

2007

Linda Anderson v. Glenn Hunter Thompson : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LINDA ANDERSON,
(f.k.a. Linda LaRee Thompson),

Petitioner,

v.

GLENN HUNTER THOMPSON,

Respondent.

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Appellate Case No. 20070176

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
FOR TOOELE COUNTY, UTAH
JUDGE MARK S. KOURIS

REPLY BRIEF OF APPELLANT

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AUG 07 2007

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ARGUMENT

POINT I

RESPONDENT IS NOT LIABLE FOR CONTEMPT OF COURT UNDER THE CIRCUMSTANCES WHEREIN THE PARTIES OPERATED PURSUANT TO THEIR OWN PROCESS FOR SEVERAL YEARS.

The Petitioner's Response to Appellant's Argument Point I argues that the finding of contempt is supported because of conclusions reached regarding the terms of the original Decree of Divorce. Contempt of court does not result from disputes between parties to a divorce or a court resolution of such disputes. Rather, contempt of court involves actions having significant adverse impacts on the courts in the administration of justice.

Black's Law Dictionary defines contempt of court as follows:

Any act which is calculated to embarrass, hinder, or obstruct court in administration of justice, or which is calculated to lessen its authority or its dignity. Committed by a person who does any act in willful contravention of its authority or dignity, or tending to impede or frustrate the administration of justice, or by one who, being under the court's authority as a party to a proceeding therein, willfully disobeys its lawful orders or fails to comply with an undertaking which he has given.

Black's Law Dictionary, 6th Ed., West Publishing Co., (1990) p. 319.

This definition requires willful disobedience to an order. Utah requires intentional disobedience. There is not clear and convincing evidence that Respondent intentionally disobeyed any court order.

As pointed out in Appellant's brief, the parties worked for over six years with their financial arrangements. These arrangements included Respondent paying Petitioner's taxes

totaling more than \$21,000.00 not required by the Decree of Divorce. Only after Petitioner remarried did she attempt to collect increased child support. She sought the increased past child support only after first proceeding with a Petition to Modify seeking higher future child support.

Petitioner claims that contempt occurred because the Respondent testified that he had not complied with aspects of the Court's Order. Respondent testified that he paid the maximum amount of child support provided by the Uniform Child Support Guidelines. (R. 352, Trial Transcript Pgs. 79-80.) Respondent also testified as to his interpretation that additional amounts for clothing and Christmas expenses were part of the child support upon the automatic adjustment of child support to the child support guidelines and consequently not payable. (R. 352, Trial Transcript Pgs. 81-83.)

Respondent was not in compliance with the Court's Order only once the determinations were made as to what was required by the Order. Our system of Courts is established for the purpose of resolving disputes. Respondent had bona fide disputes as to the requirements of the Court's Order. There is no showing that the Respondent acted in willful or intentional violation of any Court Order.

Commonly, Courts deal in domestic relations cases with so-called "deadbeat dads." These parties fail to pay Court ordered support, often move from the jurisdiction, change jobs, hide assets or take other actions to avoid payment of obligations. Commonly, these issues are raised on numerous occasions with the "deadbeat dad" refusing to comply after repeated warnings and/or Court Orders.

In this case, the Respondent paid child support and alimony monthly without fail. Respondent also paid additional amounts for extracurricular lessons and activities for the children and paid additional monies exceeding \$21,000.00 for Petitioner's taxes.

Petitioner claimed a right to recover more for non-school extracurricular activities and lessons. (R @ 166.) Petitioner's affidavit in support of her Order to Show Cause failed to recognize Respondent's payment of half of these expenses. Petitioner's affidavit also failed to recognize the agreement to split these expenses. (R @ 162-163, and 155-156.)

This case does not involve the intentional violation of an Order as required. Courts are open to resolve disputes between parties without this dispute resolution resulting in a finding of contempt. The Order of Contempt should be reversed.

POINT II

PETITIONER'S ACTIONS, INCLUDING STIPULATING TO THE DOCUMENTS TO BE PRODUCED, CANNOT BE IGNORED BY PETITIONER OR THE TRIAL COURT.

