1969

Myra K. Butler v. Marvin Jay Butler : Brief of Respondent

IN THE SUPREME COURT
of the
STATE OF UTAH

MYRA K. BUTLER,
Plaintiff and Respondent,

vs.

MARVIN JAY BUTLER,
Defendant and Appellant.

Case No. 11662

BRIEF OF RESPONDENT

Appeal from a Final Order of the Second District Court,
Davis County, State of Utah
The Honorable Charles G. Cowley, Judge

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NATURE OF THE CASE

The gravamen of defendant's petition is to deprive plaintiff of total custody of her minor children as a punitive measure for her alleged failure to compel the children to abide by the terms of custody provisions of a previously entered decree of divorce.

DISPOSITION IN LOWER COURT

At the close of defendant's evidence (he being the only witness) the trial court granted plaintiff's motion to dismiss the contempt proceeding and awarded the plaintiff $600.00 by way of attorney's fees. The defendant was granted affirmative relief authorizing him to take the children of the parties as deductions on his income tax returns and to delete the plaintiff from a life insurance trust.

Defendant's petition was filed on September 10, 1968 (R. 10). On the same day defendant filed a motion for change of venue from Davis County, in which county the decree of divorce was entered, to Utah County. The motion for change of venue was denied by the formal order of the court on November 30, 1968 (R. 12). The notice of appeal in the instant matter (R.16) specifically refers to the judgment entered on the 1st day of May, 1969, with no reference to the denial of the motion for change of venue.

RELIEF SOUGHT ON APPEAL

Defendant claims that this court should, upon the record, conclude that the plaintiff is guilty of contempt and that as a punitive measure she should be denied custody of her minor children.

STATEMENT OF FACTS

Defendant's statement is a self serving statement of his own testimony. He omits important facets that justify the adverse ruling. He makes no appropriate reference to the independent actions of others, including the children, and the overreaching and imperious conduct of himself.

The parties were married twice, each to the other. The first divorce was in 1966 and the second on the 17th day of October, 1967, pursuant to stipulation as to property matters, custody, child support and alimony (R.1-5). By the decree, the plaintiff was given the care, custody

and control of the minor children with reasonable rights of visitation on the part of the defendant. The defendant was granted the right to have the care, custody and control of the minor children for a period of ninety days during each summer thereafter. The decree is silent with respect to the right of the defendant to take the personal belongings of the children or any property in the control of the plaintiff incident to his right of custody but which he demanded by Exhibit 3, which lists an imposing array of articles, including bicycles, outdoor equipment, radios, cameras, sewing equipment, a 30-30 rifle, binoculars and clothing and accessories, both for summer and cold weather. The defendant is an airline captain residing in San Francisco with annual earnings in excess of $30,000.00 (Rep. Tr. 20) and he was obligated to pay $80.00 per month per child as child support, except during the time he had custody (R.1-5).

On May 20, when defendant went to Provo to pick up his children, the children came out of the house to meet him. Defendant testified that the children knew what he was there for but they did not have all of the articles that he had requested (Rep. Tr. 30). On this occasion the defendant asked the children "Where's the rest of your belongings?" They told him that their mother had forbid them from bringing any other belongings. The defendant then asked Julie to go back into the house and get the list (Exhibit 3) so that they could go over it (Rep. Tr. 31). The defendant did not take the children on the occasion afforded him because they did not have the articles demanded.

Around the 5th of June when defendant obtained custody of Brett and John, he appeared at the Seethaler residence and had a face to face meeting with plaintiff:

> "And I rang the bell, and Mrs. Seethaler appeared at the door. And I told her that I had come to get the children.
>
> She said to me that: "We are not fully unpacked from the move. Do you want to take Bret with just the few things that I have unpacked?" And I said: "Yes."
>
> She said to me: "Julie is not going." And I told her I would like to speak with Julie.
>
> She said: "John's at the plant. They'll bring him, and you can talk to him there."
>
> Q. What did she give you for Bret in the way of clothing?
>
> A. She gave me a small cardboard box about this square (indicating) with some old odds and ends.
>
> And Bret came out, and he was wearing older clothing that certainly wasn't suitable to ride on an airplane with.
>
> Q. All right. Did you take Bret that morning of the 5th?
>
> A. I did.
>
> Q. Did you go down to the plant to get John?
>
> A. Yes. (Rep. Tr. 46).

