1976

# Kathryn L. Mattingly et al v. Thomas C. Mattingly : Brief of Appellant

Utah Supreme Court


Vernon B. Romney; Stephen G. Schwendiman; Attorneys for Appellants;
Don L. Bybee; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

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KATHRYN L. MATTINGLY, and the STATE OF UTAH , by and through UTAH STATE DEPARTMENT OF SOCIAL SERVICES,

Plaintiffs and Appellants,

-vs-

THOMAS C. MATTINGLY,

Defendant and Respondent.

Case No.

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BRIEF OF APPELLANT

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An Action for Review of [illegible] Judicial District Court, Judge [illegible] Presiding, Holding That an Order [illegible] Must First Be Obtained Prior [illegible] in Child Support Coverage Matters [illegible] Decree.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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| KATHRYN L. MATTINGLY and the STATE OF UTAH, by and through Utah State Department of Social Services,<br><br>Plaintiffs and Appellants,<br><br>vs.<br><br>THOMAS C. MATTINGLY,<br><br>Defendant and Respondent. | Case No. 14627 |

# BRIEF OF APPELLANTS

Appeal from an Order of Dismissal of the Third Judicial District Court in and for Salt Lake County, the Honorable Bryant H. Croft, presiding.

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# BRIEF OF APPELLANTS

## STATEMENT OF THE NATURE OF THE CASE

The issues are procedural questions. Specifically, the basic issue is whether or not it is appropriate to take depositions in actions to recover child support arrearages without first obtaining an order to show cause.

## DISPOSITION IN THE LOWER COURT

The lower court, the Honorable Bryant H. Croft presiding, entered an order on the 4th day of June, 1976, decreeing:

1. That the State of Utah's intervention in the above entitled matter is proper based on the fact that the expenditure of welfare funds makes the State of Utah a proper party to the action.

2. That the signing of a divorce decree makes the action final, and the intervention of the State of Utah does not give rise to a cause of action upon which a deposition may be taken.

3. That the State of Utah cannot take a deposition regarding child support payment after the signing of a divorce

decree without an order to show cause pending in the matter.

RELIEF SOUGHT ON APPEAL

Appellants seek to have provisions #2 and #3 of Judge Bryant Croft's order of June 4, 1976, reversed and an order entered requiring the defendant to appear, pursuant to the subpoena, that issued for the purpose of taking his deposition

STATEMENT OF FACTS

Defendant Mattingly was formerly married to the plaintiff Children resulted from this union, prior to their divorce. A child support order was entered pursuant to the divorce decree, but the defendant fell in arrearage on his payments. Subsequently, the plaintiff was required to go on state welfare to support her children. The State of Utah brought an action, pursuant to statute, to be joined as a party and to take defendant's deposition to ascertain what the circumstances were concerning the support arrearages.

On May 25, 1976, counsel for plaintiffs and defendant appeared before the Honorable Bryant H. Croft, Judge in the Third Judicial District for Salt Lake County. Defendant's counsel was in court objecting to the state's interpleader action and notice of taking deposition. The judge found that the State of Utah was a proper party. However, the judge found that once a final divorce decree is signed, the case is closed; and, therefore, no action concerning the taking of depositions could occur until there was an order to show

cause. From this decision, the plaintiffs-appellants appeal.

POINT I

THE SIGNING OF A DIVORCE DECREE IN UTAH IS FINAL ONLY INSOFAR AS THE RIGHTS BETWEEN THE PARTIES, BUT THE DECREE IS NEVER FINAL AS TO THE SUPPORT RIGHTS OF THE CHILDREN.

While a divorce decree is final as to the litigants, it is well established law in Utah that divorce decrees are never final in respect to child support rights. This principle has been codified in state law, and this high court has consistently held the same:

Sec. 30-3-5, U.C.A. (1953)

> Disposition of property and children--When a decree of divorce is made, the court may make such orders in relation to the children, property and parties, and the maintenance of the parties and children, as may be equitable. The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support and maintenance, or the distribution of the property as shall be reasonable and necessary. /Emphasis added./

> /1,2/ From the language of the statute, and as stated numerous times by the decisions of this court, these propositions are firmly established: (1) that such proceedings are equitable;[1] and (2) that under the authority conferred "to make subsequent changes or new orders with respect to * * * the custody of the children and their support and maintenance * * *" the court retains jurisdiction to deal with such matters in supplemental proceedings with the same authority and in the same manner as it could deal with them originally.[2] /Emphasis added./

Harmon v. Harmon, 491 P.2d 231, 232, 26 U. 2d 436.

