1967

Carol Joan Stone v. Val Franklin Stone : Petition For Rehearing

IN THE SUPREME COURT

of the

STATE OF UTAH

CAROL JOAN STONE, :

Respondent, :

-vs- : Case No. 10698

:

VAL FRANKLIN STONE, :

Appellant and Petitioner. :

PETITION FOR REHEARING

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CAROL JOAN STONE,

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-vs-

No.
10698

VAL FRANKLIN STONE,

Appellant and Petitioner

PETITION FOR REHEARING

The Appellant by his attorney hereby petitions the above entitled Court for a rehearing upon the sole issue of whether the trial court erred in deciding there was not "good cause" shown to require the Respondent to submit to a psychiatric examination pursuant to Rule 35 (a) of the Utah Rules of Civil

Procedure.

This motion is made pursuant to Rule 76 (e) of the Utah Rules of Civil Procedure and for the following reasons:

1. The holding of the majority opinion that insanity and other mental conditions can be established without expert testimony is contrary to the overwhelming weight of authority, and deprives the trial judges in the State of Utah of the testimony of psychiatrists in Rule 35 (a) hearings.

2. The majority opinion is deficient because it nowhere defines "good cause" notwithstanding the entire Rule 35 (a) issue depends upon good cause being shown.

3. The majority opinion has increased the burden of proof required for "good cause" over that of any other state in this country, and has in effect

judicially invalidated the Rule insofar as the State of Utah is concerned.

4. The majority opinion sacrifices the welfare of the minor children to the welfare of the mother, and decides this case upon an affidavit which was not presented to nor considered by any of the three District Court Judges who heard this matter.

I

THE HOLDING OF THE MAJORITY OPINION THAT INSANITY AND OTHER MENTAL CONDITIONS CAN BE ESTABLISHED WITHOUT EXPERT TESTIMONY IS CONTRARY TO THE OVERWHELMING WEIGHT OF AUTHORITY, AND DEPRIVES THE TRIAL JUDGES IN THE STATE OF UTAH OF THE TESTIMONY OF PSYCHIATRISTS IN RULE 35 (a) HEARINGS.

The majority opinion holds that the testimony of the mother's psychiatrist was properly excluded on the basis of the doctor-patient privilege and that the

issue of insanity and other mental conditions contemplated by Rule 35 could be determined without expert testimony. Such a holding is contrary to the overwhelming weight of authority. See Bowler v. Bowler, 355 Mich. 686, 96 N. W. 2d 129 (1959) and 74 A.L.R. 2d 1073 entitled Mental Health of Contesting Parent as a Factor in Awarding Child Custody. All of the cases collected in this annotation involve expert testimony by psychiatrists and the Courts' holdings are based thereon. A substantial number of these cases conclude that observations by lay witnesses such as neighbors, etc. are insufficient. However, the majority opinion of this Court has effectively deprived the trial judges in the State of Utah of the testimony of expert psychiatrists if these cases arise in the future and has in affect held that

the issue of insanity can be determined by the testimony of lay witnesses even though such testimony might be diametrically opposed to the testimony of the psychiatrist--one whose training and experience better qualify him to diagnose and evaluate such problems.

Randa v. Bear, 312 P. 2d 640 (1957-Washington) is a case very similar in nature to the instant case. In Randa a litigant claimed the doctor-patient privilege when asked about prior history with her doctor. The lower court sustained the objection, but the Supreme Court reversed on this ruling and stated:

> "In the present case, it is obvious that the use of the physician-patient privilege deprived the court of all opportunity to ascertain the material facts necessary to its determination of the principal issue raised by the pleadings..." [Note 8 p. 645]

In Randa the Respondent cited a prior case upholding the doctor-patient

privilege, but the Supreme Court overruled this case on the basis of Rule 35 of the Washington Rules of Civil Procedure which are identical to those in Utah. The Court held:

> "Thus this court, by adopting Rule of Pleading, Practice and Procedure 35, intended to correct the injustice which was permitted to exist in the Nolle case so that now a trial court can no longer be compelled by a claim of privilege to decide any case involving the mental or physical condition of any party to the action after hearing only a part of the evidence material to that issue. The means is now available to the court to have access to all material facts relating to the mental or physical condition of any party in any case where such condition is in controversy. The rule of the Nolle case has in effect, been abrogated by the adoption of Rule of Pleading, Practice and Procedure 35."