On the same day defendant went to the Seethaler plant at Provo and got the boy John. The defendant complained of the fact that he couldn't pick John up at the

place of residence and had to go to the Seethaler plant for that purpose (Rep. Tr. 47). The defendant then complained about having to take John and Bret to Salt Lake and then to a local department store where both of them were outfitted with clothing (Rep. Tr. 48-49). From Salt Lake the defendant took the two boys to Ogden and it was that night that John called his mother around midnight and asked her to come and get him. Mr. and Mrs. Seethaler went to Ogden, picked up the boy, returned him to Provo and then followed the rather traumatic experience of police intervention at the Seethaler plant where John was taken first to the Police Station and then to the Juvenile Court after which the defendant took both of the boys to the San Francisco area.

The depositions of all of the children had been previously taken by defendant at Provo, Utah (Rep. Tr. 82). The children at the request of defendant (Rep. Tr. 89-90) were present at the hearing before the court in Farmington, but on the motion of the defendant were excluded from the courtroom during his testimony (Rep. Tr. 2-4). The only testimony adduced was that of the defendant, after which he rested his case (Rep. Tr. 70). The children were available but not called nor was Mrs. Seethaler, the former Mrs. Butler. Although defendant's counsel was fully aware of the fact that he could reopen his case and adduced further testimony on the theory of contempt, he did not do so (Rep. Tr. 89-90).

ARGUMENT

POINT I.

THE PROPRIETY OF THE AWARD OF ATTORNEY'S FEES.

A reasonable attorney's fee may be awarded a wife who contests a modification petition where the custody of children is involved. *Anderson v. Anderson,* 13 U. 2d 36, 368 P.2d 264. The Supreme Court may determine whether additional counsel fees should be allowed, and may allow costs of appeal to appellant, such as filing fees, printing costs and the like. *Dahlberg v. Dahlberg,* 77 U. 157, 292 P. 214. The allowance of alimony and expenses of divorce trial, including attorney's fees, are largely matters within the discretion of the court which tries the case. *Burtt v. Burtt,* 59 U. 457, 204 P. 91. Even where the District Court had no jurisdiction of status of marriage between parties to husband's divorce action because of noncompliance with residence requirement, it could nevertheless award to the wife temporary alimony, expenses of suit and attorney's fees, the allowance and the amount thereof being largely within the sound discretion of the trial court. *Weiss v. Weiss,* 111 U. 353, 179 P.2d 1005.

In the instant matter, plaintiff in her answer to defendant's petition, alleged that she had been required to employ counsel in the defense thereof and that she should be entitled to reasonable attorney's fees to be paid by the defendant to her for the use and benefit of her attorneys herein. Defendant's answer is not made a part of the

record on appeal but was referred to in the opening statements of counsel (Rep. Tr. 13). *Rule 75 (h), Utah Rules of Civil Procedure,* permits this court on a proper suggestion or of its own initiative to require the record to be supplemented. We doubt, however, that counsel will disagree with the fact that the plaintiff filed an answer to the petition and prayed for attorney's fees as indicated.

In mitigation of our failure to file a designation of the record, defendant's designation did not include the complete record and he did not serve a statement of the points on which he intended to rely on the appeal, all as required by *Rule 75(b).* If a statement of points had been made, it would have served as a springboard for the respondent's designation of the record as contemplated by *Rule 75(a).* What we have said with reference to the answer filed by the plaintiff to defendant's petition applies equally to the objections that were filed to the motion for change of venue, which objections are not made a part of the file on the appeal not having been included in defendant's designation.

