1976

Beverly Larsen v. Earnest Larsen : Brief of Appellant

Utah Supreme Court

Vernon B. Romney; Stephen G. Schwendiman; Attorneys for Appellant;
Gordon Esplin; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

BEVERLY LARSEN, and the STATE OF UTAH, by and through Utah State Department of Social Services,

Plaintiff and Appellant,

-v-

EARNEST LARSEN,

Defendant and Respondent.

No. 14593

BRIEF OF APPELLANT

Appeal from the judgment of the District Court of the Third Judicial District of Salt Lake County, Honorable Bryant H. Croft, presiding.

VERNON B. ROMNEY
Utah Attorney General

STEPHEN G. SCHWENDIMAN
Assistant Attorney General

236 State Capitol Building
Salt Lake City, Utah 84114

Attorneys for Appellant

Gordon Esplin
216 East Fifth South
Salt Lake City, Utah 84111

Attorney for Respondent

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236 State Capitol Building
Salt Lake City, Utah 84114

Attorneys for Appellant

Gordon Esplin
216 East Fifth South
Salt Lake City, Utah 84111

Attorney for Respondent

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STATEMENT OF THE NATURE OF THE CASE

Appellants, State of Utah and Beverly Larsen, appeal from an order of the lower court which dismissed a request for judgment on an order to show cause that denied appellant, State of Utah, all right to reimbursement for support payments given respondent's children since the entry of a $1.00 support order.

DISPOSITION OF THE LOWER COURT

The lower court held that the $1.00 per year child support order was in fact a valid "order of support" and that the state was not entitled to the reasonable amount of support for money tendered by the state for care of the respondent's children whether or not the respondent's

circumstances had changed, and that that had to be done prospectively only. The court gave leave for the state to refile the order to show cause to correct flaws which would allow a modification for a new support order but outrightly dismissed the state's attempt to collect anything since the divorce order to that point of time.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the lower court's order that a one dollar ($1.00) per year support order is an order of support and seek this court to declare the same void from its inception. Further, the appellants seek this court to direct the lower court to hold a hearing to establish what the respondent's liability for support has been since the entry of the order of $1.00, with directions to grant judgment for the amount so declared up to and including the $50 per month per child as requested in the state's order to show cause.

STATEMENT OF FACTS

The co-plaintiff, Beverly Larsen, was awarded a decree of divorce from defendant in May of 1967. (R. 24-25) Care, custody and control of the parties' three minor children was awarded to the co-plaintiff, subject to reasonable rights of visitation by the defendant. Because of an illness and physical disability from which defendant then suffered, and by reason of emotional problems suffered by

the children as a result of defendant's prior conduct, the visitation rights of defendant were limited. In addition, defendant was ordered to pay one dollar ($1.00) per year alimony and one dollar ($1.00) per year child support for the three children. The support orders were, however, subject to review and modification by the court, as the circumstances of the defendant became such that he should be required to pay additional amounts for support.

Because of defendant's failure to provide support, defendant's wife and children were forced to rely upon public assistance from April, 1972, through January, 1976. An assignment of collection was executed on September 17, 1975, pursuant to Utah Code Annotated 78-45-9, by which plaintiffs' rights to support for herself and her children were subrogated to those of the Department of Social Services.

A hearing was held on plaintiffs' order to show cause on April 16, 1976, to determine why the child support provision of the divorce decree should not be modified upwards and why a judgment for the reasonable amount of support from April, 1972, through February, 1976, based on the rate of fifty dollars ($50.00) per month per child, should not be entered against defendant for accrued and unpaid child support payments totaling six thousand seven hundred and seventeen dollars ($6,717.00).

The state made an attempt to bring to the court's attention the fact of changed circumstances since the entry of the order, as well as the contention that the $1.00 order is in fact no order of support. The lower court, as per Judge Croft, would not allow such evidence in, holding that since the order referred to was in fact an order of support, the state was not entitled to a retroactive determination of liability and, therefore, the only matter the court could consider was present changed circumstances for prospective support only. The court held the order to show cause deficient for the prospective hearing but gave leave to counsel for the state to refile for that matter only. From this decision, the state appeals.