The Appellant submits the Washington citation, together with the citation set forth hereinafter from The United States Supreme Court and

the various State Courts, clearly establishes the correct principle of interpretation which is that Rule 35 (a) makes it possible now for the trial judge to receive evidence from qualified psychiatrists whereas under the common law this was impossible becuase of the doctor-patient privilege. However, the majority opinion in the instant case has buried this enlighted interpretation and has in effect resurrected the common law privilege so that it now exists in the State of Utah and so that now Rule 35 (a) has no application to mental examinations.

II

THE MAJORITY OPINION IS DEFICIENT BECAUSE IT NOWHERE DEFINES "GOOD CAUSE" NOTWITHSTANDING THE ENTIRE RULE 35 (a) ISSUE DEPENDS UPON GOOD CAUSE BEING SHOWN.

The majority opinion nowhere defines "good cause" and in fact that term is not

even mentioned in the majority opinion; notwithstanding the entire issue in this case depends upon whether "good cause" for a mental examination was shown. The majority opinion cites Rule 35 (a) then promptly ignores the good cause aspect and goes on to something else. In contrast, the dissenting opinion recognizes that "good cause" is the pivotal point in this case and elaborates on exactly what quantum of proof is required. The majority opinion on the otherhand, leaves the reader in complete darkness as to what facts a litigant must produce to show "good cause."

The Appellant further submits that by failing to define "good cause" and by failing to cite any evidence upon which the majority opinion bases its conclusion, this Court has left Appellant without any idea of what would be important

or material in the future if the mother had recurring symptoms of mental illness. The majority opinion has commended the trial judge for saying, that, "If it appears that at some future time that a psychiatric and physical examination is necessary, application to the Court shall be made immediately;" however, it has not suggested what facts might be sufficient for such an application. The majority opinion as it now stands could well mean that the father would need additional symptoms to those set forth in the dissenting opinion of Justice Ellett before any further application could be justified. This would mean that if the mother suffered these same symptoms tomorrow and if the father tried to make application to the Court for a Rule 35 commitment as Judge Hanson suggests, that counsel for the mother could cite

the majority opinion as saying that there was not sufficient evidence shown for such a commitment. It would then be incumbent upon the father to produce additional evidence; even though any psychiatrist would concede that such symptoms warrant not only a Rule 35 commitment but also hospitalization. The Appellant submits that such a ruling goes far beyond any "good cause" requirements contemplated by Rule 35, and in effect makes it impossible to ever use Judge Hanson's suggestion.

III

THE MAJORITY OPINION HAS INCREASED THE BURDEN OF PROOF REQUIRED FOR "GOOD CAUSE" OVER THAT OF ANY OTHER STATE IN THIS COUNTRY, AND HAS IN EFFECT JUDICIALLY INVALIDATED THE RULE INSOFAR AS THE STATE OF UTAH IS CONCERNED.

The dissenting opinion of Justice Ellett as it appears on Page 6 of the

green sheets, contains the general rules relating to the quantum of proof required for a "good cause" commitment. The United States Supreme Court has held that it takes very little showing to convince the court that there is "good cause" for having an examination in a proper case, and the Appellant submits it is error for this Court to go so much further than the United States Supreme Court has gone. Schlagenhauf v. Holder, 379 v. s. 104, 13 L. Ed. 2d 152, 85 S. CT. 234 (1965).

The majority opinion states in part as follows:

> "While there is some evidence that the Plaintiff has at times been somewhat erratic in her behavior, there is countervailing evidence that the mental and/or nervous difficulties she suffered from had been temporary, and that she was a good mother to her children. The capstone on this point is that upon disputed evidence, the trial court made an affirmative finding that she was

not mentally incompetent nor otherwise unfit to care for them." [Emphasis added]

The Appellant will readily concede that Rule 35 matters are discretionary with the trial judge when there is a conflict in the testimony. However, Appellant submits the salient facts in this case are not in dispute. The following facts testified to by the witnesses at the hearing before Judge Hanson were undisputed:

A. The Plaintiff could not identify her own children on at least two occasions. On one of these occasions, a neighbor took the mother to primary and when the neighbor brought the children out to the car, the mother told her to take them back, that they were not her children. On another occasion, the mother told the father that the principal had sent the wrong children home from school and she wanted him to do something about them.

