

1963

Mona McBroom v. Howard Kirtley McBroom : Plaintiff's Brief

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
MAY 15 1963

MONNA McBROOM,
Plaintiff and Appellant,

vs.

HOWARD KIRTLEY McBROOM,
Defendant and Respondent.

Supreme Court, Utah

Case No.
9702

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Plaintiff's Brief with Respect to the Appeal
By Plaintiff from the Decision of the
Honorable Marcellus K. Snow
Third District Court for Salt Lake County, Utah

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STATEMENT OF THE KIND OF CASE

This matter came on for hearing on motion by the defendant for an order to show cause, ordering the plaintiff to show cause why the court should not fix visitation rights, restrain the plaintiff from punishing the children, restrain the plaintiff from removing the children from the State of Utah without the express permission of the court; and on the plaintiff's answer thereto and counter-petition, wherein the plaintiff petitioned the court for a judgment for delinquent support money under the decree of divorce in the sum of \$200.00, to hold defendant in contempt of court for wilfully failing and refusing

to pay said money, and to restrain the defendant from coming upon the home premises of the plaintiff at 583 Cortez Street, for attorneys fees and costs of court.

DISPOSITION IN THE LOWER COURT

The case was tried on the 9th and 11th days of July, 1962 before the Honorable Marcellus K. Snow. From the decree of Judge Snow, the plaintiff appeals from the visitation provisions set forth in said order, the failure of the court to grant judgment for the sum of \$200.00 delinquent support money, the failure of the court to restrain defendant from interfering with the plaintiff's job or harassing the plaintiff at home or at work on the telephone or in any other manner, and from threatening the plaintiff with bodily harm; from the order restraining plaintiff from taking the minor children from the State of Utah without first securing the consent and permission of the court.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks (1) a judgment for \$200.00 delinquent support money to and including the 23rd day of June, 1962; (2) for visitation in accordance with the plaintiff's petition; (3) a restraining order restraining the defendant from interfering with the plaintiff's job, or harassing the plaintiff at home or at work on the telephone or in any other manner, and to restrain the defendant from threatening the plaintiff with bodily harm; (4) to vacate the re-

straining order restraining plaintiff from removing the children from the State of Utah without the express permission of the court.

STATEMENT OF FACTS

Pursuant to the decree of divorce entered by the Honorable Joseph G. Jeppson, judge of the above entitled court, the defendant was ordered to pay to plaintiff the sum of \$100.00 per month per child for the support and maintenance of the minor children. Said payments were to commence as of the 23rd day of March, 1962, and to be paid through the clerk of the court of Salt Lake County. R. 42, 43, and 44. Pursuant to Exhibit D (a) (1), the defendant produced receipts showing \$200.00 paid on May 2, 1962, \$200.00 paid on May 31, 1962, and \$200.00 paid on June 29, 1962. Accordingly, defendant is delinquent \$200.00 in his support money, for which plaintiff should be awarded judgment. The other receipts which are part of defendant's Exhibit D (a) (1) show payment of \$200.00 on February 2, 1962, a payment of \$100.00 on March 1, 1962, a payment of \$75.00 on March 1, 1962, and payment of a water bill of \$25.00 on March 1, 1962; all of said receipts being prior to the entry of the decree and the commencement of the \$200.00 pursuant to said decree of divorce.

With respect to the visitation of the minor children, both plaintiff and defendant sought an order whereby specific times would be set up for the visitation of the minor children by the defend-

ant. The plaintiff proposed that defendant be given the right to take the children and have them over night with him every other weekend from Friday, at 6:00 o'clock p.m., until the following Saturday at 6:00 o'clock, and for the alternate weekends to have them on Sundays from 1:00 o'clock p.m. until 7:30 p.m. in the evening. R. 627. In view of the fact that plaintiff was working five days a week, plaintiff requested the right to have them each Sunday morning in order to take them to Sunday School. R. 627.