From this language, it is clear that a court in Utah has full authority to deal with continuing child support matters in the same manner as it could deal with them originally, even after the divorce decree is final. This is because the divorce decree is really a separate entity, altogether different from the issue of child support, and the two are related tangentially at best. Thus, while the divorce decree is a final judgment between the litigants, i.e., the parents, the issue of child support is a separate and distinct issue between the minor children and their father. It is, therefore, incongruous for a trial court to assume that the final divorce decree has any finality as to its effect on the child support issue. As quoted from Harmon, supra: "The court retains jurisdiction to deal with such matters /child support and maintenance/ in supplemental proceedings with the same authority and in the same manner as it could deal with them originally."

Other Utah cases supporting this basic position include: Rees v. Archibald, 6 Utah 2d 864, 311 P.2d 788; Bott v. Bott, 20 U.2d 329, 437 P.2d 684; Harrison v. Harrison, 22 U.2d 180, 450 P.2d 456; Riding v. Riding, 329 P.2d 878, 8 Utah 2d 136.

POINT II

THE ISSUANCE OF A SUBPOENA TO COMPEL ATTENDANCE FOR DEPOSITION PROCEEDINGS, WITHOUT FIRST OBTAINING AN ORDER TO SHOW CAUSE, IS APPROPRIATE IN DIVORCE CASES WHERE ARREARAGES IN SUPPORT PAYMENTS EXIST.

Authorized by Utah Code Annotated, Section 78-45-(1-9), the State of Utah has the authority to collect support funds in the manner of reimbursement for public funds expended in the support of children and neglected families. The receiving of public assistance aid establishes the need of the welfare recipient as well as bringing into play the authoritative, collateral position of the State of Utah in collecting child support payments.

As was established in point #1, supra, the cases are numerous holding that divorce decrees are never final insofar as child custody and support matters. By definition, they are modifiable and if they are modifiable it is proper to allow the free use of depositions to help establish financial status. The requirement of first obtaining an order to show cause prior to taking such depositions is an unwarranted burden.

Utah Code Annotated, 30-3-1, states as follows:

> Proceedings in divorce shall be commenced and conducted in the manner provided by law for proceedings in civil causes.

Since divorce proceedings and continuing support requirements are civil in nature, it only follows that Utah Rules of Civil Procedure, Rules 26-37, regarding depositions and discovery, may properly be used in arrearage matters following a divorce decree. Until the point of time when final judgment is entered, discovery by deposition under Utah Rules of Civil Procedure, Rules 26-30, is available to help establish what has or what has not been paid. And since divorce decrees are never final as to child support, the free use of

depositions to determine a father's financial status, even after the divorce decree, is entirely proper. Thus, the Rules of Civil Procedure apply to child support as being a continuing aspect of the original divorce proceedings.

Many states recognize that pretrial disclosure might destroy any chance of reconciliation of the parties, but once the decree has been signed, this concern goes to the welfare of the children and not to hopes of reconciliation. This court cogently explained this basic principle and its relationship to divorce decrees, continuing child support, et al., in Harmon v. Harmon, supra.

> In order to carry out the important responsibility of safeguarding the interests and welfare of children, it has always been deemed that the courts have broad equitable powers. To accept the plaintiff's contention that an adjudged arrearage is tantamount to a judgment in law, would in the long run tend to impair rather than to enhance the abilities of both the plaintiff and the court to accomplish the desired objective. Such a judgment at law does not have the valuable and useful attribute which allows its enforcement by contempt measures. For the foregoing reasons decrees and orders in divorce proceedings are of a different and higher character than judgments in suits at law; and by their nature are better suited to the purpose of protecting the interests and welfare of children.[3]
>
> In carrying out that objective there are a number of factors to be taken into consideration. These include not only the enforcement of the payment of support money which becomes due, but perhaps more important, the conserving of the prospects for its continuance. At p. 232, 233. /Emphasis added./

This language indicates the rather unique character of divorce decrees and child support. It further points out the fallacious reasoning of the district court in assuming that a

final divorce decree has the same effect as other final judgments, insofar as discovery is concerned.

