1994

Lesa Denice Bird v. Brian Bird : Response to Petition for Rehearing

Utah Court of Appeals

M. Joy Jelte; Corporon and Williams; Attorney for Plaintiff/Appellant.
Brian C. Harrison; Hill, Harrison, Johnson and Schmutz; Attorney for Defendant-Appellee.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

LESA DENICE BIRD,	)	
Plaintiff-Appellant,	)	
vs.	)	Case No. 940419-CA
BRIAN BIRD,	)	Priority 2
Defendant-Appellee.	)	

RESPONSE TO PETITION FOR REHEARING

Appeal from Judgment and Order of the
Third Judicial District Court for Summit County
Honorable David S. Young, Presiding

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RESPONSE TO PETITION FOR REHEARING

DECISION OF COURT OF APPEALS

The Court of Appeals affirmed the trial court's order of contempt on the following grounds:

1. Plaintiff did not appeal the visitation orders and did not demonstrate that they were illegal;

2. The Plaintiff did not marshall the evidence in support of the findings and therefore the findings and conclusions were accepted;

3. Plaintiff was given adequate notice of her conduct which was alleged to be contemptuous.

The Court of Appeals decision was correct and should not be disturbed.

SUMMARY OF THE ARGUMENT

I. The visitation order of March 28, 1994, was lawful and was not appealed.

II. Plaintiff failed to marshall the evidence in support of the findings and orders issued on May 9, 1994, and May 24, 1994, and accordingly the findings and resulting conclusions are lawful.

III. Plaintiff had adequate notice of her conduct alleged to have been contemptuous.

ARGUMENT

I. The visitation order of March 28, 1994, was lawful and was not appealed.

Plaintiff first argues that this Court overlooked or misapprehended the Order of March 28, 1994.

This Order was dictated by the Court to both counsel by telephone conference on March 28, 1994, and signed the same day.

Plaintiff knew of the hearing because her attorney had requested a continuance from March 14, 1994, until March 28, 1994. [R. 278-279].

Although Plaintiff asserts that she did not know about the

content of the Order by April 2, 1994, she admits that she did know the content of the Order by April 8, 1994. [R. 504 L. 22, R. 512 L. 18-22].

Plaintiff was not held in contempt of court for her denial of visitation on April 2, 1994, but was held in contempt of court for her actions on April 8, 1994.

Plaintiff argues that a Rule 60(b) U.R.C.P. motion filed May 5, 1994, somehow extends the time of finality for purposes of appeal. This is not correct.

Rule 60(b) by its own language states:

> ...A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

Rule 4 of the Utah Rules of Appellate Procedure provides in part as follows:

> ...The notice of appeal required by Rule 3 shall be filed with the clerk of the trial court, within thirty (30) days after the date of entry of the judgment or order appealed from.

The last day to appeal this Order would have been April 28, 1994. Nothing whatsoever was filed until May 5, 1994, and that motion was a Rule 60(b) motion which did not affect the finality of March 28, 1994 Order or extend the deadline for filing an appeal to the March 28, 1994 Order.

Plaintiff's reliance of Rule 54(b) is misplaced. This rule

applies to complaints, counter-claims, cross-claims, and third-party claims, and not interlocutory visitation orders.

To adopt Plaintiff's argument would mean that all interim orders in domestic and other civil cases would have no finality until the very last issue was resolved.

This would defeat the intent of Rule 5 U.R.A.P. pertaining to interlocutory orders. An interlocutory order is an order which is "temporary and which intervenes between the commencement and the end of a lawsuit."

Parties have a right to appeal interlocutory orders by following the procedure of Rule 5 of the Utah Rules of Appellate Procedure.

In this case, Plaintiff did not seek review of the interlocutory order under Rule 5 U.R.A.P., did not appeal said order within thirty (30) days, and failed to marshall evidence in support of said order. Accordingly, the visitation Order of March 28, 1994, was lawful.

