1976

# Barbara Nancy Astorga v. Richard George Julio : Brief of Appellant

Utah Supreme Court


Reading & Snow; Attorneys for Respondent.

IN THE SUPREME COURT

OF THE STATE OF UTAH

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| ARA NANCY ASTORGA, | |
| Plaintiff and Respondent, | |
| vs. | Case No. |
| D GEORGE JULIO, | |
| Defendant and Appellant. | |

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# BRIEF OF APPELLANT

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APPEAL FROM THE JUDGMENT OF THE
D DISTRICT COURT FOR SALT LAKE
NORABLE MARCELLUS K. SNOW,

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READING AND SNOW
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IN THE SUPREME COURT

OF THE STATE OF UTAH

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|---|---|---|
| BARBARA NANCY ASTORGA, Plaintiff and Respondent, | ) | |
| vs. | ) | Case No. 14526 |
| RICHARD GEORGE JULIO, Defendant and Appellant. | ) | |

# BRIEF OF APPELLANT

## STATEMENT OF KIND OF CASE

This is a civil action by the plaintiff to modify the judgment and order rendered against the appellant in a criminal bastardy proceeding.

## DISPOSITION IN LOWER COURT

Defendant's Motion to Dismiss prior to trial was denied. The case was heard by the Court, which ordered that the child support payments by the defendant in behalf of Todd Troy be increased from $50.00 to the sum of $75.00 per month.

## RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the lower court's Order and judgment in his favor and dismissal of plaintiff's order, and in the alternative, a new trial.

## STATEMENT OF FACTS

On March 15, 1967, in the matter of State of Utah v. Richard Julio, Third Judicial District Court, Salt Lake County, criminal case number 20016, the jury found the defendant guilty of being the father of a minor child, Todd Troy born to the plaintiff herein, and the Court ordered the defendant to pay child support in the amount of $50.00 per month, plus medical expenses incurred in connection with the birth of said minor child. The defendant has fully performed according to the court's order.

On or about November 17, 1975, plaintiff filed the within action, and subsequently obtained the issuance of an Order to Show Cause in re Modification wherein plaintiff sought modification of the judgment and order in the previous bastardy proceeding, seeking an increase in the monthly child support payment to $100.00. Defendant's pretrial Motion to Dismiss was denied from which defendant appeals.

Upon trial of the issue, the lower court ordered that child supp

payments by the defendant in behalf of said minor child be increased to $75.00 per month, from which order the defendant appeals.

## STATEMENT OF POINTS

POINT I. THE PLAINTIFF, HAVING ELECTED TO PROCEED UNDER THE BASTARDY ACT, IS PRECLUDED FROM SEEKING MODIFICATION OF THE JUDGMENT RENDERED THEREUNDER THROUGH A NEW AND SEPARATE CIVIL ACTION.

POINT II. PLAINTIFF'S ACTION AGAINST THE DEFENDANT IS A COLLATERAL ATTACK ON A PRIOR JUDGMENT AND MUST BE DISMISSED.

POINT III. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDING OF THE COURT THAT THERE EXISTED SUFFICIENT CHANGE OF CIRCUMSTANCES TO WARRANT A MODIFICATION OF THE SUPPORT ORDER.

## ARGUMENT

### POINT I.

THE PLAINTIFF HAVING ELECTED TO PROCEED UNDER THE BASTARDY ACT, IS PRECLUDED FROM SEEKING MODIFICATION OF THE JUDGMENT RENDERED THEREUNDER THROUGH A NEW AND SEPARATE CIVIL ACTION.

In Brown v. Marrelli, Utah 2d 527 P. 2d 230 (1974), this Court, citing its own recent decisions, held that the Bastardy Act, Section 77-60-1 et seq., U.C.A. (1953, as amended) and the Uniform Act on Paternity, Section 78-45a-1, et seq., U.C.A. (1953, as amended) are alternative remedies and that the election to pursue one precludes subsequent use of

the other. The plaintiff herein elected to proceed under the criminal Bastardy Act, and is obviously now prohibited from proceeding under the civil Uniform Act on Paternity for additional relief. Instead, the plaintiff has instituted a civil action of her own invention to modify the judgment rendered in the Bastardy Act proceeding. The Brown case, cited above, dictates that when the plaintiff elects her remedy against the putative father, she is bound by that election regarding the subsequ attempts to enforce or modify any resulting judgment. Plaintiff must not be permitted to do indirectly that which this Court has prohibited her from doing directly. Accordingly, plaintiff's action must be dismissed

## POINT II.

### PLAINTIFF'S ACTION AGAINST THE DEFENDANT IS A COLLATERAL ATTACK ON A PRIOR JUDGMENT AND MUST BE DISMISSED.

This Court ruled in Erickson v. McCullough, 91 Utah 159, 63 P. 595 ( 1937 ), that a judgment is not subject to collateral attack wh the Court had jurisdiction of the subject matter and the parties. This recognized rule was violated when the plaintiff filed a new and separat civil action to modify the judgment rendered in the earlier criminal bastardy proceedings. Plaintiff should not be permitted to make this collateral attack on that judgment. Instead, she should be limited to seeking her additional remedy under the style and number of the origi

proceedings. Her attempt to do otherwise must be dismissed.

## POINT III.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDING OF THE COURT THAT THERE EXISTED SUFFICIENT CHANGE OF CIRCUMSTANCES TO WARRANT A MODIFICATION OF THE SUPPORT ORDER.

The Plaintiff failes to establish sufficient facts of changed circumstances to support a modification of the original order. The Plaintiff testified (Transcript 26, Lines 2-16) that at the time of the original order she had no income but that her income has increased to $680.00 per month (T. 26 L.8-11). On the other hand, the defendant testified his net income has increased only by $88.48 since the original order was entered (T.11 L. 19-22). Clearly, the facts do not warrant the modification entered by the trial court.

An error in computation of the plaintiff's payroll deductions is apparent, a mis-stated fact which may have been relied upon by the Court in arriving at its decision. At one point, the plaintiff,under cross examination, indicates that $6.62 per month is withheld for retirement (T.24 L.14). Under re-direct examination (T.28 L.23), the plaintiff indicates the retirement figure is $62.62, the discrepancy being more than the gross increase in support ordered by the Court. This confusion must be clarified, requiring a new trial of this issue.

## CONCLUSION

The Plaintiff has attempted a practice which, unchecked, would result in a veritable flood of litigation with every displeased party being free to file yet another separate action to impeach or modify an earlier judgment. This Court has unequivocally stated that a mother may seek relief against her child's putative father in either of two court proceedings, civil or criminal. Decisions of this Court, judicial economy, and common sense dictate that once that choice is made, all further related proceedings should and must be brought under the original case style and number, a course of action which Plaintiff admits was contemplated at one time (T. 27 L. 14-28).

The facts contained in the record do not support a judgment modification even if the Plaintiff had proceeded correctly, and at best are inconclusive and even confusing, requiring a new trial of the issue if the judgment is not reversed. However, it is clear that the judicial system would be best served by reversal of the lower court's decision.

Respectfully submitted,

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## AUTHORITIES CITED

### CASES



### OTHER AUTHORITIES