The Petitioner's Response to Appellant's Argument Point II argues the trial court did not disregard the stipulation of the parties nor the law of the case by finding Respondent in contempt of court. Petitioner argues that the order was not objected to. This argument is stated to be of paramount importance. At the October 16, 2006 hearing, Respondent's counsel raised the issue with the following argument:

MR. RICHARDS: Your Honor, as the Court has noted, this matter has been pending for – for some time and this matter comes before the Court and where basically, there are pending two cross petitions for modification of the divorce decree; the one was filed by the petitioner and a cross-petition filed on behalf of the respondent.

With prior counsel, we were working towards that and in fact the – the petition does not talk about the issues that are being brought forward today, it talks about – it talks about, in that petition of the amount of child support. And there are a number of both factual and legal issues that do not allow for this matter to be treated or addressed here

today. I believe it is going to have to go forward to
a – the trial calendar for that to be worked out.

One of – (R. 351 October 16, 2006
Transcript @ 10-11.)

The Court then cut off the argument and began discussing the Court's interpretation of
the Divorce Decree (R 351, October 16, 2006 Transcript @ 11.)

Prior to the trial in this matter, the Court requested that the parties submit proposed
findings to the Court by October 24, 2006. (R. 169.) Respondent's Proposed Findings of Fact
and Conclusions of Law included Finding of Fact 32 that states:

32. On March 3, 2005, Petitioner filed a Motion for
Modification of the Decree of Divorce. This
Petition for Modification sought a change in the
amount of child support. This petition
acknowledged in Paragraph 6 that Respondent was
required to pay \$1,000.00 per month as child
support. The Petitioner did not make any claims for
other amounts to be due pursuant to the Divorce
Decree. (R. 171.)

The issue regarding the stipulation and the pending motions was raised before the trial
court.

Petitioner attempts to distinguish In re E.H., 137 P.3d 809 (Utah 2006) by stating the trial
court's order was not voided in this case. The Supreme Court did not state in In re E.H. id. that
the rule only applied to specifically voided orders. The rule applies to matters being reopened or
inconsistent orders being made.

Petitioner claims the Respondent mischaracterizes the Petitioner's position at the
October 16, 2006 hearing. As Petitioner has pointed out, Petitioner filed an Order to Show
Cause in March, 2005 (R. 73.). Petitioner then proceeded to request documents; stipulated as to
the documents that were required; received the stipulated documents; filed a Motion to Compel
Discovery that was denied; requested that her legal counsel withdraw from the case; hired new

legal counsel; and filed an inconsistent Order to Show Cause. The original Order to Show Cause has never been dismissed.

The issue of providing income verification is the same in both Orders to Show Cause. In the Affidavit of Linda Anderson in Support of Order to Show Cause filed in connection with the Order to Show Cause filed March 2, 2005, Ms. Anderson states in paragraph 5:

Respondent has failed to provide to me his income verification for the years 2000 through and including 2004. On or about January 25, 2005, I requested, in writing, that Respondent provide to me his income verification. Respondent continues to refuse to do so.

(R at 64.)

In the Order to Show Cause filed March 23, 2005, in paragraph 2 request from the Court as follows:

Why Respondent should not be required to immediately provide to Petitioner income verification for the years 1999, 2000, 2001, 2002, 2003 and 2004 as provided in the parties' Decree of Divorce.

(R at 72-73.)

In the Affidavit of Petitioner in Support of Motion for Order to Show Cause filed September 18, 2006 in paragraph 8 the Petitioner states the following:

My previous attorney attempted to receive discovery information regarding Respondent's gross receipts, but this was never supplied. I am requesting that the Court compel Respondent to comply with this information from 1999 to the present. My child support should increase automatically based upon Respondent's gross receipts increase.

(R at 161.)

Paragraph 3 of the Order to Show Cause filed September 27, 2006 states:

Why child support should not increase automatically based upon Respondent's gross yearly receipts and why an order compelling discovery should not be issued against the Respondent for his failure to comply with previous discovery requests. In particular, Respondent must provide his gross yearly receipts from 1999 through the current date. Petitioner's child support should automatically increase consistent with Decree of Divorce directives and should not be limited to the child support guidelines.