B. The Plaintiff believed she had a tape recorder in her head.

C. The Plaintiff believed her neighbors were spying on her.

D. The Plaintiff had her phone changed because she felt other people were spying on her.

E. These symptoms were not temporary but had persisted over a period from June, 1965, to April, 1966, and were a recurrence of symptoms that had arisen in 1958-1960 and had required the mother to be hospitalized and treated with electric shock. Furthermore, the mother's psychiatrist had been treating her continuously since 1958 to the time of the trial and he so testified.

F. The Plaintiff's psychiatrist had recommended that she be committed to a mental hospital for psychiatric evaluation.

G. The Plaintiff refused to let her psychiatrist testify in Court as to whether or not she was insane.

The Appellant submits these facts are not disputed by anyone testifying at the trial and submits that any inference that they were disputed cannot be justified by reference to any page in the record on appeal in this case. It is true that there was some dispute on other issues

such as whether the mother washed the children properly and fed and clothed them, but the Appellant submits that as to the salient mental facts there was no dispute. Moreover, even if the evidence was conflicting the burden of showing "good cause" was certainly sustained by the facts presented at the hearing before Judge Hanson, and the evidence produced at that hearing is the only evidence that would be important to this Court. It was this evidence which the trial judge used to render his decision and not the allegations in an affidavit or in the answers to any interrogatories as suggested in the majority opinion by this Court.

By holding that the facts set forth above, and in Justice Ellett's opinion, do not establish "good cause", the majority opinion has in effect equated good cause with preponderance of the evidence, or

possibly with an even higher degree of proof. It has also substantially raised the degree of proof which has heretofore been required in Utah for "good cause" production of documents under Rule 34, and for "good cause" physical examinations in personal injury cases. This is contrary to all of the authorities. In addition to Schlagenhauf, supra., see also the following: Beach v. Beach, 114 F. 2d 479 (1940); Greyhound Corp. v. Superior Court, Merced County, 15 Cal. Rptr. 90, 364 P. 2d 266 (1961). Note 22 p. 283 wherein "good cause" is discussed at length; 4 Moore's Federal Practice 2449 Section 34.08 "Showing of Good Cause," and page 2559 where the author states, "it will usually be easy enough to make such a showing where the physical or mental condition of the party is actually in controversy"; Richardson v. Richardson,

236 P. 2d 121 (1951). Note 10 p. 126.

IV

THE MAJORITY OPINION SACRIFICES THE WELFARE OF THE MINOR CHILDREN TO THE WELFARE OF THE MOTHER, AND DECIDES THIS CASE UPON AN AFFIDAVIT WHICH WAS NOT PRESENTED TO NOR CONSIDERED BY ANY OF THE THREE DISTRICT COURT JUDGES WHO HEARD THIS MATTER.

The majority opinion states in part as follows:

> "The question of a person's sanity nearly always involves considerable delicacy. If mere allegations in an affidavit compelled the court to require a party to submit to a psychiatric examination, a way would be open for opposing parties to harass, annoy or intimidate each other. The potential for mischief in such a situation is obvious and the court would always be well advised in exercising caution and restraint in regard to such a request, as it appears was done here." [Emphasis added].

This obvious concern for the welfare of the mother is commendable but it fails to recognize that the welfare of the minor children is paramount in a case

of this nature and that any embarrassment to the mother must yield, especially when the minor children's future emotional and mental condition is at issue as it was in the instant case. Moreover the fact that the mother had been seeing a psychiatrist continually since 1958 to the time of the trial argues against any embarrassment or danger resulting from a Rule 35 (a) examination. The majority opinion's concern about opening a pandora's box which would allow mental commitments based only on an affidavit is not justified by either the Rule itself or the facts in this case.

