8-3-1976

Brown v. District Court In and For City and County of Denver

IN THE SUPREME COURT

OF THE STATE OF COLORADO

No. 27284

PAUL WILSON BROWN, Petitioner, vs. DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER, and JOHN BROOKS, JR., DISTRICT COURT JUDGE, Respondents.	)	ORIGINAL PROCEEDING Error To The District Court In And For The City and County of Denver Honorable John Brooks, Jr. Judge

BRIEF OF RESPONDENTS IN RESPONSE TO PETITIONER'S PETITION FOR RELIEF IN THE NATURE OF PROHIBITION

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COME NOW the Respondents by and through their attorney, Bruce A. Matas, and submit the following brief in response to the brief in support of Petition for Relief in the Nature of Prohibition previously filed by the Petitioner.

I

STATEMENT OF THE CASE

Respondents take issue with the completeness of the Statement of the Case provided by the Petitioner. Numerous facts are recited by the Petitioner, but other facts have been left from their presentation.

It should be noted that the Decree of Dissolution of Marriage entered by the Missouri Court, March 4, 1975, contained no prohibition that the custodian of the children, Joyce Lee Brown, now known as Joyce Lee MacMaster, could not remove the children from the State of Missouri to any other state and particularly to the State of Colorado. Subsequent to July 21, 1975, when Mrs. Brown resided within the State of Colorado, Mr. Brown, while exercising visitation with the minor children, took said children from the State of Colorado to the State of Missouri, which resulted in Mrs. Brown filing a Writ of Habeas Corpus for the return of the children in Missouri.

This proceeding was culminated by the Stipulation for Consent Modification of Decree of Dissolution of Marriage granted March 4, 1975, which was approved and made an order of the Missouri court on September 4, 1975. No further documents have been filed with the Missouri court since that date and there are no further matters pending in the Missouri court as of this date.

On Page 2 of said Stipulation, it is stated:

> "NOW, THEREFORE, it is mutually agreed between the parties hereto that it is for the best interest and well being of said children that they stay and remain with the Petitioner and be allowed to reside with the Petitioner in the City of Denver, Colorado . . ."

The Respondents contend that by this language, all parties agree to the change of residence and domicile of Mrs. Brown and the minor children of the parties, and the Court acquiesced in this change of jurisdiction by virtue of making same an Order of Court. It should be further noted that the only rights the Petitioner had by said Stipulation and Order was the right of visitation.

Then, on September 25, 1975, Mrs. Brown, who at that time had remarried a long-time resident and domiciliary of the State of Colorado, commenced an action in the Denver District Court entitled "Action on Foreign Judgment Re. Custody" pursuant to C.R.S. 1973, 14-11-101, and contemporaneous with said filing, requested that the Court enter an ex parte order temporarily terminating visitation rights in the Petitioner. The Court, after reviewing 14-11-101, felt it had insufficient information regarding jurisdiction over all parties to enter an Order regarding temporarily terminating visitation under the Uniform Child Custody Jurisdiction Act, but allowed Mrs. MacMaster the right to reopen said motion upon notice to the Respondent.

Between September 25, 1975, and the date of service upon the Petitioner, March 5, 1976, the Petitioner exercised little or no visitation with the minor children of the parties.

On March 5, 1976, while within the State of Colorado, the Petitioner was served personally, at which time the Petitioner had terminated his relationship with the State of Missouri by having taken up residency in the State of California. The Petitioner, at that time, was also in arrears on the child support payments. Therefore, Mrs. MacMaster, being unaware of his present circumstances, elected not to serve him with the Motion to Temporarily Terminate Visitation, but subsequently elected to and was given leave of Court to serve the Petitioner with a Motion and Order for Contempt Citation by virtue of his failure to pay his child support obligation as per the stipulation and order of Court. The Petitioner's attorneys subsequently filed a Motion to Quash said Citation, and the Court ex parte vacated said Citation.

The Petitioner then changed residences again and moved from the State of California to the State of Missouri, after service of process, and now maintains that Missouri is the appropriate forum and has jurisdiction over the parties.

Mrs. MacMaster subsequently filed an Amendment to Motion to Terminate and a Notice to Set, at which time, Petitioner's attorney participated in the setting of said hearing date, and shortly thereafter Petitioner's Motion to Dismiss came up for hearing and was determined by the Court. Said Motion to Terminate Visitation is presently set for hearing on December 8, 1976. In said Amendment to Motion to Terminate, Mrs. MacMaster requested certain relief which the lower court granted on June 30, 1976.