POINT I

THE DIVORCE DECREE SUPPORT ORDER DOES NOT CONSTITUTE AN ORDER OF SUPPORT AND WAS AN ABUSE OF THE LOWER COURT'S DISCRETION.

The sum of one dollar ($1.00) per year for the support of three (3) children, which the district court ordered in the divorce decree and which the lower court, through Judge Bryant H. Croft, affirmed, from which this appeal is brought, was void from its inception. A child support order requires that an existing need be met. In the present case, no need was met at the time of the decree and no need has been met. In essence, the lower court has put its stamp of approval on "non-support" instead of support.

As stated in the early case of Gould v. City of Lawrence, 160 Mass. 232, 35 N.E. 462 (1893), "the word 'support' is often used in our statutes, and in its ordinary signification it includes not merely board, but everything necessary to proper maintenance." And, in Snyder v. Lane, 135 W. Va. 887, 65 S.E.2d 483 (1951): "the words 'maintenance' and 'support' are usually synoymous. They mean necessaries of life and means of livelihood and include, but are not limited to, food, shelter and clothing." Since one dollar per year for three children equals but 2.77 cents per child per month, this pittance not only fails to provide for the maintenance of the children, but also renders the law farcical and meaningless.

That the duty to provide support requires a meaningful contribution on the part of an obligor father is illustrated by various code provisions. Utah Code Annotated 78-45-3 (1953) states: "Every man shall support his wife and his child." A "support debt," as defined in Section 78-45b-2(4), "means the debt created by nonpayment of child support under the laws of this state or the decree of any court of appropriate jurisdiction ordering a sum to be paid as child support." An indication of what might be required by way of support is found in Sections 78-45a-1 and 78-45b-2(5). Under Section 78-45a-1, a father is liable " . . . for the education, necessary support and funeral expenses of [his] child." And, under Section 78-45b-2(5),

"'Need' means the necessary costs of food, clothing, shelter and medical attendance for the support of any dependent child." Obviously, a valid support order must reflect and contribute to meeting these needs of the child.

Not only were the needs of the children in the instant case not met, but the court below clearly abused its discretion by refusing to follow the guidelines set forth in Section 78-45-7:

> "Determination of amount of support.-- When determining amount due for support the court shall consider all relevant factors including but not limited to:
>
> (1) the standard of living and situation of the parties;
> (2) the relative wealth and income of the parties;
> (3) the ability of the obligor to earn;
> (4) the ability of the obligee to earn;
> (5) the need of the obligee;
> (6) the age of the parties;
> (7) the responsibility of the obligor for the support of others."

Though the lower court in the divorce decree made mention of defendant's illness and physical disability, it clearly failed to seriously consider, much less talk about, the other relevant factors as contained in 78-45-7, e.g., the standard of living and situation of the parties; the relative wealth and income of said parties; the needs and ages of the obligee children, etc. Indeed, the ridiculous sum of $1.00 should prima facie demonstrate that it did not. Years ago, this court set forth the basic policy to be followed in the Utah courts. This basic policy is found in Rees v. Archibald, 6 Utah 2d 264, 311 P.2d 788 (1957), wherein the rule of law decided upon was approved because it gave " . . .

primary consideration to the rights and needs of children." (Emphasis added.)

Appellants are hard put to distinguish which aspect of the former order took primary concern for "the children." The order, in essence, made the children paupers, having to rely on the support of the state through public welfare instead of the father who could have paid something. The affidavit of the State of Utah for the order to show cause hearing shows that the defendant didn't even pay the "one dollar" per year.

To disregard the welfare of the children as evidenced by the order is an abuse of discretion of the lower court. The state's attempt to collect back the reasonable amount of support for the several years involved goes to mitigate this inconsistent position the court originally took. Too often, as here, the welfare of the children is totally disregarded, as are the statutory duties imposed. Equity speaks for varying amounts of support when circumstances warrant, but an order of $1.00 a year for three children is NO ORDER OF SUPPORT, and any judge rendering such a decision or sanctioning such an agreement has abused the discretion granted him to make "equitable" orders. Such an order of 2.77 cents per child per month is indeed not equitable. This court, in Utah Fuel Company v. Industrial Commission, 83 Utah 166, 27 P.2d 434, held that a child cannot waive support. What right does the court have of taking that right away from the child when the child cannot even

do it himself? Appellants cannot find any reason for such logic.

