney John Moore Williams, commenced an action for divorce against his wife, appellant herein, said action being filed with the Clerk of the Third Judicial District Court in and for Salt Lake County, State of Utah, on August 29, 1963 (R 1 & 2). In this divorce complaint it was alleged that the defendant wife was an unfit person to have the care, custody and control of the minor child who at that time was under the age of one year. Respondent further made the necessary jurisdictional allegations, none of which are contested, and sufficient allegations for a divorce, also none of which are contested as failing to state a cause of action (R 3 & 4). An answer and counter-claim was filed by appellant seeking custody of the minor child, attorney's fees, alimony and support money (R 3 & 4). These allegations were denied (R 6) and thereby, the issues were formulated. The case was set down for trial on the 8th day of April, 1964, with both parties causing subpoenas to be issued for purposes of trial (R 10, 11, & 13). At the time of trial plaintiff appeared in open court with counsel and the defendant-appellant did not appear but was represented in open court by present counsel. It was stipulated that appellant's counter-claim could be withdrawn, that the default of appellant be entered, and plaintiff-husband be allowed to give such testimony

as would substantiate the awarding of a decree of divorce to plaintiff. A brief entry order summarizing plaintiff's testimony was entered stating: "Plaintiff be granted a decree of divorce. Plaintiff is ordered to pay Defendant $50.00 per month alimony and $50.00 per month child support; Defendant to have custody of child, Plaintiff to have visitation rights . . ." Defendant was awarded the furniture and each was awarded their personal belongings as stipulated (R 12). Subsequent thereto, and on the 31st day of July, 1964, respondent's present counsel caused to be filed alternative motions requesting a new trial, a further trial, or in the alternative to be relieved from the findings or order of the court, and noticed the same down for hearing on August 18, 1964, at the hour of 2:30 p.m. before the trial Judge, Joseph G. Jeppson. (R 15, 16, 17 & 18). These motions were as stated, based on plaintiff's understanding of the entire terms of the stipulated evidence. Apparently, those portions of resondent's motions to be relieved from the judgment were denied on the basis that in fact no final judgment had been entered. Relief was granted respondent pursuant to the allegations contained in the uncontroverted motions of the plaintiff-respondent, and leave to file formal findings of fact, conclusions of law and a decree of divorce was afforded plaintiff-respondent. These amended and elaborated on the minute order to provide for alimony be awarded defendant-appellant for a period of six months, and child support is to cease if the minor child is removed from the State of Utah (R 19 sic. The entered order dated August 18, 1964, states that alimony is to

cease if the child is removed, and the total time for alimony to run is for a period of six months. This is erroneous in that the entered order should have stated that *child support* is to cease if the child is removed from the State of Utah, and is correct in that the entered order should have stated that alimony is to run only for a period of six months. This fact is not contested in appellant's brief and is a clerical error.)

Findings of fact, conclusions of law, and a decree of divorce were duly entered, detailing the Entry Order (R 20, 21, 22, 23 & 24). Defendant-appellant filed a motion to amend findings of fact, conclusions of law and decree (R 25, 26) which said motion was apparently intended solely for the purpose of considering the child support question while the child was out of the State of Utah. This assumption is derived from defendant's drafting of the order of denial which covers only this point (R 27). From this denial, in the foregoing respect, defendant appeals.

POINTS ON APPEAL

POINT I

ALLEGATIONS OF AN ATTORNEY DULY SIGNED BY HIM NEED NOT BE SUPPORTED BY AN AFFIDAVIT UNLESS THE RULES OF PROCEDURE SO PRESCRIBE AND THE MOTIONS FILED BY RESPONDENT IN THE LOWER COURT, AND THE RELIEF GRANTED THEREUNDER, ARE NOT CONTRARY TO THE RULES OF PROCEDURE.

POINT II

IT IS WITHIN THE DISCRETION OF THE TRIAL COURT TO MAKE SUCH REASONABLE AND PROPER RESTRICTIONS ON VISITATION RIGHTS AND SUPPORT PAYMENTS AS MAY BE JUST AND PROPER UNDER THE CIRCUMSTANCES.

POINT III

ATTORNEY'S FEES SHOULD BE DENIED APPELLANT BY THIS COURT.

ARGUMENT

POINT I

ALLEGATIONS OF AN ATTORNEY DULY SIGNED BY HIM NEED NOT BE SUPPORTED BY AN AFFIDAVIT UNLESS THE RULES OF PROCEDURE SO PRESCRIBE AND THE MOTIONS FILED BY RESPONDENT IN THE LOWER COURT, AND THE RELIEF GRANTED THEREUNDER, ARE NOT CONTRARY TO THE RULES OF PROCEDURE.