Defendant in his brief, in light of the present record on appeal, casts some sort of a cloud upon the propriety of attorney's fees when he says on page 20 that *"Unaccountably,* this request was granted by the trial court." Assuming attorney's fees to be proper in this type of an action, we subscribe to the previous expressions of this court and to the citations that defendant makes with reference to the subject that in the absence of proof or of

a stipulation, attorney's fees may not be awarded. The objection made by defendant at the time of trial as to attorney's fees was that they were not proper in matters of this kind.

Plaintiff's counsel proposed that if he were sworn and testified that he would say that $750.00 is a reasonable fee and called attention to the time spent in attendance at the taking by defendant of six depositions which included the three children of the parties and Mr. Seethaler, the present husband of the plaintiff, the time consumed in the preparation of the pleadings, resisting the motion for change of venue and the trial of the instant matter. In response, the following occurred:

> THE COURT: Do you have anything that you want to say, Mr. Howard?
>
> MR HOWARD: Well, Your Honor, there is nothing more important to the lawyer than the payment of his attorney's fees, and I don't oppose attorney's fees, per se. I am in favor of the payment of fees.
>
> But I do take this position: You're not entitled to attorney's fees after the divorce automatically, and you're certainly not entitled to attorney's fees to defend a matter that's created by your own conduct. And I've got some authorities on it and it's— * * * But the thing I'm trying to say is that we're forced into this court because she deprives us of our rights of custody, and so we come into court asking for relief.
>
> That's the only reason we came. That's the primary reason we came.

And then she says: "My gosh, I had to come to court to defend it, so he ought to pay me attorney's fees.

Now that's like heaping insult onto injury. That just isn't fair either.

And we're here because she wouldn't do what the decree said she should do. And I think there ought to be sanctions imposed.

MR GUSTIN: I don't think there is any evidence as to that effect.

MR HOWARD: Well, all of the evidence is to that effect. And I have another brief on that subject, Your Honor.

THE COURT: Well, I think I would award $600.00 for this number of depositions.

MR. HOWARD: Then I have one other authority to submit to you, Your Honor. And if you will just let me have a moment, I will tell you about that.

And I don't think the court can grant attorney's fees on the basis of the evidence. But I would submit it.

THE COURT: Well, I'll grant $600.00.

MR HOWARD: All right (Rep. Tr. 83-84).

From the foregoing, it is fair to assume, we believe, that counsel was in agreement on the fee as fixed by the court but in disagreement as to the propriety of the same.

POINT II.

THE RULING ON THE MOTION FOR CHANGE OF VENUE IS NOT PROPERLY BEFORE THE COURT, BUT IN ANY EVENT THE VENUE REMAINS IN DAVIS COUNTY AND DEFENDANT IS NOT PREJUDICED THEREBY.

Both parties were residents of Davis County at the time of the divorce. The first paragraph of defendant's petition alleges the divorce by action of the Second Judicial District Court in and for Davis County on the 17th day of October, 1967 (R.6). There is no question concerning jurisdiction in the divorce action. *Section 30-3-5, Utah Code Annotated,* 1953, prior to the 1969 amendment provides in part:

> "Such subsequent changes or new orders may be made by the court with respect to the disposal of the children or the distribution of property as shall be reasonable and proper."

There is a continuing jurisdiction of the court that is inherent in the within proceeding and this, we believe, to be the rule announced by this court in *Cody v. Cody,* 47 U. 456, 154 P. 952; *Bott v. Bott,* 20 U.2d 329, 437 P.2d 684 and *Anderson v. Anderson,* 18 U.2d 89, 416 P.2d 308.