POINT II

THE DUTY TO SUPPORT IS CONTINUING AND EXISTS REGARDLESS OF THE FAILURE OF A COURT TO PROVIDE THEREFOR.

Because of appellant's intense belief that the one dollar support order is NO ORDER OF SUPPORT, the question then arises as to appellant's right to collect for the reasonable support that should have been paid. The lower court, as per Judge Croft, denied the appellant's right to have that determined or even to have brought to the court's attention the defendant's ability to pay more than the decreed order from a change of circumstances, such as becoming employed.

Therefore, it is appellant's contention, backed by the courts of many states, that the duty to support exists and is continuing even when no support order (as in this case) is entered. Though this question is one of first impression in this state, Justice Ellet in his comments in the Whitaker v. Whitaker No. 14329, Filed June 10, 1976, emphasized what appellants feel is their position:

> "Of course the defendant, as father of the children, would be liable in a civil action regardless of the lack of an order in the decree of divorce. In fact he might be criminally liable for failing to provide for his minor children if he was willful in that regard." (Emphasis added.)

This sheds some light on the fact that if the one dollar order is not considered a "support order" liability still

exists to third parties. Simply because a decree uses the terms "child support" or "support order" doesn't hide the fact that the order isn't what it purports to be.

This "meaningful contribution" to a child's care is a continuing duty through a child's minority and as indicated by Utah Code Annotated 78-45-2 and 3, this duty continues until age 21, unless a court orders otherwise.

Utah case law reinforces the absolute and continuing nature of this duty. In Jenkins v. Jenkins, 107 Utah 239, 153 P.2d 262 (1944), the court stated that the father has a positive duty to support his minor child. And, in Reas v. Archibald, supra:

> "This court has invariably emphasized the father's obligation to support his children based upon the elementary principle that the law imposes upon those who bring children into the world the duty to care for and support them during their minority and dependency."

The Colorado court, in Garvin v. Garvin, 108 Colo. 415, 118 P.2d 768 (1951), declared that the "primary liability of a father to support his minor child always exists during minority." (Emphasis added.)

This court has recognized that to take away from a defendant the duty and obligations of support cannot be done and to do so is void, unless permitted by the law. In fact, the court indicated that the duty is so fundamental that "there is not vested in any court of this state the right to make a final order relieving a father, permanently, of his obligation to support his child except under the statutory provisions existing." 8 Utah 2d

878 (1958). Though it will undoubtedly be argued that the order in this case did not go to the extreme as Riding, Id., and that a modification could have been made upon motion to the court, the fact that Mrs. Larsen has been on public assistance should not allow the respondent to hide behind a purported "order of support" which is void as soon as abilities permit contribution of any degree at all. That point was at the original hearing date despite of his physical disabilities. There is nothing to indicate in the findings of fact (R-27) whether the respondent had any other income at all. Nonetheless, he has willfully failed to make any attempt to support his children despite the circumstances behind the technicality of the $1.00 support order.

Because of the continuing nature of this obligation, the great weight of authority holds the father liable even where the court has failed to provide for support. In Curton v. Gordon, 510 S.W.2d 682 (Texas, 1974), that court stated:

> "The natural father has the legal duty to support his child, even when not ordered by the trial court to make payments."

And, in Krog v. Krog, 32 C.2d 812, 198 P.2d 510 (1948):

> "The law is established that, despite the fact that a final decree of divorce contains no provision for support of the children of the parties, the court may in supplemental proceedings in the divorce action order the husband to make payments for that purpose. (Citations omitted.) Moreover, a child's rights in this respect cannot be barred by agreement between the parents."

Further, in Martinez v. State, 307 S.W.2d 259 (Texas Criminal, 1975), the court said, in the case of criminal non-support, that:

> ". . . even though the divorce decree makes no provision for support and maintenance of the children, the father's duty is still primary and continuing."

