

SUPREME COURT OF GEORGIA

Shepherd v. Shepherd, 225 Ga. 455

169 S.E.2d 314 (1969) · No. 25247 · Decided July 10, 1969

SUMMARY

The Supreme Court of Georgia considered an appeal from orders denying a motion to vacate and finding the husband in contempt for failing to pay attorney's fees in a divorce, alimony, and child custody case. The court denied dismissal, held that challenges to earlier temporary alimony and contempt orders were untimely, concluded that the record supported the trial court's rulings, and affirmed the judgment.

CASE DETAILS

COURT	Supreme Court of Georgia
WRITING FOR THE COURT	Mobley, Justice
JURISDICTION	Georgia
DECIDED	July 10, 1969
DOCKET	25247
DISPOSITION	affirmed
PROCEDURAL POSTURE	The husband appealed from two May 2, 1969, orders denying his motion to vacate prior temporary alimony and property orders and finding him in contempt for failure to pay attorney's fees. The wife moved to dismiss the appeal.
STANDARD OF REVIEW	An appellant bears the burden of affirmatively showing error in the record. When the record does not establish the alleged error, the appellate court presumes that the trial court acted correctly.
PRECEDENTIAL VALUE	Published opinion of the Supreme Court of Georgia
PARTIES	Charles Richard Shepherd v. Jana Lou Clanton Butler Shepherd

TOPICS

- family law procedure
- appellate procedure
- divorce
- alimony
- contempt

PRACTICE AREAS

- family law
- appellate procedure
- civil procedure
- contempt
- service of process

QUESTIONS PRESENTED

1. Whether the appeal should be dismissed because the notice of appeal did not accurately identify the May 2, 1969, orders being challenged.
2. Whether the husband's challenges to the December 19, 1968, temporary alimony, property, and contempt orders were timely.
3. Whether the record established that the December 19 orders were entered without adequate notice to the husband.
4. Whether service of the contempt citation on the husband's attorneys by mail and personal service on the husband sufficiently complied with the governing service statute.

HOLDINGS

1. The appeal was not subject to dismissal because the notice of appeal and enumeration of errors, considered together, showed that the husband appealed from both May 2, 1969, orders.
2. The challenges to the December 19, 1968, orders were untimely because those temporary alimony and contempt orders were directly appealable and the time for appealing them had expired before the May 8, 1969, notice of appeal was filed.
3. The trial court's orders were upheld because the husband failed to provide a transcript or other affirmative record evidence establishing that the December 19 orders were entered without due notice.
4. Service was legally sufficient under the circumstances because the citation and order were mailed to the husband's attorneys and the husband was personally served before the May 2 contempt order.

KEY QUOTATIONS

“The burden is on the party alleging error to show it affirmatively by the record.” (225 Ga. 457)

“Under the circumstances of this case, as they appear from the record, we cannot say that there was not sufficient compliance with the law in regard to service.” (225 Ga. 458)

FACTUAL BACKGROUND

The trial court entered temporary orders requiring the husband to deliver specified personal property to the wife and pay \$1,000 in attorney's fees. The husband later moved to vacate those orders, claiming that he and his attorneys lacked notice that attorney's fees and personal property would be considered at the hearing. The trial court denied the motion and held the husband in contempt for failing to pay the attorney's fees. The contempt citation was mailed to the husband's attorneys and personally served on the husband before the contempt order was entered.

PROCEDURAL HISTORY

In a divorce, alimony, and child-custody proceeding, the trial court entered temporary orders on December 19, 1968, awarding the wife specified personal property and \$1,000 in attorney's fees and ordering the husband's arrest for contempt. On May 2, 1969, the court denied the husband's motion to vacate those orders and found

him in contempt for failure to pay the attorney's fees. The husband appealed, and the Supreme Court of Georgia denied the motion to dismiss and affirmed.

DISPOSITION

affirmed

CASES CITED

- Richmond Hosiery Mills v. Hayes, 146 Ga. 240 (2) (91 S.E. 54)
- Campbell v. Powell, 206 Ga. 768 (3) (58 S.E.2d 829)

OPINION

MOBLEY, J.

225 Ga. 455 (1969) 169 S.E.2d 314 SHEPHERD v. SHEPHERD. 25247. Supreme Court of Georgia. Submitted June 12, 1969. Decided July 10, 1969. Rehearing Denied July 24, 1969. Pierre Howard, for appellant. James R. Venable, H. H. Hutchins, for appellee. MOBLEY, Justice.

