

1970

In The Matter of the Writ of Habeas Corpus For Ronnie Lynn Hathaway, A Minor, and Linda Lucille Hathaway v. Ronald J. Hathaway : Appellant's Brief Consolidated By Order of the Court

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In the Supreme Court of the State of Utah

IN THE MATTER OF THE WRIT
OF HABEAS CORPUS FOR RON-
NIE LYNN HATHAWAY, a minor,
and LINDA LUCILLE HATHA-
WAY,

Respondent

vs.

RONALD J. HATHAWAY,

Appellant,

Case No.
11827

Case No.
11902

APPELLANT'S BRIEF

CONSOLIDATED BY ORDER OF COURT

Relief Sought: Reinstatement of Writ of Habeas Corpus
and/or setting aside default judgment and permitting
appellant to try case on merits.

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TABLE OF CONTENTS

	<i>Page</i>
RELIEF SOUGHT	1
STATEMENT OF FACTS	1
ARGUMENT	3
POINT I. THE COURT ERRED IN DISCHARGING THE WRIT OF HABEAS CORPUS.	3
POINT II. THE COURT ERRED IN NOT SETTING THE DEFAULT ASIDE.	6
CONCLUSION	8

CASES CITED

Dichson v. Mullings, 66 U. 282, 241 P. 840, 43 A.L.R. 136.....	4
Mayhew v. Gilsonsite Company, 14 U.2d 52, 376 Pac. 551.....	8
Shurtliff v. Oregon Short Line R. Co., 66 U. 161, 241 P. 1058..	4
State of Montana ex rel. Sherman Ernest Lessley Relator v. District Court Gallatin County, et al., Respondents, 318 P.2d 571 (Montana, 1957).....	5
Thomas v. District Court of Third Judicial District, in and for Salt Lake County at, 110 Utah 245; 171 Pac. 2nd 667	6
Tolbert v. Utah Sand and Gravel Products Corporation, 16 Ut. 2nd 407, 402 Pac. 704	6

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APPELLANT'S BRIEF

CONSOLIDATED BY ORDER OF COURT

RELIEF SOUGHT

That the Writ of Habeas Corpus be reinstated and Appellant be granted custody of the child; or,

That the Default Judgment be set aside and the Appellant be given a trial on merits.

STATEMENT OF FACTS

Appellant, Ronald J. Hathaway and Respondent, Linda Lucille Hathaway, were married on the 19th day of August, 1961, and as issue of that marriage, Ronnie Lynn Hathaway was born on September 6, 1964. (TR-1)

The Respondent on June 6, 1968, filed an action in the District Court of Salt Lake County for a divorce against the Appellant, asking for the custody of the minor child, who was then three years old, and alleging in her Complaint that the minor child was in the out-of-state custody of the Appellant. (TR-1) No summons was served at this time. On January 8, 1969, Appellant filed an action for divorce against Respondent in California asking for the custody of the said minor child, and alleging that the child was then in his custody. On January 13, 1969, Respondent amended her Complaint in her Utah action and Appellant was personally served in that action in California on January 27, 1969. (TR-1) On January 20, 1969, Respondent was personally served with summons in the California action and subsequently made her appearance therein. On March 4, 1969, Respondent appeared personally and entered by and through her counsel, her appearance in the California action and, in open Court, stipulated that the custody of the minor child remain with the Appellant, and that she would not remove the child from the State of California without the consent of the Court. Notwithstanding the stipulation of Respondent and of counsel and the Order of the California Court, the Respondent ■■■, in June, 1969, under the guise of getting the child some clothes, spirited the child away from the sister of the Appellant; she did take the child back to Utah, and started to live under an assumed name, to-wit: Mrs. Noah Case. (R-47) On May 13, 1969, Carl Nemelka withdrew as respondent's counsel. No Utah Counsel appeared of record. On June

20, 1969, the appellant filed a Writ of Habeas Corpus to regain the custody and possession of the minor child. On June 20, 1969, Appellant filed a notice of the proceedings in the California action in the Utah action. (TR-10) Respondent could not be found to be served on the first writ which was to be heard on June 23, 1969 ((HC)-TR-3), so another writ was issued on July 2, 1969, to be heard on July 7th at 2 p.m. ((HC)-TR-4) Respondent was served with a copy of the writ on July 3, 1969. ((HC)-TR-5) Notwithstanding that no default divorces were to be heard that on the morning of Monday, July 7, 1969. Respondent rushed to court and, without any notice to appellant's counsel, had the Honorable Joseph G. Jeppson, the trial court judge who was to hear the writ at 2 p.m. that same afternoon, enter the default of Appellant, and grant a divorce to respondent and reserve the issue of custody until the hearing on the writ that afternoon. The default divorce action was concealed from appellant until after Habeas Corpus hearings was completed.

ARGUMENT

POINT I.

THE COURT ERRED IN DISCHARGING THE WRIT OF HABEAS CORPUS.

The trial court ignored the Order of the California court restraining the Respondent from taking the minor

child out of the State of California and made findings that the California court was without jurisdiction because the appellant was not a resident of the state of California when he commenced the California action. (R-14, 15) We submit that this was an erroneous finding of fact. A fair survey of the record indicates that he was physically present in California for the year preceding the filing of the action except for a temporary absence of eight weeks. (TR-35) A large portion of which he spent deer hunting. (TR-26)

He was employed only in California and paid his California income tax for the year, 1968, which preceded the filing of the action. (R-25, 33) The California Court found him to be a resident and respondent so admitted when she appeared in open Court and asked for affirmative relief, to-wit: custody of the child. (R-38) March 17, 1969.