Even though the plaintiff and the minor children of the parties are now residing in Utah County and while the defendant now resides outside of the State of Utah, once the jurisdiction of the Davis County District Court attached by the filing of the divorce action, there is no statutory or other right for either party to move for a change of venue. The plaintiff is not asking for a change of venue and so far as the convenience of the parties is

concerned, the defendant who resides in California is not inconvenienced and there is nothing to indicate prejudice on his part as between having the cause heard in Utah County or in Davis County. Judge Cowley, as an individual judge, was a stranger to the decree as entered by Judge Swan in the Davis County District Court. Furthermore, the notice of appeal dated May 27, 1969 did not refer to the Order denying the motion for change of venue entered November 30, 1968. There should be no time or space wasted on this facet of the appeal.

POINT III.

HEARSAY EVIDENCE WAS PROPERLY EXCLUDED.

Examples of the rulings and of the type of evidence attempted to be adduced by hearsay are the following:

> Q. In any event, were you able to get your children that night?
>
> A. No, I was not.
> But I told my daughter Julie that—
>
> MR. GUSTIN: (interposing) I object to that on the grounds it's hearsay.
>
> THE COURT: Well, I'll sustain the objection. (Rep. Tr. 42)
>
> * * *
>
> Q. (by Mr. Howard) You had a conversation with Julie at this time.
>
> Were you able to get any of your children as a result of this conversation?
>
> A. Not on that occasion.
> And I advised them that—

MR. GUSTIN: (interposing) Now just a minute,

We object—

A. (continuing) — I would be by the next morning to pick them up.

THE COURT: Well, you can tell us about the next morning. I'll sustain the objection to the answer. I don't think it was responsive even, was it? You hadn't asked your question?

MR. HOWARD: No. (Rep. Tr. 45)

* * *

And I said: "That may be, but I want to see him and I want to see him now."

So Joe disappeared, and in a moment he came back and he said to me, and indicated an office door—

MR. GUSTIN: (interposing) Object to that on the grounds it's hearsay.

THE COURT: I'll sustain the objection. (Rep. Tr. 47)

* * *

Q. And what did you say to John?

MR. GUSTIN: I object to that on the grounds it's hearsay.

A. I told John that—

THE COURT: (interposing) I'll sustain the objection. (Rep. Tr. 47)

The foregoing do not come within the category of exceptions to the hearsay rule or the portion attributed by defendant to *Webb v. Webb,* 116 U. 155, 209 P.2d 201, or to *Sine v. Harper,* 118 U. 425, 222 P.2d 571. Actually

the witness was attempting to state what he had said to Julie and Mr. Seethaler.

Mr. Seethaler and the children were in court. While they were excluded from the courtroom at the request of the defendant, they were nevertheless available as witnesses. Their depositions had been taken by the defendant. *Jones on Evidence,* Fifth Edition, Vol. 1, Sec. 231, p. 444 states the rule that we believe is applicable:

> "It has been broadly stated that the best evidence that is obtainable under the circumstances of the case must be adduced to prove any disputed fact."

It is interesting to observe in the instant record the following:

> THE COURT: I have just been trying to pass upon evidence here.
>
> MR. HOWARD: Well, I acknowledge that, Your Honor, and I don't think—
>
> THE COURT: (interposing) According to what you said, you haven't acknowledged that. What you're trying to say is that I'm kind of crooked.
>
> MR. HOWARD: No, I'm not. I didn't mean to say that at all. But I don't think the evidence is that shallow. I think the evidence is quite deep.
>
> *I put all of the evidence I've got.* This man only knows what happened, and he's told about it. And I didn't mean to be personal about it. (Rep. Tr. 84-85.