Respondent's alternative motions were filed pursuant to Rule 59, 60 and 61, URCP. It should be noted that a motion to be relieved of a judgment filed pursuant to Rule 59 (a)(7) pertaining to excessive damages does not need to be supported by an affidavit; likewise clerical errors in judgment or orders may be corrected upon motion of either party without affidavit pursuant to Rule 60(a) URCP which is also part of plaintiff's motion to amend the minute order, and, like motions

made pursuant to Rule 60(b), the same do not require supporting affidavits. Rule 61 does not require respondent's motion in the lower court to be supported by affidavit. Since Rule 11, URCP requires that all pleadings be signed by an attorney licensed to practice law in the State of Utah, and "the signature of an attorney constitutes a certificate by him that he has read the pleadings; that to the best of his knowledge, information and belief, there is good grounds to support it, and that it is not interposed for delay," the trial court in its discretion could consider the uncontroverted allegations as fact. Nowhere in the record is there a denial of the allegations set forth in plaintiff's alternative motions to amend the minute order. Inasmuch as the minute order of August 18, 1964 (R 19) indicates that plaintiff appeared in person and with counsel and the defendant did not appear but did appear by counsel and the court under its broad evidentiary powers when sitting without a jury ordered that alimony (sic. child support) ". . . is to cease if the minor child is removed from the State of Utah. . . .", it appears to respondent that the appeal point raised on this matter in appellant's brief is now moot as to what evidence Judge Jeppson based his decision on, especially when appellant's counsel concedes the fact of absence of his client from Utah.

POINT II

IT IS WITHIN THE DISCRETION OF THE TRIAL COURT TO MAKE SUCH REASONABLE AND PROPER RESTRICTIONS ON VISITATION RIGHTS AND SUPPORT

PAYMENTS AS MAY BE JUST AND PROPER UNDER TH CIRCUMSTANCES.

It is conceded that the defendant-wife removed herself and the minor child of the parties from the State of Utah shortly after the stipulated hearing on the decree of divorce and further that she has continually remained outside the State of Utah. There is no evidence that at any time since the hearing in this case on the numerous motions filed by plaintiff-respondent in July, 1964, the wife was ever within the State of Utah or that she ever afforded the father of the child rights of visitation; likewise, there is no evidence that appellant-wife has at any time petitioned the District Court, in anticipation of moving residency, for a modification of the stipulated divorce settlement or for a modification of the formal findings of fact or decree so as to provide for explicit visitation rights with the contemplated moving from the State of Utah, thereby prohibiting, for practical purposes, any visitation rights by the father of the minor child.

On the contrary, there is evidence in this case that the plaintiff-husband in the lower court timely attempted, while the wife was still before the court, though residing outside of Utah, to petition the trial court for relief after the changed visitation circumstances became known. This court has held in the case of *Baker v. Baker,* 119 Utah 37, 224 P.2d 192, that it is incumbent upon a party to seek the aid of the court to enforce proper conduct or to modify a decree rather than to arbitrarily act without

the approval of the court. Respondent submits that the alternative motions filed were for that purpose and in the absence of any other alternative propositions for handling the visitation rights of the father, none of which are borne out in the record, it was within the jurisdiction and prerogative of the trial judge to grant temporary relief from support payments at this time as compensation to the father for lack of rights of visitation and enjoyment of offspring. Further, in the instant case, it should be pointed out to the court that there is no evidence of wrongdoing on the part of the respondent-father and that he qualifies in every respect under the standards and criteria set down in the Baker case, supra, at page 39.

It is interesting to note from the numerous cases cited by appellant, and the sequel cases thereto not cited, that none are close in point with the instant case except *Baker v. Baker,* supra. The case of *Price v. Price,* 4 Utah 2d 153, 154, 289 P.2d 1044, holds for the proposition: "Future child support effectively cannot be the subject of bargain and sale." In that case the husband had tried to settle the back and future support obligation in a lump sum of money which was the same sum of money ordered paid the plaintiff in the original decree of divorce. This rule of law was restated in the case of *Larsen v. Larsen,* 5 Utah 2d 224, 227, 300 P.2d 596. In the case of *Riding v. Riding,* 8 Utah 2d 136, 139, 329 P.2d 878, this court again relied on the case of *Price v. Price*, supra, in interpreting an order relieving a father from

all future support obligations as being void if the same were to be construed as a final and unconditional release. Another case relied on by appellant is *McClure v. Dowell*, 15 Utah 324, 392 P.2d 624, interpreting numerous of the previous cases discussed. Once again this court stated, though discussing accrued support payments which is not the instant case, that the duty of support existed and accrued even though the mother had left the State and concealed herself with the child. This court expounded the obligation of an aggrieved party to seek relief through the proper court channels, rather than contemptuously violate the orders of the court of proper jurisdiction.