In Rees v. Archibald, supra, the Utah Supreme Court succinctly stated the Utah position: " . . . the great weight of authority is that a father's obligation to support his minor children is not changed by a divorce decree which gives the custody of the children to the wife, but does not mention their support." (Emphasis added.)

Here, of course, support was mentioned, but did the court really intend 2.77 cents a month to be support? If so, the court is placing the stamp of approval on non-support of anyone who can show he's not working or has a temporary illness. Children must live, too, and it is against public policy to encourage fathers this way out.

POINT III

> IF THIS COURT HOLDS THAT THE LOWER COURT MAY MAKE AN ORDER OF SUPPORT SUCH AS THAT IN THIS CASE ON A TEMPORARY BASIS, THE RIGHT TO ENLARGED SUPPORT BEGINS AUTOMATICALLY UPON A CHANGE IN CIRCUMSTANCES NOTWITHSTANDING A COURT ORDER TO THE CONTRARY.

Though there is support in Utah law that fathers may be temporarily relieved of the support obligation "if the circumstances warrant," this court should require some legitimate reduction of "aid" to the children instead of permitting an over-the-[illegible] avoidance of any and all obligations.

If there is allowed unfettered discretion, every father who is out of work, sick, lazy, etc., would have "good grounds to have the support reduced as in this case. Although it could be argued that the one dollar ($1.00) support order was only meant to show that the court below was aware of the defendant's support obligation and merely intended to demonstrate that said was relieved of his support duty, this court should restrict the interpretation on the language as given by Judge Croft.

Judge Croft held that even though there might have been substantial and material change of circumstances since the order of $1.00 of support was entered, the father-defendant had no increased duty of support until the order was changed to a larger amount. Further, the holding prohibits the state or any other third party furnishing support the right to collect a reasonable compensation for aid rendered even if the defendant-father had the ability to pay. A hypothetical at this point would be helpful:

> Mr. X is incapacitated from an accident and has zero income with no apparent ability to work. An order is entered totally relieving the defendant from his support obligation. One year later, Mr. X finds employment and nets $20,000 for the year. The ex-wife does not learn of the employment until one and one-half years later because she has not seen Mr. X. The court holds that even though Mr. X has had the ability to pay substantial support for one and one-half years, he needs not because of the prior order.

Appellants feel that though the above hypothetical might exaggerate the situation, they should have the opportunity to bring to the court's attention any change of circumstances and the date such transpired, because if the reason for the reduction is no longer in existence, the order of the court is based on a non-existent situation. Therefore, the lower court should be required to review the situation to see if the ability to support came into existence some time before the hearing appealed from. Appellants nonetheless maintain that a one dollar ($1.00) order of support is no support order and are, therefore, entitled to have the lower court review the entire period and enter a judgment for the reasonable amount over that period of time.

Factors that would and should be evaulated are as follows: change in ability to earn income, new jobs, investments, re-marriage, pensions, workmen's compensation, social security, etc. Each of these factors tend to show what ability the father of children has to support. To say that once a $1.00 order is entered that a father can hide behind that "cloak" without divulging any changes to the court is to judicially disgrace the laws of this state and the moral duty parents should have for their children.

While this court has held, in Riding, supra, that no court of the state can make a final order relieving the father of his obligations to support except under the adoption statute, Rockwood v. Rockwood, 65 Utah 261,

236 P. 457 (1957), has given indication that this could temporarily do away with the obligation. This court said:

> "The duty of the father to support his children, if he is able to do so, is imposed in this state by positive statute." (Emphasis added.)

Further, in Hulse v. Hulse, 111 Utah 193, 176 P.2d 875 (1947), the court reiterated: " . . . the father has the legal duty to support his minor child if he is able to do so." Equity calls for a review of circumstances, but appellants point out that there is a wide gulf between "support" and "contribution." Though a legitimate support order might be $100-150 per month, courts should not totally do away with the support obligation, as in this case, unless the facts are so extreme as to warrant that action as the only alternative. Appellants don't read the above cases to say that the obligation can be done away. These cases in equity show that if a father cannot "support" a child or children, that if he can contribute something towards their support, then he should. For example, one might be able to contribute $20 per month--which cannot literally be considered "support"--but cannot pay $100 per month, which is a support order. Does that mean that if one cannot pay $100 or over $50 that he should pay nothing? NO! IF THE FATHER CAN CONTRIBUTE ANYTHING, HE SHOULD BE REQUIRED TO DO SO. The $1.00 order, however, is an abuse of this equitable principle.

