

Michael E. **Betts**, Respondent, v. Rita A. **Betts**, Petitioner

COURT OF APPEALS OF WASHINGTON, Division Two

3 Wn. App. 53; 473 P.2d 403; 1970 Wash. App. LEXIS 890

July 20, 1970

OPINION: Defendant Rita A. **Betts**, now Rita A. Caporale, appeals from a judgment modifying a California divorce decree which had awarded her custody of the children of the parties. In modifying the divorce decree the trial court awarded custody of the 5-year-old daughter, Tracey Lynn, now the sole child of the parties, to plaintiff Michael E. **Betts**.

The mother's assignments of error raise three contentions:

- (1) The superior court of this state did not have jurisdiction to modify the California divorce decree.
- (2) Out-of-court statements of the child, relied on by the trial court, were inadmissible because they constituted **hearsay** evidence, and for the further reason that the child was not qualified to testify as a witness.
- (3) The trial court abused its discretion in modifying the California decree by changing the custody from the mother to the father.

While the parties were residing in California defendant wife sued for divorce. An interlocutory decree was entered on July 19, 1967 which granted custody of the children to the wife. The final decree of divorce, which incorporated all of the terms of the interlocutory decree, was entered on September 6, 1968.

In April, 1968, the wife took the children to her parents' home in Lewis County, Washington. She then returned to California and completed her move to her parents' home in July, 1968. On August 1, 1968 she and the children moved to Lacey in Thurston County, Washington, where she resided with Raymond Don Caporale. The plaintiff husband continued to reside in California.

On August 6, 1968, 2-year-old James Michael **Betts**, the minor son of the parties died. An autopsy revealed internal injuries as well as multiple bruises on the head and body. The probable cause of the death was disputed by expert medical testimony. There was testimony that the injuries were caused by accidents.

On August 9, 1968, the Thurston County Juvenile Court entered an ex parte order placing Tracey Lynn in the protective custody of the chief juvenile probation officer for the expressed reasons that her mother could not provide a fit place of residence for her and because she was needed as a material witness in the prosecution of a homicide charge against Raymond Don Caporale, who had been living with the mother.

A juvenile court hearing was later held in early September, 1968 and the juvenile court ordered "that Tracey Lynn **Betts** shall be made the temporary ward of the Thurston County Juvenile Court and placed under the control and jurisdiction of the Thurston County Juvenile Probation Officer for placement in a supervised foster home."

In August of 1968 Raymond Don Caporale was charged with murder in the second degree for the death of the minor son of the parties to this action. During the fall of 1968, Caporale was tried. The jury was unable to reach a verdict. The action was subsequently dismissed with a finding that the evidence admitted in the criminal trial was insufficient as a matter of law to warrant the conviction of Caporale.

Michael **Betts** remarried on July 26, 1969 and he and his wife have established their home in Aberdeen, Washington. Rita **Betts** married Raymond Don Caporale on November 2, 1968 and they established their home in California.

The daughter, Tracey Lynn, remained in Washington in a foster home. On October 21, 1968, Michael E. **Betts** commenced an action in Thurston County to obtain custody of the daughter. A hearing was held in December, 1969. Defendant, Rita A. **Betts**, now Caporale, appeared to contest the modification proceedings and challenged the jurisdiction of the court. The trial court granted custody of the daughter to the father, Michael E. **Betts**.

The mother's first contention is that the trial court lacked jurisdiction because her domicile was in California and the domicile of the child follows that of the parent who has legal custody of the child....

The mother's next contention is that certain statements made by the daughter to her foster mother were inadmissible because they were **hearsay** statements.

The foster mother saw an item in the paper relative to the remarriage of the child's mother and with reference to it, testified as follows:

A. So I told her that her mama and Mr. Ray Caporale had got married, and she started crying. She said, -- she ran and put her arms around me and her head in my lap and started crying real bad and hard and said, "He killed my brother and he'll kill my mommie too," -- and she doesn't seem to ever get that out of her mind. Q. Does she say this often? A. Yes, she tells all her friends -- explains why she is with us, and she goes into this tale, and I don't seem to be able to get her not to tell her problems to outsiders. Q. Did she ever make statements about this prior to the incident you have just mentioned, which apparently occurred after the trial? A. Yes, yes, she started telling about her little brother was in heaven and how he had gotten there and she always blamed him for it. Q. By "him," who do you mean? A. Mr. Caporale. Q. Has anyone in your presence tried to pull this information out of this child? A. No, because I didn't want to worry her. When she talks, we let her talk; but we don't try to change her mind, one way or the other, because we aren't there to do that -- just give her a home.

The foster mother further stated, "She always mentioned, 'He's mean.' That is the word she uses -- 'He's mean.'"

We hold that use of this testimony does not violate the **hearsay** evidence rule.

The **hearsay** evidence rule prohibits the use of testimony in court, of a statement made by another person out of court, which is being offered to show the truth of the matter asserted therein. Such evidence derives its value, not solely from the credibility of the in-court witness himself, but also in part, from the veracity and competence of the person who made the out-of-court statement. *Moen v. Chestnut*, 9 Wn.2d 93, 113 P.2d 1030 (1941); 2 B. Jones on Evidence § 268 (1958).

The statements of the child were not admitted to prove the truth of the assertions she made, but merely to indirectly and inferentially show the mental state of the child at the time of the child custody proceedings. [T]he trial court stated in part: "The fact that said statements had been made would tend to create a strained relationship between said Tracey Lynn **Betts** and her step-father, Raymond Don Caporale, and her mother, should she be awarded to her mother."

Out-of-court statements are often circumstantial evidence of the declarant's state of mind when his state of mind is relevant in a case. Evidence of such statements is not **hearsay** under the classic definition of **hearsay**.

An obvious example of an out-of-court non-**hearsay** statement which circumstantially indicates a state of mind regardless of the truth of the statement would be "I am Napoleon Bonaparte." This would be relevant in a sanity hearing.

The statements in question in this case are clearly non-**hearsay** statements which circumstantially indicate a state of mind regardless of their truth. Since they were relevant, they are admissible.

The mother further contends, however, that the out-of-court statements would not be admissible because the child was not competent to testify in court. At the time of the hearing she was 5 years old.

However, we are not considering the testimony of the 5-year-old child as an exception to the **hearsay** rule, but as a non-**hearsay** statement which circumstantially indicates the state of the child's mind regardless of the truth of the statement. Under such circumstances, the statement would be admissible even though the child may not have been competent to serve as a witness in the case.

The trial court had before it substantial evidence to find a change of conditions. The death of the child's brother, the murder trial of the present stepfather and the child's feelings toward her stepfather would justify the trial court's determination that her welfare would be best served by awarding custody of the child to the father. We find no abuse of discretion.

The judgment is affirmed.