

2006

Lisa Cook v. Brad Cook : Brief of Appellee

Utah Court of Appeals

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F. Kevin Bond; Budge W. Call; Bond and Call; Attorneys for Appellant; Sharon Kishner; Attorney for the Minor Child.

Richard S. Nemelka; Nemelka and Nemelka; Attorneys for Appellee.

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IN THE UTAH COURT OF APPEALS

LISA COOK,	:	
	:	BRIEF OF THE APPELLEE
Petitioner and Appellee,	:	
	:	
vs.	:	
	:	
BRAD COOK,	:	Appellate Case No. 20060533-CA
	:	Trial Court No. 024901092-DA
Respondent and Appellant.	:	

THIS IS AN APPEAL FROM THE THIRD DISTRICT COURT'S RULING
DISMISSING THE APPELLANT'S VERIFIED PETITION TO
MODIFY DECREE OF DIVORCE

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UTAH APPEALS COURTS
DEC 11 2006

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JURISDICTION

This Court has jurisdiction over this Appeal pursuant to, Utah Code Ann. §78-2A-3(2)(h) amended; and Rules 3 and 4, Utah Rules of Appellate Procedure.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

A. Constitutional Provisions

There are no Constitutional provisions that would be or are applicable in this matter.

B. Rules

Rule 12(b)(6) U.R.C.P

How presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the Court, the motion

shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

STATEMENT OF ADDITIONAL FACTS

Appellee herein sets forth relevant additional facts to supplement that which has previously been submitted by the Appellant in his brief.

(1) In the Findings of Fact entered by the Court on or about August 2, 2005 in regard to the Trial in the above-entitled matter the Court stated in paragraph 12 of the Findings & Conclusions, “As referenced in these Findings of Fact and Conclusions of Law, the Court finds that respondent’s testimony and much of the evidence presented on his behalf lacks credibility and is not worthy of belief or entitled to much weight. Respondent’s lack of credibility as found by the Court is rooted in respondent’s felony convictions for Forgery and Theft by Deception; his statement that he lied about his income on a rental application; the uncontraverted testimony that he intended to financially ruin petitioner and the minor children; respondent’s statement that it is more important to pay tithing than child support and alimony; respondent’s demonstrated anger on the witness stand; respondent’s false testimony that he completed the evaluation with Dr. Davies and his odd responsibility shifting statement that every man has seen pornography; and that he misrepresented the condition of the home mortgage to petitioner, resulting in eviction and foreclosure of the marital residence. Respondent’s lack of credibility permeates his whole case.”

ARGUMENT

A. NEITHER COMMISSIONER ARNETT NOR JUDGE MEDLEY ERRED OR ABUSED THEIR DISCRETION IN DISMISSING MR. COOK'S VERIFIED PETITION TO MODIFY THE DECREE OF DIVORCE.

(1) Rule 12(b)(6) of the Utah Rules of Civil Procedure specifically grants to the Court the, "...right to dismiss a complaint when a party fails to state a claim upon which relief can be granted." Commissioner Arnett reviewed the Verified Petition to Modify the Decree of Divorce and determined that the Respondent/Appellant did in fact fail to state a claim upon which relief could be granted due to the fact that there were not any substantial or material changes in circumstance alleged which would justify any modification.

(2) As stated in *Hogge v. Hogge*, 649 P.2d 51 (Utah 1982) a party seeking a modification of custody must show that there has been a change of circumstance on which the custody award was based, which substantially and materially affects the custodial parent's parenting ability or the functioning of the custodial relationship. Further, in *Becker v. Becker* 694 P.2d 608, (Utah 1984) the Court indicated that not only must there be a change of circumstance, but it needs to be specific in relation to the modifications sought.

(3) In the Affidavit of Jody Gardner, (Exhibit 'A') she confirms that there were no changes in circumstance since the trial in the above-entitled matter and the entry of the Decree of Divorce. The mere fact that the Petitioner and her mother had signed the necessary documents to allow the minor child to continue in the same school that she was attending at the time of the Decree of Divorce is not a change that is significant in relation to the modifications sought by the Respondent/Appellant in regard to the custody of the minor child, Gardner.