The reason is that equity goes both ways. Though it might be equitable to relieve the father of the full support obligation, the court must look at the welfare of the children and allow equity to look after their interests as well.

The exceptions to the general duty of support are summarized in 69 ALR2d, Section 2, as follows:

> "An exception to the general rule that a father is liable for the support of a child after a divorce exists in some states in cases where the father was unable to pay for the support of his child at the time it was furnished, or the circumstances were such that if the mother had applied in advance for a support order the court would not have required the father to support his child. This exception is usually recognized in true hardship cases, where the father has a physical inability to work for a long period of time and has little or no property." (Emphasis added.)

Once again, however, if the circumstances change from this "physical inability to work," the whole basis for the order of reduction ceases and the duty of support is automatically reinstated. The lower court should then make a determination from that point of time onward as to what the liability will be.

The Minnesota Supreme Court, in Haugen v. Swanson, 222 Minn., 23 N.W.2d 535 (1946), entertained this same question and said:

> "The father of a child will not be relieved of liability to support it except where his inability to do so clearly appears." (Emphasis added.)

Once again, the equitable principle is clear that if there is a time the circumstances for reduction have changed so that it is not "clear" that the reduction should continue, the "duty" once again arises and a court is given authority to retroactively review the situation from that point onward.

There are many times in divorces where personal jurisdiction over the father is not possible. The court must then make an order something to the effect that the matter of child support will be held in abeyance pending jurisdiction over the father. To take the logic of Judge Croft's order further is to say that because there was no jurisdiction over the absent father, no legal or moral duty exists until the decree is modified. This is a totally naive position to take. If a court gets jurisdiction over the absent father at some later date--which could be months or years--that court has the right to make the determination as to the father's liability while absent. This is clear even though a divorce decree might be silent on the matter of support entirely.

While it is generally held that modified orders are not given retroactive effect, equity, the welfare of children, reimbursement to the state and other reasons all give support to the basic view that IF A FATHER CAN SUPPORT OR CONTRIBUTE TO THE SUPPORT OF HIS CHILDREN, HE SHOULD BE LIABLE THEREFOR.

That an obligor father knows of his duty of support is clear; the obligor father also knows that relief therefrom can be effective only so long as he remains ill or disabled. The father is well aware of his own personal condition and of any subsequent change in circumstance which would reinstate his continuing duty. To relieve the father of all liability after he has recovered because of his willful failure to report his improved condition to the court or because of lack of diligence on the part of other parties involved would open the door to abuse and encourage fraud and irresponsibility. A father could, for example, be disabled for a short time, go back to work, earn a substantial salary and yet owe nothing merely because his changed circumstance was not discovered or acted upon. Public policy should require that the circumstances be considered.

A primary reason for not allowing retroactive application of a revised court order is the possibility of the father being ordered to pay sums which would be unfair to him. Such a situation, however, is before the court. The court has the competence to know the "needs" of children, the "needs" of the father, and has the ability to establish liability based on principles of fairness and justice.

Thus, given the continuing absolute nature of a father's support duty, the strong possibility of fraud and abuse, and the fact that the state has little choice but

to provide assistance and is frequently not in a position to protect itself from acts of irresponsible individuals, the lower court erred by not allowing the state to collect reimbursement for sums expended in behalf of defendant's children at least from the time of changed circumstances.

CONCLUSION

No court of this state should have the right to reduce the support obligation to 2.7 cents per child per month. To do so mocks the very principles upon which our society is based--responsibility.

This court should hold void the $1.00 support order as being no order at all and remand the case to the lower court for a determination of what liability the defendant-respondent has since the entry of the order.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General

STEPHEN G. SCHWENDIMAN
Assistant Attorney General

Attorneys for Appellant