(R at 166.)

Petitioner's argument that different documents are involved between the two Orders is obviously incorrect. Petitioner requested documents from 1999 through 2004 in the first proceeding. A stipulation was agreed to by the parties and complied with by the Respondent. Petitioner's statement that the discovery had not been complied with is incorrect. Counsel for the Petitioner even acknowledged that he had seen the documents. At the October 16, 2006 hearing, Mr. Friel stated:

Your Honor, I do believe I've seen some of those returns Mr. Richards referenced, but even in those returns, the critical document that we are looking for and the one we asked for today was a document showing the gross receipts or gross revenues for Mr. Thompson for those years.

So even though I – I have seen some documents and they may be what he's referencing in the stipulation, there still needs to be, because the – the decree is tied to the gross revenues.

(R at 351, October 16, 2006 Transcript at 4-5.)

The income tax returns produced pursuant to the stipulation included the exact same returns provided in connection with the second Order to Show Cause with the exception of the limited number of years involved.

The issue involved in both Orders to Show Cause involved the amount of child support. The trial court disregarded the stipulation and the proceedings held before Judge Skanchy. Petitioner's assertion that these issues are different is simply not correct.

The trial court, in part, bases its findings on Petitioner's claims that she did not receive documents until six days before trial. Respondent was in compliance with the Order of Judge Skanchy. The trial court failed to recognize the stipulation and Order of Judge Skanchy.

POINT IV

A STATEMENT IN A SETTLEMENT NEGOTIATION LETTER IS NOT ADMISSIBLE.

In Petitioner's Response to Appellant's Argument Point III Petitioner argues that she offered the statement to show Respondent's character and credibility and that the Respondent had made an open threat against the Petitioner. As explained in the Appellant's brief, Rule 408, Utah Rules of Evidence excludes evidence of conduct or statements made in compromise negotiations.

The question asked by Petitioner's counsel had no other basis than the letter itself. The question even referred to an "e-mail letter." (R. @ 88, Lines 22-25.) The preceding line of questioning related to Respondent's gross receipts. (R. @ 88.) The subsequent questions related to extra-curricular activity expenses (R. @ 93). The introduction of the contents of the letter was not to address any prior inconsistent statements. The question stood alone as did the answer. Consequently the statements were not used to impeach or determine credibility based on other statements.

As explained in the Appellant's brief, the trial court asked the Petitioner questions about the letter. Such questions illicit evidence going far beyond credibility or any acceptable basis of inquiry.

The Court's error in admitting this statement caused prejudice to the Respondent. The Court used the statement as a contradiction by the Respondent leading to the trial court disregarding the testimony of the Respondent and finding the Respondent not to be credible.

POINT V

PETITIONER'S ACTION IN RETAINING OVER \$21,000.00 FOR PAYMENTS OF TAXES AND OTHER ACTIONS EQUITABLY ESTOP HER FROM COLLECTING OTHER AMOUNTS.

In the Petitioner's Response to Appellant's Argument Point IV, Petitioner argues that the issue of equitable estoppel is raised for the first time on appeal. Petitioner also argues that Petitioner's credibility as determined by the trial court eliminates the elements of equitable estoppel. These arguments are not accurate.

Petitioner cites S.K. and J.K. v. State, 157 P.3d 352 (Utah App. 2007) for the proposition that "in order to preserve an issue for appeal, the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." Respondent doesn't dispute this principle.

The Utah Supreme Court provided even more recent guidance about preserving an issue on appeal in Pratt v. Nelson, 578 Utah Adv. Rep. 31 (Utah 2007). The Court acknowledged that three factors determine whether the Court had an opportunity to rule. These factors are:

1. The issue must be raised in a timely fashion;
2. The issue must be specifically raised; and
3. A party must introduce supporting evidence or relevant legal authority.

The issue of the payment of taxes being amounts Petitioner is not entitled to retain was discussed during oral argument at the October 26, 2006 hearing. First, counsel for Respondent argued the following:

Now, that includes the 2004 taxes. Now, if there – if that payment of the taxes is consideration for the agreement that there is no increase in the child support and the alimony and so forth, then \$2,480 may be payable on that basis, but it is not payable as being extracurricular activity and it's not payable as being required by the – by the divorce decree.