The defendant complained that plaintiff was not allowing him to see the children; whereupon plaintiff testified that the defendant had visited and taken the children on the following occasions: 18th of March 12:00 noon until 8:30 p.m.; March 26th from 3:30 p.m. until 8:00 p.m.; Sunday, April 1st from 12:00 noon until 8:30 p.m.; April 6th until 5:30 p.m.; Saturday, April 7th the defendant picked Kirt, the boy, up off the street at 3:00 p.m. and did not return him until 6:00 p.m.; the following Sunday from 12:00 noon until 8:30 p.m.; the 10th of April from 12:00 o'clock until 1:00 o'clock; April 12th from 3:30 p.m. until 5:30 p.m.; Friday, the 13th of April, from 3:30 until 5:30 p.m.; April 14th, April 15th, from 12:00 noon until 8:00 p.m.; on Friday, April 20th, he picked them up at 3:20 p.m. and returned them the following Sunday night at 8:30 p.m., this was the Easter Weekend; April 23rd one hour with them at the tenders; April 24th an hour after school at the tenders and also the 25th of April; on Sunday

April 29th from 12:00 noon until 7:30 p.m.; on May 4th defendant picked the little girl up and took her to the beauty parlor and had her until that evening; May 6th, a Sunday, they had the measles and could not go with defendant; the following week he called them every day at the tenders to see how they were, and saw them every day. Friday, the 11th of May, he picked them up after school and kept them over night, returning them the following Saturday morning. May 13th, Mother's Day, he had them from 12:00 noon until 8:30 p.m.; May 18th he was at the tenders with the children from 3:00 until 4:30 p.m.; May 20th from 12:00 noon until 7:30 p.m.; on the 24th of May from 3:30 until 5:30 p.m.; on the 25th of May he picked them up after school and kept them over night until the following Saturday at noon; the following Sunday he had them from 12:00 noon until 3:30 p.m. The following Monday he had them from 3:30 until 5:00 p.m. The 29th of May, the last day of school, he picked them up from school and kept them that night and all the following day, which was Memorial Day, without any permission or advance notice. On June 1st from 3:00 until 4:00 at the tenders; June 4th, 5th and 6th he visited them at the tenders from 20 to 45 minutes each day; on June 8th from 2:00 until 4:00 o'clock; June 17th from 12:00 noon until 9:00 p.m; Sunday, June 24th from noon until 9:00 o'clock.

The above testimony of plaintiff is set forth at pages R. 628, 629, 630, 631, 632, 633.

Plaintiff testified that she was afraid of the defendant; that he might inflict some harm upon her; and testified: R. 634

“Q. And can you tell us what that fear is based on?

“A. Well, two occasions during our marriage —

“MR. HYDE: Just a minute. I object to anything prior to the decree.

“THE WITNESS: All right. Then since, there have been several conversations on the telephone where threats have been made. On one occasion he said he didn’t care what happened or how this turned out in the Supreme Court, if I was awarded the children he would see to it that I wouldn’t live to raise them.

“Q. Now, you’ve heard the defendant’s testimony in which he stated that he told you that he would use force if necessary to prevent you from taking the children out of the state?

“A. Yes.

“Q. This conversation or threat that he made to you, did it cause you to have fear of him?

“A. Yes, it does.

“Q. Safety for yourself and your children?

“A. Yes.”

The court at page 663 of the record stated:

“THE COURT: Well, of course, both

parties, when we are through with this hearing, both parties are going to be restrained from any unwarranted interference with the other. And this Court is going to delineate the sphere of activities of each party so there is no question about these children being picked up on Saturday and odd hours without the consent and acquiescence of the other other party * * * ." R. 663

Further, plaintiff testified that she had been harassed both at her job, at home, and by the telephone. And the plaintiff upon being requested by the court to disclose her present employment and her telephone number, refused to do so. Whereupon the court at page R. 663 of the record, stated to the plaintiff:

"THE COURT: There will be no worries from Mr. McBroom, because he'll be in contempt of this Court if he in any way interferes with you in connection with your job. So you may tell the court where you work and what hours."

The plaintiff had already lost her job at the Kennecott Copper Corp. and was fearful that further harassment would cause her to lose her present employment. R. 662. The court specifically indicated it would restrain the defendant from in any way interfering with the plaintiff's job, but failed to include this as a part of the court's order. R. 664, 665.

The testimony of defendant with respect to the court's order restraining plaintiff from removing the children from the state of Utah without the consent of the court is as follows: R: 616 line 21.

“Q. Have you ever threatened Mrs. Mc Broom since this trial?

“A. (Mr. McBroom) When she told me —yes, I threatened her to this extent that I told her I would use force if necessary to prevent her taking the children out of the state and me ever seeing them again. And I also told her—

“Q. Well, now, what was the occasion for this?

“A. A telephone call. It was this conversation around the end of May regarding the appeal and this lawsuit. And I told her that I’d use force to see that this didn’t occur. And I also promised her that I wouldn’t let her raise these children. Eventually I wouldn’t. I can’t permit that. And what I meant was that I had faith in the law. But she called me on it and she said, “You mean law or no law, you’re not going to let me raise the children?” And I said, “I am going to take those children period.” And I can’t permit this. I can’t do it.” R. 617. Also see R. 615, 616, 620.

