

1970

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

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. George H. Searle; Attorney for Respondents

Recommended Citation

Brief of Respondent, *Hathaway v. Hathaway*, No. 11827 (1970).
https://digitalcommons.law.byu.edu/uofu_sc2/4920

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

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

Respondent

vs.

RONALD J. HATHAWAY,

Appellant

RESPONDENT'S BRIEF
CONSOLIDATED BY ORDER OF COURT

Relief Sought: Dismissal of

GEORGE S. [unclear]
2805 South [unclear]
Salt Lake City, Utah
Attorney for Respondent

LELAND K. WIMMER
MARK S. MINER

600 Utah Saving & Trust Bldg
Salt Lake City, Utah
Attorneys for Appellant

F I L E

Clerk

TABLE OF CONTENTS

	Page
RELIEF SOUGHT	1
STATEMENT OF FACTS	1
ARGUMENT	5
POINT I. THE COURT DID NOT ERR IN NOT SETTING THE DEFAULT ASIDE.	5
POINT II. THE COURT DID NOT ERR IN DISCHARGING THE WRIT OF HABEUS CORPUS.	7
CONCLUSION	7

CASES CITED

Thomas v. District Court of Third Judicial District, in and for Salt Lake County, 110 Ut. 245; 171 Pac. 2d 667	6
Tolbert v. Utah Sand & Gravel Corporation, 16 Ut. 2d 407; 402 Pac. 2d 704	6
Sorensen v. Sorensen, 18 Utah 2d 102; 417 Pac. 2d 118....	8

In the Supreme Court of the State of Utah

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

Respondent

vs.

RONALD J. HATHAWAY,

Appellant

Case No.
11827

Case No.
11902

RESPONDENT'S BRIEF CONSOLIDATED BY ORDER OF COURT

RELIEF SOUGHT

DECISIONS OF THE THIRD DISTRICT
COURT UPHELD

STATEMENT OF FACTS

Respondent, Linda Lucille Hathaway, commenced her divorce action in Third District Court on June 6, 1968. (11902-R-1)

Appellant, Ronald J. Hathaway, commenced his divorce action in California on January 8, 1969 alleging for jurisdictional reasons that he had been a resident of the State of California for more than one year prior to

commencement of action. (11902-R-13 also Exhibit D-2 case 187429)

Appellant was personally served with Summons on the 27th day of January, 1969 by a California Deputy Sheriff. (11902-R-8 also Exhibit D-2 case 187429)

The same month the Respondent, in an effort to acquire possession of her five-year old son from the Appellant, traveled to California and while there was served by a friend of the Appellant with Summons on the 20th of January, 1969.

Appellant, four days after being served with Summons, had his California attorney write (See Exhibit 2 Case 187429) to Respondent's counsel in Utah and in said letter, recognized the fact that the Utah Courts had jurisdiction first and that the Respondent did not intend to make an appearance before the Utah Court by writing the following:

"In any event, Mr. Hathaway does not intend to make any appearance in the action which your client filed in Utah. The Utah Court would have no personal jurisdiction over Mr. Hathaway so Mrs. Hathaway could be awarded nothing more than the actual default divorce itself.

Apparently, both parties are in agreement that they want a divorce and the only dispute is as to custody of the minor child."

Respondent, in an effort (the last of seven trips make to California to obtain her child) to obtain her child, did travel to California and because she had no

money, relied on welfare counsel who stipulated to the Court that Respondent could be temporarily deprived of her child and the Court entered such an Order without taking any testimony whatsoever from either of the parties. (Exhibit 1, Case 187429)

Respondent was thereafter, for the first time, given the opportunity to see her child for a few minutes in California and was able to leave California and return to Utah with the minor child.

On the 13th of May, 1969, Respondent's Utah counsel withdrew as her attorney (11902-R-9)

Appellant after the 13th of May 1969 employed Utah counsel who chose to make a general appearance on behalf of the Appellant by filing on Appellant's behalf, notice that he was proceeding in the divorce matter and said notice contained copies of the California proceedings. (11902-R-10) Appellant chose to not otherwise answer Respondent's Utah divorce proceedings notwithstanding full knowledge of the same. (See 11902-R-37 & 62 — counsel's Affidavit dated day of July, 1969, wherein Utah counsel, under oath, admits he was employed by Appellant and did intend to give notice in the file and to enter his appearance in the Utah case pursuant thereto. (Attachment "A"))

Ignoring the Utah divorce case, the Appellant did thereafter file a Habeas Corpus Complaint against Respondent based entirely upon the California Court order.

Respondent, upon being served with the Habeas

Corpus proceedings, did employ without remuneration, new counsel who, upon examining the Respondent's Utah divorce file, concluded that Respondent was entitled to be heard forthwith on the same. The District Court was contacted the day before the Habeas Corpus hearing and took under advisement, until the next day, whether the Respondent was entitled to be heard on her divorce Complaint. Counsel for Respondent contacted the District Court the following morning and submitted to the Honorable Judge Joseph G. Jeppson that the Respondent was entitled to be heard on her divorce Complaint as no responsive pleadings had been filed by Appellant and to thereby be afforded the use thereof, in defense of Appellant's Habeas Corpus Complaint. The Court concluded the same, heard the Respondent that morning (180008-T-68 to 79) and continued the matter for further hearing.