In any event, Respondent's case in this attack on the jurisdiction of the California Court was defective in that she did not plead and prove the California Statutory Law in this respect to prove the length of time of the California residence requirement. Utah will not take judicial notice of the statutes of another state. *Shurtliff v. Oregon Short Line R. Co.*, 66 U. 161, 241 P. 1058; *Dichson v. Mullings*, 66 U. 282, 241 P. 840, 43 A.L.R. 136. Nor will the rule that in the absence of proof of foreign statutory law, it is presumed that the law of the foreign

jurisdiction is the same as the law of the forum since the residency period in Utah is only three months.

Although a litigant cannot confer jurisdiction upon a Court by consent, it is well settled that a parent can waive it's right to custody.

State of Montana el rel. Sherman Ernest Lessley
Relator V. District Court Gallatin County, et al.,
Respondents 318 P.2d 571 (Montana, 1957).

Not only did the Respondent spirit the minor child away in violation of the California Order, it was also in violation of an Order which she, herself had stipulated to in open court. (TR Exhibit 1)

Appellant signed a Verified Complaint in California alleging his residence. This was subsequently proved to the California Court's satisfaction. Respondent herself asked the California Court for affirmative relief in that she made a motion for the temporary custody of the minor child. (R-26)

In any event the lower court was leaning on a slender reed to upset the jurisdiction of the California court on the basis of appellant's obtaining a Utah resident hunting license in the fall of 1968. The record shows he was working in California and was living there and paid his state income tax there. The lower court resolved

for transitory evidence of mental intentions to abrogate California residency in order to obviate the effect of the California order and to avoid the issue of Respondent's blatant "seize and run" conduct in respect to the custody of the minor child.

POINT II.

THE COURT ERRED IN NOT SETTING THE DEFAULT ASIDE.

The lower court did not have jurisdiction to enter the default against the appellant in Civil Case 180008. The summons which was served upon appellant was defective and void under Rule no's 4 and 5, U.~~R~~.C.P. The sheriff did not endorse the date, place of service, time, and his official title thereto on appellant's copy. Failure to do so deprives the court of jurisdiction and is fatal. *Thomas v. District Court of Third Judicial District in and for Salt Lake County at*, 110 Utah 245, 171 P. 2nd 667; *Tolbert v. Utah Sand and Gravel Products Corporation*, 402 Pac. 703, 16 Ut. 2nd 407. The service of process must comply with the rules of the law of the forum. In California the clerk of the court issues the summons. (R-31) Because of our practice, endorsement by the process server is indispensable in order to give some evidence of the official character of the papers appearing on its face other than the signature of an agent (attorney) for the approving litigant.

At any rate in the Thomas case, it was held that such service without endorsing on the Summons where it was served, upon whom it was served, the date of service, and the server's official title is fatal and there is no reason for a different rule for service outside the State where personal service is a substitute for publication.

Regardless of the validity of the entry of the default judgment, as a matter of equity, the lower Court should have granted Appellant's timely Motion to Set the Default Aside. Irrespective of the technical rules of Court in custody cases, the welfare of the children have always been of paramount concern and appellant should have been heard in this regard. The Affidavit and proposed answer of the appellant in support of his motion to set aside the default raised grave issues as to the Respondent's fitness with regard to the custody of the minor child. (R-40) It is alleged that the Respondent is a heavy user of alcoholic beverages and a user of dangerous drugs and she has attempted suicide on several occasions and has made threatening statements pertaining to herself and the minor child. She was living under the name of Mrs. Noah Case in circumstances which warranted a review.

Although the Trial Court, in the morning reserved a ruling on the issue of custody until the hearing of the Writ that afternoon as to the Respondent's fitness for

custody. The fitness of the respondent was never tried at either proceeding which entirely ignored the welfare of the minor child. (R-50, 51) The lower Court's remarks in connecting with the appellant's taking the child from the State were not justified by any of the testimony at no time was the appellant under any Utah Court order not to remove the child from the State. In fact, in both Respondent's Complaint and in her Amended Complaint, she alleged that the Appellant had the custody of the minor child and was out of state. (R-1, 4) The law is well settled that upon a timely Motion and for good cause shown, a Default Judgment will be set aside.

See Mayhew vs. Gilsonite Company, 14 U.2d 52, 376 Pac. 551.

The granting of the Default Judgment at 10 A.M. knowing all parties would appear at 2 p.m. and the advising the Appellant after the second hearing that a Default Judgment had been taken at 10 A.M. that morning certainly was arbitrary. Then, refusing to set same aside on immediate Motion was an abuse of discretion.

CONCLUSION

To recapitulate, the facts of the instant case show that the respondent, in defiance of a California Court Order to which she herself had stipulated surreptitiously

and clandestinely seized the minor child from the lawful custody of the Appellant and sought a move to a more equitable haven favorable in the local forum to litigate the issue of custody and she further, through the use of legal technicalities avoided even the litigation of this issue in both of these Consolidated Cases. It is submitted that to place a quietus on these "seize and run" cases, the Writ of Habeas Corpus of the Appellant should have been granted. Otherwise, the orders of a foreign Court in these matters become mere predatory, idle vaporings and make a 'cat and mouse' game out of the issue of custody with the parents playing "seize and run" with the child as pawn.

It is further submitted that in any event, the welfare of the child and the fitness of the parents were never litigated in the local forum.

Respondent respectfully requests that the Writ of Habeas Corpus be made permanent or, in the alternative, that the Default be set aside and that there be a hearing on the merits.

Respectfully submitted,

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