The foregoing, in light of the presence of the children and Mr. and Mrs. Seethaler, the latter who could be called

as an adverse witness, makes appropriate the following language from *Jones on Evidence*, Fifth Edition, Vol. 1, Sec. 27, pps. 59-60, to wit:

> "There is a recognized legal presumption that a party will produce evidence which is favorable to him if such evidence exists and is available. And the mere withholding or failing to produce material evidence which is available and would, in the circumstances of the case, be expected to be produced, gives rise to a natural inference—less forceful than that arising from the destruction, fabrication or suppression of evidence in which other parties have a legal interest but constantly acted upon by the courts—that such evidence is held back because it would be unfavorable or adverse to the party withholding it. It is pertinent to note that the inference in question is not ordinarily to be accorded weight as substantive proof, *but has persuasive value as discounting the credibility of the claim of the party who has withheld the evidence.*" (Emphasis added).

POINT IV.

THERE WAS NO SUFFICIENT SHOWING OF CONTEMPT UPON THE PART OF THE PLAINTIFF.

The notice (Exhibit 3) stated that the defendant could pick up his children on May 27. May 20th was on a Monday and the defendant testified:

> Q. Now did you get a communication from them later on in that week?
>
> A. Yes.
>
> Q. When did you next hear from the children?

A. Friday night. Julie and John called me on the telephone and told me they didn't want to come.

Q. And what, in substance, did they say?

A. Well, Julie indicated that she might like to come part of the summer, but she didn't want to spend the entire summer, and that she wanted to go to summer camp, and she had boy friends, and she had her friends, and she felt it would be in a strange place, and that she would rather not come and spend the entire summer. In fact, she indicated she didn't want to come.

Now I asked John what his reasons were, and he was very vague. He didn't — he didn't really give any concrete reasons. I did, however, discover later what one of his reasons were. (Rep. Tr. 32).

When defendant arrived in Provo on May 27 for the purpose of obtaining the children, he went to the Seethaler residence. There was no indication of any activity at the property. There were no cars in the driveway and nobody answered the door. There was no one there (Rep. Tr. 33-34). Defendant then went to Salt Lake and in the evening of that day talked to his son John by telephone. "I told him that I was coming to get him and to be ready. He said he didn't want to go." (Rep. Tr. 34).

In the interim between May 27 and June 5, defendant met Carl Seethaler at the Seethaler home who told him that Julie and John had slept with friends the previous night at separate places. Carl said "I don't think they want to go" in answer to the statement of the defendant that he was the children's father and that he had

come to get them. The defendant then said, "Well, that's a matter to be decided between them and me, and I've come to get them." (Rep. Tr. 36).

On June 4 defendant went to the Seethaler plant after consultation with his attorney (Rep. Tr. 38-40) and was told that John was not there; that his mother had come and taken him (Rep. Tr. 41). He then went to the Seethaler residence and told Mrs. Seethaler that he had come to get the children "and she said nothing." She disappeared behind the door and in a short time Julie came to the door and told defendant that John and Brett were not there and that they had been taken to Heber City swimming by Carl Seethaler. He then talked with Julie for about an hour and a half in the presence of his counsel (Rep. Tr. 42). It was the next morning, June 5, that Mrs. Seethaler told defendant that Julie is not going and that John was at the Seethaler plant (Rep. Tr. 46). It was that day that defendant got Brett and John, the latter after the traumatic experience at the Seethaler plant involving the Police Department and the Juvenile Court (Rep. Tr. 46-54).

Defendant had the boys for the remainder of the summer but not Julie. The boys were taken on a fishing trip to Alaska and they had a good time in the company of their father, interrupted only by defendant's work schedule (Rep. Tr. 54-56). At the conclusion of the summer and around August 23, defendant picked Julie up and took her and the two boys to a gathering of defendant's family in Wyoming, a trip that lasted about five days.

The relationship was good between defendant and his children and he had no reason to think that they did not have affection for him (Rep. Tr. 57).

On September 27 defendant had a telephone conversation with Julie and inquired as to where she was on the previous weekend and was informed that she was in Salt Lake City at a girl friend's house and had returned the following day in the automobile "of some boy." Defendant had intended to visit with Julie on the previous weekend but had not been able to.