There was never any testimony by plaintiff to the effect that she intended taking the children from the state, except as a matter of self-preservation against the threats that the defendant was making to do her physical harm. Plaintiff testified at R. 637:

“Q. (By Mr. McCullough to Mrs. Mc Broom) Now, your husband testified that there was a three-week period around May

28th when you refused to allow the children, allow him to visit the children because something about he did not agree to drop this adultery suit. Do you recall any conversation with him of that nature?

“A. (R. 638) I recall telling him that I couldn’t stand the constant phone calls, the harassment, the threats of valentines, which he refers to as being subpoenas or court orders, and that unless he left me alone I was going to have to leave just for my own peace of mind. I couldn’t take it.

“Q. These telephone calls you refer to, are they frequent?

“A. Every night. There wasn’t a night without them.

“Q. And have they caused you to become upset?

“A. Yes. I have had the number changed to an unlisted number just in the last few days.

“Q. And that’s because you couldn’t stand—

“A. Because I can’t take it.

“Q. Did you ever tell the defendant that you would not live up to the order of the court?

“A. Never, never did.”

Plaintiff testified that she had never degraded the defendant in the eyes of the children (R. 627) nor had she ever punished them because of their having gone with their father for reasonable visitation. R. 628.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN REFUSING TO GRANT PLAINTIFF A JUDGMENT FOR \$200.00 DELINQUENT SUPPORT MONEY TO AND INCLUDING THE 23RD DAY OF JUNE, 1962.

The decree of divorce specified that the defendant was to pay \$200.00 per month for the support and maintenance of the minor children, said payments to commence as of the 23rd day of March, 1962. As of the 23rd day of June, 1962, the defendant had made payments of only \$600.00. According to the decree four monthly payments had accrued for a total of \$800.00, leaving a deficiency of \$200.00. The defendant attempted to show by receipts, that he had paid prior to the entry of the decree that he was not delinquent in said support. However, defendant's exhibit D (a)(1) shows a payment of \$200.00 on February 2, 1962, a payment of \$200.00 on March 1, 1962, a payment of \$75.00 on March 1, 1962, and a payment of a water bill for \$25.00 on March 1, 1962. All of said payments were prior to the entry of the decree of divorce on the 23rd day of March, 1962, and cannot affect the order of the court dated the 23rd day of March, 1962. Accordingly the lower court should be instructed to enter judgment in favor of plaintiff and against defendant for the sum of \$200.00 delinquent support money to and including the 23rd day of June, 1962. In addition thereto, interest should be added to said judgment at the rate of 8% per annum from the due date, to-wit June 23, 1962, to date of judgment,

and thereafter at the rate of 8% per annum. See LARSON v. LARSON, 9 Utah 2d 160, 340 P.2d 421. This court has ruled that the defendant has the burden in a contempt proceeding to show the amount of support money paid. See OPENSHAW v. OPENSHAW, 86 Utah 229, 42 P.2d 191.

POINT II.

THE TRIAL COURT ERRED IN REFUSING TO SET UP VISITATION RIGHTS FOR THE DEFENDANT IN ACCORDANCE WITH THE PLAINTIFF'S ANSWER AND COUNTER PETITION.

The plaintiff specified in her answer and counter petition the reasonable visitation which she felt the court should award to the defendant, to-wit: that the defendant should be able to pick up the children and have them over night with him every other weekend from Friday at 6:00 o'clock p.m. until Saturday at 6:00 o'clock p.m. That on alternate weekends the defendant should be able to pick up and take the children with him on Sunday afternoons from 1:00 o'clock until 7:30 in the evening. The plaintiff's testimony in detail is set forth in the statement of facts showing the times and places when the defendant had taken the children prior to the hearing before Judge Snow, and based thereon, certainly the defendant could have no reasonable grounds upon which to complain that he was being denied visitation. On the other hand, the plaintiff, in order to know when the children were taken and at what time, proposed a reasonable visitation period for the defendant. Further, in view of the fact that the plaintiff was working five days a week, she felt

it was only proper that she should have a portion of each weekend in which she could devote time to the children. Specifically the plaintiff requested the right to have the children on Sunday morning in order to take them to Sunday School. The lower court, however, in setting up the visitation periods entirely ignored the suggestions of visitation on the part of the plaintiff, and specified that defendant should have and take the children from 3:00 o'clock p.m. on Friday to 7:30 p.m. the following Sunday of every other weekend; that on the alternate weekend the defendant should have the right to take them at 9:00 a.m. on Saturday morning and return them that night at 7:30 p.m.