II. Plaintiff failed to marshall the evidence in support of the findings and orders issued on May 9, 1994, and May 24, 1994, and accordingly the findings and resulting conclusions are lawful.

The Plaintiff next argues that the May 9, 1994, and May 24,

1994 Orders were overlooked or misapprehended by this Court. The May 9, 1994, was based upon a stipulation offered by Plaintiff and accepted by Defendant. [R. 556 L. 17, R. 563 L. 20].

The Stipulation and Order were put into effect immediately by order of the trial court. [R. 355].

Rather than comply with her own stipulation and the resulting court order, Plaintiff immediately violated the stipulation by denying Defendant visitation on May 14, 1994, and May 15, 1994. [R. 445-446].

The May 24, 1994, Order was properly appealed.

However, Plaintiff failed to challenge the findings contained in the Orders of May 9, 1994, and May 24, 1994. Because Plaintiff failed to marshall the evidence in support of these findings, this Court should properly accept the findings and resulting conclusions as lawful.

In the recent case of State v. Hurst, 821 P.2d 467, 471 (Utah App. 1991), the Court stated:

> We affirm the trial court's findings - and the conclusions logically flowing therefrom - if the findings are based on sufficient evidence, viewing the evidence in the light most generous to the trial court. West Valley City v. Magestic Inv. Co., 818 P.2d 1311, 1312-14 (Utah App. 1991). We will not set aside a finding unless it is clearly erroneous. Utah R. Civ. P. 52(a). We give "due regard" to the "opportunity of the trial court to judge the credibility of the witnesses." To show insufficiency of the evidence, Hurst is

> required to "marshall all the evidence supporting the challenged findings and then show that despite that evidence, the findings are clearly lacking in support." State of Utah, in the interest of M.S., 815 P.2d 1325, 1328 (Utah App. 1991).
>
> Rather than marshalling the evidence supporting the challenged findings, Hurst has restated only the evidence favorable to her position. Because she failed to marshall the evidence, we accept the challenged finding and the resulting conclusion.

In the instant case, Plaintiff has only restated the evidence favorable to her position and has failed to marshall the evidence supporting the challenged findings. Accordingly, this Court should accept the findings and conclusions as lawful.

III. Plaintiff had adequate notice of her conduct alleged to have been contemptuous.

Plaintiff argues that she did not have notice of her conduct alleged to have been contemptuous.

This assertion is contrary to the facts.

Plaintiff received and had in her possession affidavits dated April 22, 1994, [R. 283], May 17, 1994, [R. 364], and May 24, 1994, [R. 402], all setting forth the acts "done or omitted" that formed the basis for the contempt charge.

The trial court even continued the hearing from 1:40 p.m.

until 4:30 p.m. on May 24, 1994, to allow Plaintiff to further consider all affidavits, reports, and proffers. [R. 435].

The simple fact is that Plaintiff violated each successive visitation order and blamed someone else in each case ie., her previous attorney, her husband, her children, and finally the trial judge.

This is a clear case in which Plaintiff:

1. Knew what was required;

2. Had the ability to comply; and

3. Intentionally failed or refused to do so.

Plaintiff had adequate notice of her conduct which was alleged to be contemptuous.

CONCLUSION

Respondent respectfully requests that the Petition for Rehearing be denied and the Respondent awarded costs and attorney's fees pursuant to Bradshaw v. Kershaw, 627 P.2d 528 (Utah 1981).

DATED this 5th day of May, 1995.

Brian C. Harrison
Attorney for Defendant-Appellee

MAILING CERTIFICATE

I HEREBY CERTIFY that I personally mailed two (2) copies of the foregoing Response to Petition for Rehearing to M. Joy Jelte, Corporon & Williams, 310 South Main St., Ste. 1400, Salt Lake City, UT 84101, by first-class U.S. mail, postage prepaid, this 9 day of May, 1995.

Brian C. Harrison