Defendant made arrangements with Julie to visit him on the 4th, 5th and 6th of October and made arrangements to have an airline pass waiting for her at the airport which would take her to San Francisco. Julie was told what she should bring in the way of clothing and she expressed an interest in the visit. The plane was to depart from Salt Lake City at 6:10 p.m. and around 4:30 p.m. in the afternoon of that day Julie called and said that she was not coming because she didn't have any way to get to the airport; that her mother would not bring her and had indicated to her that she didn't have to do the defendant the favor of bringing Julie to the airport. The defendant then instructed Julie to go by bus from Provo to Salt Lake and determined that Julie wanted to do so (Rep. Tr. 58-60).

At this point, the objection was made and sustained preventing defendant from going into matters subsequent to the filing of his petition, which petition was filed September 10, 1968(Rep. Tr. 61). At the time of the hearing

Julie was 17 years of age, a junior in high school at Provo, and John was 14 years of age (Rep. Tr. 65).

Defendant expressed himself as being critical of the mother's approach to the children, thinking that she was very permissive with the daughter Julie and referred to the incident about Julie being taken to Salt Lake City and left over the weekend unsupervised, to come home "with some boy." The defendant stated that the mother didn't know who Julie was really going to ride home with and that she did not know what kind of a driver the boy was. The defendant posed a question as to whether the mother knew exactly where the girl was overnight, where she actually went, and who she was with during the evening:

> "I've gone there at times when the daughter wasn't there and was told that she didn't know where the girl was, or that the girl was at school, or that she might be at some game, or she might be at some ball game.
>
> I object to this. The mother isn't there." (Rep. Tr. 64).

On the claim of alienation and notwithstanding the admitted love and affection of the children toward the father, the defendant testified that the plaintiff had told the children that he was a person of unsound mentality, interested in money only, and an unclean, immoral person and concluded that the plaintiff had by one means or another caused the children to feel that it's not a suitable thing to go to live with him. The defendant said, "I point to the record" (Rep. Tr. 67-68).

Judge Cowley who heard the matter is a trial judge of long experience, a capable and understanding individual. He observed that the defendant had the two boys beginning on June 6, that they had a good time after he got them (Rep. Tr. 72) and that human relations aren't always the easiest thing to carry out, work out, with ease (Rep. Tr. 73).

On May 20 when the defendant arrived in Provo, he was met by all of the children who knew what he was there for. He frustrated his own plan by telling the children to go back and get the items listed in Exhibit 3 (Rep. Tr. 30). From that point on there was confusion attributed to the individual thinking of the children, their vacillation in their own sphere of activity and wisely and properly the trial court dismissed the contempt proceeding on the insufficiency of the defendant's testimony.

POINT V.

CHANGE OF CUSTODY OF THE CHILDREN AS A PUNITIVE MEASURE WOULD BE IMPROPER.

This court as recently as May, 1969, in the case of *Hyde v. Hyde,* ..... U. ....., 454 P.2d 884 reiterated the basic concept as follows:

> "Child custody proceedings are equitable in the highest degree, and this court has consistently held that the best interest and welfare of the minor child is the controlling factor in every case. *Walton v. Coffman,* 110 Utah 1, 169 P.2d 97, and cases there cited."

The Idaho case of *Thurman v. Thurman,* 245 P.2d 810 cited by defendant and other case authority to the

same effect do not coincide with the views of this court and should not govern the instant case.

CONCLUSION

Defendant's claim that plaintiff should be held in contempt is based upon his own testimony. He admitted that his testimony was the only evidence he had. The failure to interrogate the plaintiff and his failure to call the children whose depositions he had taken reflect upon the credibility of his conclusions. The defendant obtained monetary relief and there is no quarrel with the plaintiff having been deleted from the life insurance trust. The judgment of dismissal with regard to contempt and the attempted change of custody is sound and was judiciously made in light of the evidence presented. The judgment should be affirmed with such relief to the plaintiff in the defense of the appeal as the court may deem proper.

Respectfully submitted,

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