II

ARGUMENT RE. JURISDICTION

The Respondents contend that the Colorado courts have jurisdiction over all parties for numerous reasons, to-wit:

The Stipulation and Order of Court of September 4, 1975, allowed the mother and children to change residence from the State of Missouri to the State of Colorado; the father and the Court both agreed to such change of domicile; the father, subsequent to said order changed his residence and domicile from the State of Missouri to the State of California; this action was filed within the State of Colorado and personal service was effectuated on the Petitioner within the State of Colorado; the Petitioner retained counsel within the State of Colorado by virtue of this action; the attorney for the Petitioner filed a Motion to Dismiss and accompanying briefs in this Colorado action; the attorney for Petitioner filed a Motion to Quash and accompanying brief regarding the mother's Motion for Issuance of Contempt Citation; the attorney for the Petitioner participated in the setting of the hearing date on the mother's Motion to Terminate Visitation; the Petitioner filed an affidavit with the Colorado court pursuant to statute regarding the custody and residence of the minor children of the parties during the past five years; and the attorney for the Petitioner argued on June 30, 1976, the merits of the Court entering an order for a homestudy investigation and temporarily terminating the Petitioner's visitation rights.

In the case of Prinster v. District Court of Seventh Judicial District, 137 Colo. 393, 325 P.2d 938, the Court stated at Page 393, as follows:

> "Judge Hughes is charged with the duty of determining the rights and liabilities of all parties appearing in or brought into his Court. In the District Court, the plaintiffs filed their Complaint seeking relief against the Defendants, all of whom were properly before him. Judge Hughes proceeded in an orderly way; he considered plaintiffs' Complaint and defendants' Motion to Dismiss. Defendants

> recognized Judge Hughes' jurisdiction when they asked him to dismiss the Complaint; the fact that he denied the motion rather than to sustain it does not go to the question of jurisdiction. The real complaint of plaintiffs here is that Judge Hughes erroneously denied their motion. If his ruling was erroneous, that ruling can ultimately be reviewed here by Writ of Error."

It should be noted that the former Mrs. Brown has remarried, and the marriage is to a long-time Colorado resident and domiciliary. It should be further noted that had Mrs. MacMaster been aware prior to filing this action that the Court would refuse to take any action regarding her ex parte motion to temporarily terminate visitation, that she in fact would have waited until such time as the Petitioner was served with Colorado process before filing said action. A calculation would therefore indicate that she would have been a Colorado resident and domiciliary for approximately 8 months at the time of service upon the Petitioner. Even so, Mrs. MacMaster meets all the criteria of C.R.S. 1973, 14-13-104, as follows:

> "(1) (a) This state is the home state of the child at the time of commencement of the proceeding . . ."
>
> "(1) (b) It is in the best interest of the child that the Court of this state assume jurisdiction because the child and his parents or the child and at least one contestant, have a significant connection with this state and there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;"
>
> "(1) (c) The child is physically present in this State.
>
> "(1) (d) It appears that no other state would have jurisdiction under the prerequisites substantially in accordance with paragraphs (a), (b) or (c) of this subsection (1). . . and it is in the best interests of the child that this Court assume jurisdiction."

This statute is reiterated in the case of Nelson v. District Court, 186 Colo. 381, 527 P.2d 811, where the Court refers to said statute and determines that the Colorado Courts had jurisdiction over the child where both the parents were domiciliaries of the state but the minor child was a domiciliary of Montana.

In the case of Evans v. Evans, 136 Colo. 6, 314 P.2d 391, the Court stated as follows at Page 13:

> "It is well settled that the domicile of a child follows that of its parents; in the event of separation or divorce, the domicile of the child follows that of the parent to whom custody is decreed."

At Pages 14 and 15, the Court then cites from the case of Jones v. McCloud, 19 Wash. 2d 314, 142 P.2d 397, as follows:

> ". . . where it is shown to the courts of this state that the condition of the parties has so changed since the entry of the judgment by the sister state that the welfare of the minor requires that the courts of this state hear and determine the question presented, if we think that, included in the question presented, there is really the further question of whether or not the minor did in fact have a residence or a bona fide domicile in this state."
>
> ". . . however, we are convinced that, in this case, the residence and domicile of appellant having at all times being in Oregon and it appearing that under the divorce decree the custody, care, and control of the minor was awarded to the appellant, and it further appearing that the respondent, under the decree, was only permitted to have the minor during the months of June, July and August*** the minor never became a resident of, nor can it be said he was domiciled in, the state of Washington, regardless of what Respondent may claim relative to her having become a resident to the state. The residence and domicile of a minor remain in the State of Oregon, where the appellant resided and was domiciled***."