THE COURT: Let me ask you this, if – if in fact, your client claims the payment of the taxes is what he took, his portion and Mrs. Anderson then released him of the duties of the increases that we are talking about and so forth, why did he not pay it in 2004 then, if that was his belief?

MR. RICHARDS: He has not been submitted with the tax bill until the order to show cause was filed a month ago. (R at 352, Trial Transcript at 136-137.)

Later in the argument for Respondent, the following is stated:

... So, if we don't have that agreement that everything goes away across the board, as far as those increases, then Dr. Thompson is entitled to credit for what he paid that was not provided for by the divorce decree, and that is the taxes that he has paid which are not \$21,000.00. So, he is entitled to a credit for that; we don't think that's the – the correct analysis, if there are other amounts that he is supposed to be paying _____ the divorce decree, then he's not – or he is entitled to that – that offset, or that credit for the taxes that he paid that the divorce decree does not require him to be involved with... (R at 352, Trial Transcript at 145-146.)

The issue of equitable estoppel is also raised in the Proposed Findings of Fact and Conclusions of Law filed on behalf of Respondent October 24, 2006. Paragraphs 5, 6 and 7 of the proposed Conclusions of Law state:

5. Petitioner, by her representations or her actions in agreeing with Respondent about activities and lessons for the children; by agreeing that one-half of the expenses of nonschool extra-curricular activities and lessons would be paid by each party; by accepting contributions for her taxes from Respondent; and failing to raise any issues for as

much as seven years led Respondent to believe he had met his support obligations.

6. Respondent in reliance upon Petitioner's representations and actions, changed his position to his detriment.

7. Petitioner is estopped from claiming unpaid support.

In the Memorandum of Points and Authorities filed by Respondent on October 26, 2006, Point II addressed estoppel (R. 178-179). The estoppel issue was raised factually and with relevant legal authority. The issue was raised specifically even being raised in the Court's requested Proposed Findings of Fact and Conclusions of Law. Petitioner's argument that estoppel was not raised is unfounded.

Petitioner cites Youngblood v. Auto Owners, 158 P.3d 1088 (Utah 2007) with respect to the elements of equitable estoppel. The elements stated in Youngblood are the same as the elements cited by the Appellant in his brief. Applying the requirements of Youngblood in this case results in concluding that the Petitioner admitted that she approached the Respondent for him to pay her taxes. She acted each year by submitting a tax bill to him each year and receiving payment from him. Consequently, the Youngblood requirement that there be a statement, admission, act or failure to act by one party inconsistent with a claim later asserted exists. The claim now asserted by the Petitioner is that there was no agreement for the taxes to be paid in lieu of other amounts such as increased child support. This is a position that is inconsistent with Petitioner's acceptance of the tax payments.

The Respondent continued to pay the taxes each year as the tax bill was presented to him. If the Respondent were to be required to pay higher child support, Respondent could have refused to pay the taxes. Respondent detrimentally relied upon the acts of the Petitioner by continuing to pay the taxes.

The issue of Petitioner retaining the payment of taxes was raised at the trial court. The basis for being equitably estopped from retaining the benefit of these monies remains unchanged by the Youngblood decision. Respondent meets the requirements of equitable estoppel.

POINT VI

PETITIONER WAIVED HER RIGHTS TO COLLECT UNCLAIMED MONIES FROM THE RESPONDENT.

The waiver argument is based on similar circumstances to that of equitable estoppel. The issue was raised in the trial court as was the equitable estoppel argument.

Petitioner's characterization of the facts and circumstances involved in Petitioner's waiver of her rights to claim past child support is incorrect.