The Rule itself has a built-in protection against such an evil. It specifically requires (1) A written motion, (2) Notice to adverse party, and (3) A hearing on the allegation in the motion. The record clearly shows

a written motion was filed; notice was served upon the Respondent--mother [the Sheriff's return says the Defendant, but this is an obvious error since the Defendant would not have served himself], and a hearing was held. The trial judge did not look simply to an affidavit as the majority opinion seems to imply in the citation above. The affidavit has absolutely no bearing on this case and Appellant does not know why it was cited by the majority opinion. The Appellant has never suggested at any time that mere allegations in an affidavit were sufficient; and the trial judge did not base his decision on any affidavit. The original appeal to this Court claimed error on the part of the trial judge in deciding that the evidence produced <u>at the trial</u> was insufficient to warrant a Rule 35 commitment and <u>not</u> that the

trial judge decided that some affidavit failed to support such a commitment. The Appellant readily agrees that the practice of law by affidavit as opposed to an adversary proceeding in open court is at best a poor way to establish justice and truth.

The majority opinion has misinterpreted either the procedure which was used in the lower court or the evidence upon which the court rendered its decision. In either case, the Appellant submits that a rehearing is justified to clarify these matters since the affidavit aspect emphasized by this Court was not a part of the trial judge's consideration at all.

The majority opinion further intimates that there was something wrong in consolidating the Rule 35 issue with the other matters raised in the petition; and suggests that the Rule 35 matter should have been treated separately and prior to

hearing the other matters. Appellant attempted to do this both at the April 8 hearing before Judge Jeppson and at the pre-trial hearing before Judge Elton; however, counsel for the mother stated that he could not be ready to hear even the Rule 35 matter for several months because of his congested office schedule. Based upon this representation the law and motion judge and the pre-trial judge were willing to consolidate all issues rather than prolong the matter first for a Rule 35 hearing and then later for a second hearing on the other points raised in the original petition. Apparently, the trial judge [Hanson] concurred in this procedure because he received testimony on all issues and then rendered his opinion on them all including the Rule 35 matters. In other words, he received evidence on the Rule 35 issue and treated

it as a separate matter and made a separate order as to it. Nowhere did any of the trial judges intimate that it was improper to consolidate the Rule 35 matters with the other issues. Moreover, counsel for the mother did not object to any part of this procedure. He has raised a procedural irregularity for the first time in his brief on appeal to this Court and has apparently convinced a majority of this Court that the trial judges were guilty of some procedural error which counsel for the mother sought, agreed to, and actively participated in.

All the father tried to do was to get the matter heard as soon as possible because he felt there was an aggravated situation in the home which required immediate attention. He was willing to consolidate the Rule 35 matters with the other issues set forth in his original

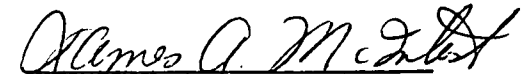
petition because that appeared to be the quickest way to handle the matter due to the mother's counsel's representation that his office schedule was too congested to hear any of the issues earlier than June 13, which was about two and one-half months after the original petition was filed. This procedure apparently had the blessing of three District Court Judges and it makes sense. By having only one hearing, the trial judge could receive evidence on all issues and then take the matter under advisement until he received a report from an independent Court-appointed psychiatrist. After evaluation was received, a complete judgment could then be entered. The Appellant submits that such a consolidation has the further advantage of avoiding a multiplicity of trials with the attendant extra attorney's fees, court costs, and time involved.

However, the majority opinion has intimated that something was wrong with this procedure and Appellant submits that a rehearing is justified and would be of great benefit to attorneys in this State to know what procedure is going to be allowed by this Court in matters of this nature in the future.

For the reasons set forth above, the Appellant respectfully requests a rehearing as to the Rule 35 issue only and asks this Court to grant the motion for an independent psychiatric examination and to continue the matter for further hearing until the independent psychiatrist can give testimony to the trial judge after which the trial judge should make new findings and such an order as is warranted by all of the evidence presented to him. The Appellant submits

the emotional and mental welfare of the minor children justifies such action.

RESPECTFULLY SUBMITTED



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