(4) The care, custody, and control of the minor child, Gardner, has always been with the Petitioner/Appellee and has never been relinquished to anyone. The fact that the Petitioner/Appellee had to secure the help of her mother in taking care of her children due to the financial burden placed upon the Petitioner/Appellee due to the Respondent/Appellant's failure to support her and the children and incurring arrearage in child-support and alimony of over one-hundred and fifty-thousand dollars (\$150,000.00) should not now be used against her to assert that there has been any change in circumstance justifying a modification.

(5) Further, as stated in the Order (Exhibit 'B') from the hearing where the Verified Petition was dismissed, Commissioner Arnett found that the allegations in the Respondent/Appellant's Petition to Modify alleged facts that occurred prior to the Decree of Divorce being entered by the Court. Said facts were specifically that the minor child Gardner had been with his grandmother prior to the Decree of Divorce and has continued to spend some of the time with the grandmother. This does not constitute a change of circumstance since it was a circumstance that was occurring prior to the Decree of Divorce being entered.

B. THE VERIFIED PETITION TO MODIFY THE DECREE OF DIVORCE SHOULD HAVE BEEN DISMISSED BASED UPON THE SHORT PERIOD OF TIME BETWEEN THE DECREE OF DIVORCE AND THE FILING OF THE VERIFIED PETITION.

(1) The Decree of Divorce was entered on the 2nd of August, 2005. The Respondent/Appellant filed his Verified Petition to Modify the Decree of Divorce on the 27th of September, 2005, approximately eight weeks later. It is true that the last day of the trial in this matter was the 31st of March, 2005, however Judge Medley did not enter his memorandum

decision until May 20th, 2005.

(2) A Petition to Modify brought within a relatively short time since the award of custody in the Decree of Divorce is frowned upon by the Courts. In *Thorpe v. Jensen*, 817 P.2d 387, 391 (Utah Ct. App. 1991) the Utah Court of Appeals stated as follows:

“This initial post-divorce period is frequently difficult, traumatic, and emotional for children. They are often subject to social, community, educational, and lifestyle changes. Courts should exercise caution in disturbing custody awards during the early reconstructive months after a divorce. It is ordinarily best to let the dust settle for a time, lest temporary factors incident to readjustment be mistaken for material changes.”

(3) As stated in the Order (Exhibit ‘B’) from the hearing dismissing the Verified Petition to Modify the Decree of Divorce, Commissioner Arnett correctly found that the Respondent filed his Petition to Modify before the ink was dry on the Decree of Divorce, and before any court could determine whether any changes were significant, material, or permanent.

C. THE TRIAL COURT CORRECTLY FOUND THAT THE COMMISSIONER DID NOT ABUSE HIS DISCRETION.

(1) Judge Medley was not required to conduct an evidentiary hearing and his review on the Respondent/Appellant’s Objection to Ruling was appropriate in determining whether or not Commissioner Arnett abused his discretion in dismissing the Petition to Modify the Decree of Divorce. The Respondent/Appellant’s assertion that Judge Medley did not review the Verified Petition to Modify is absurd. Judge Medley always reviews the file and all pleadings and had reviewed the Petition to Modify prior to sustaining Commissioner Arnett’s ruling.

(2) Judge Medley was not required to make findings since there was no evidentiary

hearing and his decision was only to review Commissioner Arnetts ruling to see whether or not he abused his discretion. Commissioner Arnett made the findings in regard to the dismissal of the Petition to Modify, as stated in his Order. (Exhibit ‘B’)

D. COMMISSIONER ARNETT WAS CORRECT IN DISMISSING THE VERIFIED PETITION ALSO ON THE GROUNDS OF “UNCLEAN HANDS.

(1) As stated in the Order (Exhibit ‘B’) from the hearing dismissing the Petition to Modify, Commissioner Arnett found that the Respondent has “unclean hands” in regard to his non-payment of child-support and alimony and further that he had abused the processes of the Court, specifically in regard to Rules 15, 16, 6-401, and 101. Commissioner Arnett was very familiar with the numerous pleadings filed by the Respondent/Appellant and the numerous times he had required the Petitioner/Appellee to appear before the Court, on claims that did not have any merit. As stated in the Findings by Judge Medley, the Respondent/Appellant’s main goal in this divorce action had been to financially ruin the Petitioner and the minor children. His filing of three different appeals in this matter only confirms Judge Medley’s findings. The fact that he filed the Petition to Modify within weeks after the Decree of Divorce was signed also confirms said findings.