The Court at Page 16, then cites from McMillin v. McMillin, 114 Colo. 247, 158 P.2d 444, as follows:

> "After a final decree in divorce either party may change domicile at will; the child's domicile then changes with that of the parent in whose custody he has been placed and the court of new domicile has jurisdiction over proceedings as to custody.

> After such change of domicile we have held that any modification of the provisions of the final decree as to custody by the Court of the former domicile is without extra-territorial effect in Colorado. People ex rel v. Torrence, 94 Colo. 47, 27 P.2d 1038; and Hodgen v. Byrne, 105 Colo. 410, 98 P.2d 1000.***"

The Court then cites from Wagner v. Torrence at Page 18, as follows:

> "We feel that counsel has overlooked one very vital difference in the facts in that case and in the facts in the case at bar. In the Torrence case the Wisconsin court granted full-time custody to the mother, the father had visitation rights only. True, the Decree provided the children should not be removed from the State of Wisconsin and the mother violated this prohibition and brought the children to Colorado, thereby being in contempt of the Wisconsin court; even so, she retained her position as sole legal custodian of the children. The court said: 'The mother had the legal custody of the children when she crossed the Wisconsin border and it remained with her when she settled in Colorado. Violation of the removal order did not of itself defeat her custody. It subjected her to punishment for contempt. When she domiciled in Colorado, it became the domicile of the children."

In the case of Kraudel v. Kraudel, 148 Colo. 525, 366 P.2d 667, at Page 529, the Court states as follows:

> "Equally well established is the rule that when a child from another state becomes domiciled in Colorado and there is a material change of the circumstances of the divorced parents which would justify modification of the rights of custody of the child, the Colorado courts have and do take jurisdiction of the custody proceedings and enter appropriate orders based on conditions as they then appear. In such a case, we have held that the custody provisions of a decree rendered by the court of former domicile is subject to modification in Colorado if there be a change in conditions arising after the decree in the foreign state, which could not have been considered by that court in making the award. People ex rel v. Torrence, 94 Colo. 47, 27 P.2d 1038; Hodgen v. Byrne, 105 Colo. 410, 98 P.2d 1000; and Evans v. Evans, 136 Colo. 6, 314 P.2d 391."

In the case of Scheer v. District Court, 147 Colo. 265, 363 P.2d 1059, at Page 268, the Court states as follows:

"See People ex rel Wagner v. Torrence, 94 Colo. 47, 27 P.2d 1038, recognizing the principle that a custody award entered by one court is not binding on courts of another state under the full faith and credit clause of the federal constitution after the child has been domiciled in the latter state; that when a child's domicile is changed he is no longer subject to the controls of the Court which first awarded his custody. It is clear, of course, that the child's domicile is that of the parent with whom it lives. See Lyons v. Egan, 110 Colo. 227, 132 P.2d 794."

The Petitioner further contends that there might be other proceedings pending in the St. Louis court dealing with custody, and the Respondents state that such is not the case. C.R.S., 1973, 14-13-107 (2) states:

"If the court has reason to believe that proceedings may be pending in another state, it shall direct an inquiry to the state court administrator or other appropriate official of the other state."

This issue has not been raised in good faith in the lower court, and Respondents feel is not raised in good faith in this court.

In the case of Wheeler v. District Court, ____ Colo. ____, 526 P.2d 658, the Court states at Page 660, as follows:

"The trial court construed Section 46-6-6 as a bar to its authority. That section concerns simultaneous proceedings in other states. It provides that a state where the children may be (such as in Colorado) nevertheless has no jurisdiction when a proceeding concerning custody of the children is pending in another state at the time of filing the petition.

"In our view, Section 46-6-6 does not apply. There was no proceeding pending in Illinois. Once a custody decree has been rendered in one state, jurisdiction is determined by other sections under the Act.

"Section 46-6-3 (1) (a) and (b) allows modification of a prior foreign child custody decree when this state is the home state of the child at the time of commencement of the proceeding. That test has been met.

> "The children being here and having established their domicile here under a Court order from Illinois permitting the same, the Colorado court has jurisdiction."