The lower court in substituting its judgment for that of the plaintiff mother, has entirely ignored the reasonable requests of the plaintiff. Certainly if the trial court in awarding custody of these children to plaintiff felt she was competent to have custody awarded to her, and a fit and proper person for such, it should not then turn around and slap this mother in the face by telling her that the visitation periods which she has set out, and which are entirely reasonable, are not proper. The court should not arbitrarily set up periods of time which do not conform to the mother's work schedule or give her proper time to devote to the children. The effect of the lower court's decree is to say to this mother that you can have the children with you on Sunday every other weekend. The lower court did eliminate

some of the difficulty which the plaintiff mother was suffering because of the defendant's unrestrained visitation of the children. And the lower court did specify in paragraph 3 of its order, "The defendant is restrained from taking said children with defendant except as herein provided without the consent of plaintiff first had and obtained." R. 83.

The visitation which the plaintiff mother had set up for the children and to which she testified in detail certainly do not demonstrate that this plaintiff mother was attempting to limit or be unreasonable with the defendant with respect to visitation with these minor children. In view of the stormy proceedings and the animosity that exists between these parties, it would seem unfair that the lower court would substitute its judgment for that of the plaintiff mother with respect to the visitation periods, particularly where the visitation periods specified by the plaintiff mother are entirely reasonable and have been made in good faith on the part of the plaintiff and for the best interests of the minor children. Accordingly the plaintiff requests this court to modify the visitation periods in accordance with the periods specified by the plaintiff in her answer and counter petition before the court.

POINT III.

THE LOWER COURT ERRED IN REFUSING TO RESTRAIN THE DEFENDANT FROM INTERFERING WITH THE PLAINTIFF'S JOB, OR HARASSING THE PLAINTIFF AT HOME OR AT WORK, ON THE TELEPHONE, OR IN ANY OTHER MANNER, AND IN REFUSING TO RESTRAIN DEFENDANT FROM THREATENING PLAINTIFF WITH BODILY HARM.

The testimony of the plaintiff and corroborated

by the testimony of the defendant, all as specifically set forth in the statement of facts, shows a definite threat on the part of the defendant to inflict bodily harm to the plaintiff, and to harass her on her job and at home. The defendant made no secret of the fact that he intended to continue such activity until he had gained his objective of taking these children from their mother. Based upon said expressed intention of the defendant, and particularly in view of the fact that the lower court stated during the court proceeding that it would protect the plaintiff by a restraining order, the lower court should in its final decree have entered a restraining order restraining the defendant from interfering with plaintiff's job, or harassing the plaintiff at home or at work, and restraining the defendant from threatening the plaintiff with bodily harm. The request of plaintiff in this regard was reasonable, and should have been granted in view of the testimony of both plaintiff and defendant.

POINT IV.

IT WAS ERROR FOR THE LOWER COURT TO RESTRAIN THE PLAINTIFF FROM TAKING THE MINOR CHILDREN OUT OF THE STATE OF UTAH, OR IN ANY MANNER CAUSING SAID CHILDREN TO BE REMOVED FROM THE STATE OF UTAH.

The only purpose of the plaintiff in telling the defendant that she would take the children and leave, was to cause the defendant to cease his harassment, phone calls, and threats of "valentines." In view of the expressed intention of the defendant

that he was going to take the children from their mother regardless of the circumstances and the orders of the court, certainly the plaintiff's threat to leave the state was the only protection she felt she had recourse to. It is not necessary to repeat the testimony of the plaintiff and defendant in this regard. It is set forth in full in the statement of fact. The order of the lower court does not do justice to the situation and particularly in view of the fact that the court has provided no safeguards for the plaintiff's protection. If the lower court felt there was sufficient justification for entering an order of the type which it did, then in all fairness the lower court should have provided adequate safeguards to the plaintiff in order that her removal from the confines of the state would not be necessary to protect her from the threats of physical harm by the defendant.

The plaintiff does not quarrel with the proposition as cited by this court and universally accepted to the effect that the court should maintain control of the minor children of the parties and maintain said children within the jurisdiction of the court. But having accepted such proposition, the court should also provide adequate safeguards for the plaintiff against the expressed threats of physical

harm to her by the defendant. See GRIFFIN v. GRIFFIN, 18 Utah 98, 55 P 84; ALLEY v. ALLEY, 67 Utah 316, 247 P 301.

Respectfully submitted,

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