Thereafter, on the same day in the afternoon and before the Habeas Corpus proceeding was heard by the Court, the Appellant and his counsel were notified by Respondent's counsel that Respondent had been heard on her divorce Complaint earlier in the morning.

Thereafter, Appellant was heard on the Habeas Corpus matter (187429-T-18 to 52), the petition was denied and Respondent allowed to keep her child. The court further granted the Appellant the chance to file an answer and defense to paying child support money, alimony, attorney fees and costs.

Since then, the Appellant has answered the Utah

divorce action of Respondent, has moved the Court unsuccessfully to set aside her Utah divorce for the reason that when the Appellant was served personally with Summons in California ,the officer may not have placed on the Summons the date, place and title of person serving the papers.

Meanwhile and after appearing before the Utah Court, the Appellant has returned to California and obtained a California divorce against the Respondent, awarding him the custody of the minor child, thereby attempting to contravene the Utah Court action and leaving the Respondent in an untenable position of having a California Divorce Judgment against her outstanding and prior in time if Respondent's divorce action is set aside now.

Respondent has failed to contribute one cent to the support of the minor child since the Respondent was able to obtain custody of the child from the Appellant.

POINT I.

THE COURT DID NOT ERR IN NOT SETTING THE DEFAULT ASIDE.

Appellant under Point II of his brief alleges the lower Court did not have Jurisdiction to enter the default in Civil Case 180008 because the Summons served upon Appellant was defective and void under Rule No.'s 4 and 5 U.R.C.P. because the sheriff did not endorse the date, place of service, time, and his official title thereto on Appellant's copy.

Appellant cites *Thomas v. District Court of Third Judicial District Court of Third Judicial District in and for Salt Lake County* 110 Utah 245, 171 Pac. 2d 667 and *Tolbert v. Utah Sand and Gravel Products Corporation*, 16 Utah 2d 407, 402 P. 2d 407.

The "Thomas" case was decided under the provisions of 104-5-7 Utah Code Annotated 1943 to-wit:

"Any officer, or the person authorized to serve the same, shal, at the time of the service thereof, *endorse upon the copy or copies of such summons which he shall deliver to the defendant or defendants in such action the date upon which the same was so served, and sign his name thereto, and add, if an officer, his official title.*" 104-5-7 Utah Code Annotated 1943 was repealed nearly 20 years ago.

The foregoing Statute 104-5-7 was repealed and replaced by Rule 4 J of U.R.C.P. to-wit:

"At the time of service, the person making such service shall endorse upon the copy of the *summons left for the person being served*, the date upon which the same was served, and shall sign his name thereto, and, if an officer, add his official title."

It is submitted now that endorsement is now not necessary when the Summons is personally served upon the Appellant as in this case. (180008-R-9) In this case, it was not necessary to leave the Summons with someone else for to be given to the Appellant because he was personally served.

The "Tolbert" case was not decided upon "endorsement" and has no application to this case.

Further, both of the foregoing cases are cases where the defendant was served in the State of Utah and was not upon a defendant that was trying to avoid service by staying out of the State of Utah. It is submitted that no substantial right of the Appellant has been impaired when lawfully and personally served by and under the law of the State which the Appellant chose to run and hide in for the express purpose of depriving the Respondent of her five-year-old son.

POINT II.

THE COURT DID NOT ERR IN DISCHARGING THE WRIT OF HABEAS CORPUS.

The appellant with full knowledge that the Respondent had in her Utah divorce Complaint prayed and first asked for custody of the minor child, chose not to challenge said Utah divorce action, but to rely on his own self serving actions in California. Under the facts of this case and the testimony and lack of testimony that the Appellant gave in open court as compared with the pleadings in the case and testimony of the Respondent given, the lower court certainly was within the right to be satisfied with Respondent's right to "hold the body of the 5 year old boy."

CONCLUSION

The Appellant after last appearing in and before the Utah courts has returned to California and obtained

a California divorce. To now set aside the divorce decree that the Respondent has received and is entitled to will leave her now in an untenable position. Respondent is not gainfully employed, has been unable to pay counsel fees and in an effort to keep expenses at a minimum, this brief has also been brief so as to keep costs down. Further argument and citations are set forth on behalf of Respondent's position in her brief hereto before filed in the lower court (See 180008-R-56 to 63. The Courts attention is invited thereto if Respondent's brief herein is found wanting.

Appellant in this case walked into court, chose to give notice of his knowledge of the case " and now cannot say I had a foot in the door, but most of his torso was out in the hall" (Sorensen v. Sorensen, 18 Ut. 2d 102; 417 P.2d 118.) In this case it was great so long as he believed that his Caliofrnia divorce was first, but when found wanting he desires his foot to be withdrawn from the door and into the hall.

Respondent respectfully requests that Appellant's appeal be dismissed with costs awarded to the Respondent together with such other and further relief as the court decrees just and equitable.

Respectfully submitted,

GEORGE H. SEARLE
Attorney for Respondent
2805 South State Street
Salt Lake City, Utah 84115