One of the Court's findings was that the Petitioner had attempted to enforce the Decree of Divorce by setting mediation dates. As noted in Appellant's brief, this finding is clearly erroneous because the Petitioner did not attempt by mediation to enforce the Decree until after her remarriage in November, 2004. Petitioner specifically testified that the mediation she proposed had nothing to do with the prior amounts. Specifically, Petitioner testified as follows:

When we met – when we first – when I first got married, we met in his car, we just met together in a mutual place and were just kind of discussing what we were going to do. And I had come to him and said – he was giving me a check, I think, I – I don't know for sure, but I think so, my first check in November of 2004, he gave me \$1,000.00 child support. And I said, what do you mean? 'Cause in the divorce decree, it's written that child support was \$1,000.00 and \$3,100.00 was alimony. And I said no, I mean, what are you doing? And then we started – I – I wanted to negotiate with him. What I really wanted to do was take his tax returns, my tax returns, go to the mediator and have the mediator say this is what it should be, because I didn't think

either one of us had the right to say. (R at 352,
Trial Transcript 55-56.)

Petitioner relies on the finding that Petitioner had reasonable explanations for waiting to enforce the Decree of Divorce. This finding is not sufficient to overcome the Petitioner's waiver. Petitioner decided not to pursue past child support. Petitioner continued to accept over \$21,000 in taxes over a period of years. Petitioner pursued an Order to Show Cause without pursuing past child support. These actions constitute an intentional relinquishment of a known right. The Court finding that a delay in bringing this action doesn't change the fact the Petitioner had waived her rights.

POINT VII

PETITIONER IS NOT ENTITLED TO RECOVER
ATTORNEY'S FEES IN A PROCEEDING IN
WHICH RESPONDENT SHOULD NOT BE
FOUND IN CONTEMPT.

Petitioner's Response to Appellant's Argument Point VI argues that the trial court did not base the award of attorney's fees on the Decree of Divorce. Paragraph 34 of the Decree of Divorce dated April 20, 1999 states:

If any party should be found to be in contempt in
any provisions of any order of this court, that party
shall be responsible for paying reasonable
attorney's fees and costs for the enforcement
thereof. (R at 46.)

As explained throughout this appeal, Respondent challenges the finding of contempt by the trial court. The requirements of Paragraph 34 are consequently not met. Petitioner states that the Court did not follow the Decree of Divorce in awarding attorney's fees. The Petitioner is bound by the Divorce Decree. Petitioner can't claim a different basis for attorney's fees.

The Petitioner also points out that the trial court did not require the documentation of Petitioner's attorney's fees claimed at the December, 2006 hearing. This is an admission of error. As noted in the Appellant's brief, reasonableness and need for the attorney's fees of \$1,286.89 is in question. This is an additional issue beyond the award of any attorney's fees.

POINT VIII

EACH PARTY SHOULD BEAR THEIR OWN ATTORNEY'S FEES.

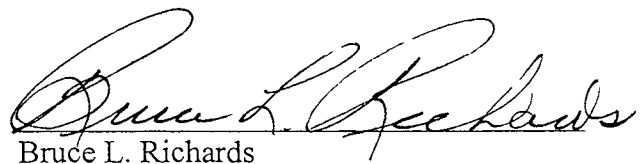
Petitioner argues that she should be awarded her attorney's fees and costs on appeal. Fees can be awarded on appeal if properly ordered in the trial court. Here, a finding of contempt is not appropriate. Consequently, the Petitioner is not entitled to attorney's fees at the trial court level. The requirements of Paragraph 34 of the Decree of Divorce are not met. Petitioner is not entitled to fees on appeal.

CONCLUSION

The trial court's Order from Trial Held October 26, 2006 and Objection Hearing held December 18, 2006 should be reversed. Respondent should not be held in contempt of court, should not be responsible for prior child support, Christmas and clothing funds, taxes for Petitioner for tax years after her remarriage, or attorney's fees. If the Order is not reversed, Respondent should be credited for amounts paid for Petitioner's taxes against any amounts found owing.

DATED this 7th day of August, 2007.

BRUCE L. RICHARDS & ASSOCIATES

A handwritten signature in cursive script, appearing to read "Bruce L. Richards", is written over a horizontal line.

Bruce L. Richards
Attorney for Respondent

MAILING CERTIFICATE

I hereby certify that on the 7th day of August, 2007, two copies of Reply Brief of Appellant was mailed via First Class Mail, postage-prepaid to:

David J. Friel
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A handwritten signature in cursive script, reading "Lynn B. Johnson", is written over a horizontal line.