The respondents feel there is no question but that Colorado has jurisdiction over all parties concerned. The respondents further feel that this Petition for Relief in the Nature of Prohibition should be summarily denied because said Petition is not the appropriate means to proceed in this action.

As was further stated in the case of Prinster v. District Court, supra, at Page 399, the Court states:

> "Prohibition may never be used to restrain a trial court having jurisdiction of the parties and of the subject matter from proceeding to a final conclusion. Nor may it be used to restrain a trial court from committing error in deciding a question properly before it; it may not be used in lieu of a Writ of Error.
>
> "In 42 Am. Jr., 165, Section 30, we find the following language:
>
> 'It is the universal rule that mere error, irregularity or mistake in the proceedings of a court having jurisdiction does not justify a resort to the extraordinary remedy by prohibition and that a writ of prohibition never issues to restrain a lower tribunal from committing mere error in deciding a question properly before it; or, as it has sometimes been said, the writ of prohibition, cannot be converted into, or made to serve the purpose of, an appeal, writ of error, or writ of review to undo what has already been done.*** Thus, when jurisdiction is clear an erroneous decision in ruling on the sufficiency of the petition or complaint or on a motion to dismiss***Is not grounds for a writ of prohibition.***"

At page 397, the Court further states:

"Admittedly, this matter is of great importance to the parties involved, and no doubt further litigation in the District Court will prove expensive. That fact, however, does not constitute sufficient reason for us to disregard the rules of procedure, decide questions not before us, divest a District Judge of all authority to determine issues properly before him, and adjudicate rights of the parties not before us."

III

ARGUMENT ON TERMINATION OF VISITATION RIGHTS

Counsel for the Petitioner has not seen fit to obtain a transcript of the lower court proceedings, but the lower court was advised at such time that the Petitioner, just a day or two prior to the June 30, 1976, hearing had contacted Mrs. MacMaster's residence and advised that he would not exercise any visitation rights with the minor children of the parties during the remainder of the summer.

The Court was also aware that it has a duty to serve the best interests of the minor children of the parties in this type of proceeding, and by virtue of the discretion allowed the District Court, elected, after being advised that such relief was requested in written form by Mrs. MacMaster and all parties were given notice thereof, to terminate on a temporary basis the visitation rights of the Petitioner until such time as a home-study investigation could be conducted, the results determined, and a further hearing on the matter had to determine rights, if any, of visitation. The Court was further advised that such a hearing date had been obtained prior to this date.

C.R.S. 1973, 14-13-120 allows the Colorado Court to order the home-study investigation to determine the circumstances of the parties. The temporary termination of the visitation rights in the Petitioner is further allowed by virtue of the Court's discretion in acting on behalf of the best interests of the minor children.

The Court was further advised that on one prior occasion, the last occasion of visitation where the Petitioner removed the children from the State of Colorado, it was necessary

that Mrs. MacMaster proceed by Writ of Habeas Corpus to obtain the return of the children.

Therefore, Respondents feel there was no abuse of discretion on the part of the trial court in exercising its judicial powers in temporarily terminating visitation rights in the Petitioner and ordering a home-study investigation thereof, nor was there any abuse of discretion on the part of the Court in entering such a temporary order without hearing as same could have been entered by the Court based on the verified Affidavits of Mrs. MacMaster on an ex parte basis.

It should further be noted that the United States Constitution guarantees certain rights, but these are legally protected rights. In the case of visitation, this is not a "right" as a matter of course, but is a "right" determined based upon the facts and evidence presented to a Court of law, and such a right can therefore be withdrawn from the party within the purview of the discretion of a Court of competent jurisdiction.

IV

CONCLUSION

Whereupon, the Respondents respectfully request that this honorable Court dismiss Petitioner's Writ of Prohibition, or, in the alternative, determine that said Writ has no merit and same should be denied, and the Respondents further request that the costs of this action be taxed against the Petitioner.

Respectfully submitted,

BRUCE A. MATAS 6193
Attorney for Respondents
1110 Capitol Life Center
1600 Sherman Street
Denver, Colorado 80203
Telephone: 222-7731

CERTIFICATE OF MAILING

I do hereby certify that a true and correct copy of the foregoing Brief of Respondents in Response to Petitioner's Petition for Relief in the Nature of Prohibition was mailed by placing same in the U. S. Mail with postage prepaid, this 3rd day of August, 1976, and properly addressed, as follows:

Clay R. Smith, Esq.
Attorney at Law
1050 17th Street - Suite 2500
Denver, Colorado 80202