There is nothing in the common law or the laws of the State of Utah that indicates that the free use of depositions in matters of arrearages is not a legitimate modern discovery tool. Rule 30(a) states as follows:

> When Depositions May Be Taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. /Emphasis added./

This rule makes no mention of, nor limits the situation or type of case in which the deposition may be taken. In particular, it has no requirement of obtaining an order to show cause before a deposition can be taken.

Furthermore, U.C.A., Section 30-3-5, supra, makes clear that matters of arrearage in child support are actually part of the original divorce action; and, thus, despite the final divorce decree, should still be subject to the same discovery procedures as any other matter in the original action. And, since an order to show cause is normally not required to take a deposition in civil cases, there is no justifiable reason to require such an order in arrearage matters.

Corpus Juris Secundum states the following concerning the scope of examination for which depositions can be used in divorce actions:

> Scope of examination. In the taking of a deposition all matters may be inquired into which may be presented as evidence at the trial; considerable liberality should be allowed in the cross-examination of a witness . . . 27 C.J.S., Divorce, Section 145.

This gives broad license for the use of depositions, going so far as saying "all matters." Surely, "all matters" can reasonably be construed to include arrearages. And, in particular, such depositions should be allowed without the added burden of first obtaining an order to show cause.

Even in older cases, where discovery techniques were limited, the courts allowed the use of depositions for determining the financial status of the husband after a decree of divorce had been entered. In Scheffer v. Scheffer, 48 N.Y.S.2d 839, 183 Misc. 344, a wife was bringing a contempt action against her former husband for failure to pay alimony. The wife was seeking to take her former husband's deposition, to determine his financial status in an attempt to collect arrearages. The court said:

> . . . Examinations before trial as to a husband's financial ability have been denied in matrimonial actions upon the theory that in advance of the establishment of the right to a separation or a divorce, the plaintiff should not be permitted to examine the defendant as to his financial affairs. Here, however, the right to a divorce has been established by a final judgment of divorce, and it is necessary for the plaintiff to obtain information concerning the earnings and financial condition of the defendant in order to properly present her case to the official referee. Otherwise, the reference might prove abortive, and of little value; at best, a wife generally has little knowledge of the financial condition of a husband from whom she has been separated or divorced." Page 840. /Emphasis added./

Thus, as this New York court held, there must be some tool available to parties to establish what the situation is relative to child support payments. It seems incongruous to say that once the decree is signed, the parties cannot freely

use discovery to establish whether modifications should be made or to find out why child support payments are not current. Such should be permitted to allow the fair and equitable procedures in such matters as divorce which in every way seem to require concern when the welfare of children are at stake and indeed provide an inexpensive method of insuring accuracy and compliance with such matters. The purpose of the recovery program of the State of Utah is to conserve tax dollars. It seems antithetical to that purpose, as well as to general public policy, to require the state to seek an order to show cause before depositions can be taken in arrearage recovery cases. Such a requirement cannot be supported legally; and, in terms of time and public expense, it cannot be justified.

## CONCLUSION

Because divorce decrees are never final, insofar as child support is concerned, the court continues to retain the same jurisdiction on arrearage matters as it had in the original divorce proceedings.

It follows, therefore, that the Utah Rules of Civil Procedure apply to arrearage matters following a divorce decree. Since it is the policy of the court to encourage free discovery, it is neither legally sound nor economically feasible, in terms of both time and money, to require a party to obtain an order to show cause before taking a deposition in an arrearage matter. Legally, there should be no distinction between the use of depositions prior to or

subsequent to a divorce decree, at least insofar as child support matters are concerned.

Respectfully submitted,

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