With the foregoing rules of law in mind, the facts of the instant appeal plainly reveal that respondent proceeded in an orderly manner in the lower court, while jurisdiction could still be had over his wife, to secure the proper protection which he was entitled to on the question of visitation. The appellant was still before the court since no findings and decree had been filed and by admission of counsel was physically outside of the jurisdiction of the court at the time of hearing. The only available means in view of the changed facts since the stipulated hearing was to appeal to the trial judge in the manner in which respondent did. Appellant has not at any time, either by pleadings or appearance as evidenced by the record in this case, requested any modification so as to protect the visitation rights in question. It is not contended by respondent that any order should

issue permanently eliminating his support obligation, but under the theory of *Richards v. Richards*, 5 Misc. 2nd 46, 157 NY Supp 2nd 874, which held that a decree may provide for abatement of support during a period that visitation rights are denied, this court should uphold the ruling of the lower court in abating the support obligation during the months that the minor child of the parties is residing outside the State of Utah, or is denied visitation pursuant to a decree. As further authority, the case of *Daly v. Daly*, 39 N.J. Super. 117, 120 A.2d 510, affirmed 21 NJ 599, 123 A.2d 3, the Supreme Court of New Jersey held:

> "One of the devices used by the courts to give effectiveness to a father's visitation rights where the children have been taken out of the State by a mother to a place so distant as to, in effect, destroy such rights is to reduce, discontinue, or suspend an existing Order for the support of the children until the children are returned, or until in some other fashion the father's visitation rights can be fully protected."

This case went on further to hold that a court which has jurisdiction over the questions of child support and visitation rights also has the power in its discretion to order the father's liability for chld support to be conditioned upon the mother's observation of the rights of visitation. Also holding for the same proposition is *Jackson v. Jackson*, 1960, 107 App. DC 255, 276 F.2d 501, cert. denied, 364 US 849, 5 L. Ed. 2d 73, 81 Sup. Ct. 94. Respondent respectfully submits that the ruling of the

lower court abating child support obligations during the period which the child is out of the State of Utah, or until such time as a petition to specify these visitation rights is filed, heard, and adhered to, is a just and proper discretionary ruling of the trial court and should be upheld.

POINT III

ATTORNEY'S FEES SHOULD BE DENIED APPELLANT BY THIS COURT.

It is conceded by respondent that the case of *Dahlberg v. Dahlberg,* 77 Utah 157, 272 P. 214, cited in appellant's brief does hold for the proposition that this court may award attorney's fees when the matter on appeal is within the specially unique understanding of this court. This rule has been expounded recently in the case of *Peters v. Peters,* 15 Utah 2d 413, 416, 394 P.2d 71, citing other cases; however, respondent submits that the instant appeal does not set forth facts or circumstances sufficient to allow this court to award attorney's fees to appellant. Notwithstanding the statements of counsel contained in appellant's brief, the record on appeal contains no evidence whatsoever as to the financial status of appellant. It is noted from the record that appellant signed an impecunious affidavit (R. 30) dated December 21, 1964. However, a notice of appeal was filed by appellant's counsel January 21, 1965 (R. 29).

Counsel for respondent recognizes that certain

memorandum filed in the lower court before the Honorable Joseph G. Jeppson, Judge, do not appear in the record on appeal as they were not pertinent to the basic question on appeal. Therefore, counsel respectfully represents to the court for purposes of this brief that the cases cited in a page and one-half memorandum submitted to the lower court, and the argument therein set forth, is essentially the same argument as appellant's counsel as attempted to set forth on page *four* of his six page brief. It is further contended by respondent that the suggested bar schedule is merely advisory; that the quality of work and the amount of work making up one's application for fees should also be considered and, in the instant case, certain facts peculiar to this case should be considered by any court attempting to set the attorney's fees, if any, which appellant should be awarded.

With the foregoing considerations, respondent respectfully requests this court to either deny appellant any attorney's fees whatsoever or, in the event the same are ordered awarded, to have this case remanded to the District Court to receive evidence.

CONCLUSION

Respondent requests this court to uphold the decision and Order of the Honorable Joseph G. Jeppson abating the child support obligation during the period of time that the minor child of the parties is not within the State of Utah and the plaintiff is not in a position to avail himself of rights of visitation.

Respondent further requests this court to deny appellant attorney's fees and costs in the instant appeal.

Respectfully submitted,

ROBERT M. McRAE
Attorney for Respondent
516 Boston Building
Salt Lake City, Utah