(2) As the Court is well aware, the Trial Court in divorce actions is a Court of Equity and a party coming to a Court of Equity must come with “clean hands.” The doctrine of “unclean hands” has been applicable in different cases where a party engages in some kind of fraud, deceit, or a consistent defiance of the Court’s orders. In other words, a party who seeks an equity remedy must have acted in good faith and not in violation of equitable principles. Such is the circumstance of the present case. [See *Jacobson v. Jacobson* 557 P.2d 156, (Utah 1976) *Hone v.*

Hone 95 P.3d 1221 (2004 Ut. App. 241)]


(4) Further, a District Court's application of the "unclean hands" doctrine is reviewable only for abuse of discretion. (*Hone v. Hone*) Judge Medley did not find that Commissioner Arnett had abused his discretion in regard to applying the doctrine of "unclean hands" and this Court should also find no abuse of discretion in Judge Medley's sustaining Commissioner Arnett's finding and ruling.

CONCLUSION

Neither Commissioner Arnett nor Judge Medley abused their discretion in dismissing the Petition to Modify. The Trial Court correctly found that the Petition to Modify did not state any claim for relief in regard to any change of circumstance that occurred after the Decree of Divorce was entered. Further, the Trial Court was accurate in finding that the ink was not yet dry on the Decree of Divorce and the Respondent/Appellant was only continuing his intent to ruin the Petitioner/Appellee financially while he continued to ignore the orders of the Court in regard to paying his child-support and alimony.

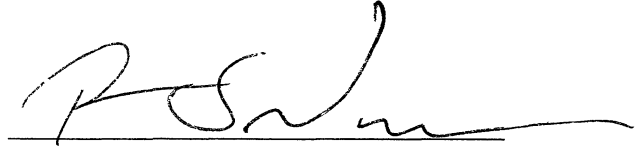
Based upon the foregoing the Trial Court's ruling granting the motion to dismiss should be affirmed.

Dated this 8 day of Dec, 2006.


Richard S. Nemelka
Attorney for Petitioner/Appellee

CERTIFICATE OF SERVICE

I hereby certify that I served by United States Mail, postage prepaid, two copies of the foregoing Brief of the Appellee to F. Kevin Bond, Budge W. Call, BOND & CALL L.C., 8 East Broadway, Suite 720, Salt Lake City, UT 84111, this the 8 day of Dec, 2006.

A handwritten signature in black ink, appearing to read "R. Bond", is written over a horizontal line.

ADDENDUM

EXHIBITS

- A. Affidavit of Jody Gardner dated the 12th of January, 2006
- B. Order from Hearing Held February 28th, 2006, dated the 4th of April, 2006

EXHIBIT 'A'

EXHIBIT ‘B’

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Heather C

Attorneys for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

J. BRAD COOK,

Petitioner,

vs.

LISA COOK,

Respondent.

AFFIDAVIT OF JODY GARDNER

Civil No: ~~030907075~~

024901092

Judge: ~~Frederick~~

MOLEY / AMIN

JODY GARDNER, being first duly sworn upon her oath hereby deposes and states as follows:

1. Affiant is the maternal grandmother of the minor children in the above matter and has personal knowledge of the facts alleged herein and is competent to testify to the same.
2. That at the time of the Trial in this matter, in December of 2004, and March of 2005, Affiant testified on behalf of the Plaintiff along with the Petitioner Lisa Cook. Both Affiant and

Petitioner, Lisa Cook testified that the minor child Gardner was in fact residing with Affiant for the reason that the Petitioner was having severe financial circumstances due to the fact that the Respondent had failed to pay hardly any child support and alimony and was in arrears approximately \$120,000.00. The Respondent Brad Cook had known even prior to the Trial and the Decree of Divorce being entered that the minor child Gardner was in fact residing most of the time with the Affiant.