1. in the divorce, alimony, and child custody case between Charles Richard Shepherd and Jana Lou Clanton Butler Shepherd, notice of appeal was filed by the husband "from the order dismissing the motion to vacate and finding the plaintiff in contempt entered in this action on May 2, 1969." Motion to dismiss the appeal has been filed by the wife on the ground that there is no order or judgment in the record such as that specified in the notice of appeal.

Two orders dated May *456 2, 1969, are in the record, one denying a motion to vacate an order of December 19, 1968, and the other finding the husband in contempt of court for failure to pay attorney's fees. From a consideration of the notice of appeal and the enumeration of errors, it appears that the appeal is from both of the orders entered on May 2, 1969, and the motion to dismiss is denied.

See Ga. L. 1968, pp. 1072, 1074 (Code Ann. § 6-809). 2. The first assignment of error asserts that the order entered December 19, 1968, which temporarily awarded specified personal property to the wife, and ordered the husband to pay \$1,000 to attorneys for the wife, was not a valid order because the court had no jurisdiction to enter the order. Assignments of error 2 and 3 complain that the order of December 19, 1968, directing that the husband be arrested and placed in jail for contempt of the order previously rendered on the same day requiring him to deliver specified personal property to the wife, was void on the ground that there had been no contempt of a valid order.

Temporary alimony and contempt orders are appealable by direct appeal. Ga. L. 1968, pp. 1072, 1073 (Code Ann. § 6-701). It was too late for an appeal from the orders of December 19, 1968, when the notice of appeal was filed on May 8, 1969. Ga. L. 1965, pp. 18, 21, as amended (Code

Ann. § 6-803). 3. Enumerated errors 4 and 5 contend that the court erred in its order of May 2, 1969, denying the husband's motion to vacate the orders of December 19, 1968, and in its order of the same date, finding the husband guilty of contempt for failing to pay attorney's fees, because the court did not have jurisdiction to issue the orders of December 19, 1968.

The motion to vacate was based on the contention that the husband and his counsel were not served with the wife's pleading of December 10, 1968, in which she prayed for attorney's fees, and had no notice that temporary alimony and possession of the personal property would be considered at the hearing of December 16, 1968, but thought the hearing was for the purpose of deciding temporary custody of the minor child.

It was alleged that no mention was made of attorney's fees or personal property at the hearing. *457 In the wife's answer to the motion to vacate she alleged that a copy of the pleading filed by her was sent to an attorney of record for the husband, and that the husband and his present attorneys had notice of the pleading filed by her. She alleged that the judge signed the order for attorney's fees after it was dictated and agreed to by attorneys for both parties.

The order denying the motion to vacate recites that it was entered "after hearing arguments thereon, and after consideration thereof..." The order finding the husband in contempt for failure to pay the attorney's fees recites that it was entered "after hearing evidence and arguments thereon..."

The husband specified no transcript of proceedings at the hearing on these matters. The burden is on the party alleging error to show it affirmatively by the record. *Richmond Hosier Mills v. Hayes*, 146 Ga. 240 (2) (91 S.E. 54); *Campbell v. Powell*, 206 Ga. 768 (3) (58 SE2d 829). Since there is nothing in the record to show that the orders of December 19, 1968, were entered without due notice to the husband, except the pleading of the husband which was controverted by the wife, we must assume that the trial judge correctly denied the motion to vacate, and properly found the husband in contempt for failure to pay the attorney's fees.

4. In the sixth assignment of error it is asserted that the court erred in finding the husband guilty of contempt on the ground that the citation for contempt had never been served upon him. Under Ga. L. 1966, pp. 609, 615, as amended (Code Ann. § 81A-105 (b)) it is provided: "Whenever under this Act service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court.

Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last-known address or, if no address is known, by leaving it with the clerk of the court." The wife filed her citation for contempt on April 7, 1969.

The judge ordered that the matter be heard on April 18, and *458 that the citation be served on the husband personally. On the latter date the judge entered an order reciting that the Sheriff or his

lawful deputies had not been able to serve the husband, postponing the hearing until April 25, and ordering that the citation be served on the husband and his attorneys.

Attorneys for the wife certified that on April 18, 1969, they served attorneys for the husband with citation and order by mailing copies thereof to his attorneys. Personal service is shown on the husband on April 25, 1969, by a deputy sheriff.

The order was entered on May 2, 1969. Under the circumstances of this case, as they appear from the record, we cannot say that there was not sufficient compliance with the law in regard to service. Judgment affirmed. All the Justices concur.