Due to the fact that the Petitioner has had to move due to the failure by the Respondent to financially take care of his minor children, the Petitioner and Affiant, in an attempt to create some type of stability for the minor child Gardner, did in fact sign a Durable Power of Attorney and a Authorization to Enroll with the specific purpose to allow the minor child Gardner to remain in the same school in which he was attending.

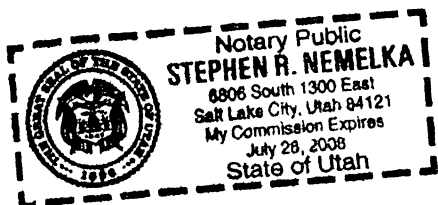
However, at no time has the Petitioner Lisa Cook ever abandoned the minor child Gardner, or released her custodial rights. In fact, the Petitioner, Lisa Cook has maintained custody of the minor child Gardner, and the minor child Gardner has resided with the Petitioner almost every weekend and the Petitioner has had the minor child with her during the week.

These circumstances existed at the time of the Decree of Divorce was entered and the Respondent knew the same, and there has been no change in circumstance in regard to the custodial arrangement and the residency of the minor child Gardner.

DATED this 1st day of January, 2006.

Jody Gardner
Jody Gardner

SUBSCRIBED AND SWORN to before me this 12th day of January, 2006.



[Signature]
Notary Public

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true copy of the foregoing Affidavit this 12 day of January, 2006, postage prepaid and addressed as follows:

F. Kevin Bond
Attorney at Law
311 South State, Suite 450
Salt Lake City, Utah 84111

[Signature]

EXHIBIT 'B'

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STEPHEN NEMELKA #9239
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Attorneys for Petitioner

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

LISA COOK, Petitioner, vs. J. BRAD COOK, Respondent.	ORDER FROM HEARING HELD FEBRUARY 28, 2006 Civil No: 024901092DA Judge: Tyrone E. Medley Comm: Thomas N. Arnett, Jr.
--	---

Petitioner's Motion to Dismiss Respondent's Petition to Modify came on regularly for hearing before the Honorable Thomas N. Arnett Jr. of the above entitled Court on the 28th day of February, 2006, Petitioner represented by her attorney, Richard S. Nemelka, and Respondent being represented by his attorney, Kevin Bond, and proffers of evidence and argument having been made to the Court, the Court having reviewed the same, and having made its recommendation, and good cause appearing therefore,

IT IS HEREBY ORDERED, DECREED, AND ADJUDGED AS FOLLOWS:

1. The Court finds that the Respondent in his Petition to Modify alleges facts that occurred prior to the Decree of Divorce being entered by the Court. The Court also finds that the Respondent filed his Petition to Modify before the ink was dry on the Decree of Divorce.

2. The Court finds that the fact that the children may be staying with relatives is not a change of circumstance and that the Respondent has "unclean hands" in regard to his nonpayment of support and alimony and that he has abused the processes of the Court, specifically in regard to Rules 15, 16, 6-401 and 101.

Based upon the forgoing Petitioner's Motion to Dismiss the Respondent's Petition to Modify is well taken and is hereby granted and Respondent's Petition to Modify is hereby dismissed.

Petitioner's request for attorney's fees is hereby reserved.

DATED this 4 day of ^{April}~~March~~, 2006.

BY THE COURT:

151
JUDGE TYRONE MEDLEY
DISTRICT COURT JUDGE

151
COMMISSIONER THOMAS N. ARNETT, JR.

APPROVED AS TO FORM:

F. Kevin Bond
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true copy of the foregoing ORDER OF HEARING HELD

FEBRUARY 28, 2006, this 17 day of March, 2006, postage prepaid, to:

F. Kevin Bond
BOND & CALL, L.C.
8 East Broadway, Suite 720
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to be 'F. Kevin Bond', is written over a horizontal line.