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Jean Seeley (Park) v. Leo P. Park : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

JEAN SEELEY (PARK),
Plaintiff-Respondent,

vs.

LEO P. PARK,
Defendant-Appellant.

Case No. 13643

APPELLANT'S BRIEF

Appeal from Judgment of the Third District Court
of Salt Lake County, State of Utah
Honorable James S. Sawaya, *Judge*

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IN THE SUPREME COURT OF THE STATE OF UTAH

JEAN SEELEY (PARK),
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LEO P. PARK,
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STATEMENT OF THE CASE

This appeal arises out of the efforts of a divorced woman to force her ex-husband to make child support payments, both those in arrears and those coming due in the future. The action was initiated by the woman's motion to the District Court for an order finding the ex-husband in contempt for having failed to pay child support payments in the amount of $40.00 per month according to a previous order of the court, and for a judgment in the amount of the arrearages in accrued child support.

DISPOSITION IN THE DISTRICT COURT

The Court heard argument on Plaintiff's motions and issued its order awarding judgment to the plaintiff in the amount of $5,800.00 as the total amount of arrearages in past due child support payments and ordering defendant to pay to the Plaintiff $50.00 per month child support, $10.00 of which is to be credited to the arrearages. The court further ordered "that the Statute of Limitations does not apply in this case."

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the order of the District Court which establishes "that the Statute of Limitations does not apply in this case," and, upon reversal of such order, Defendant seeks recomputation of the arrearages in chuld support and a revision of the District Court's Judgment against the Defendant to reflect application of the Statute of Limitations which this court finds to apply in this case, or in the alternative remand to District Court with directions to redetermine arrearages in accordance with decision herein and to issue judgment reflecting the result of such redetermination.

STATEMENT OF FACTS

The parties were divorced 7 October 1959, and at that time the Defendant was ordered to pay the Plaintiff child support and alimony. Subsequently the Plaintiff

remarried and the Defendent was relieved of paying alimony. The Defendant has been in arrears in his child support payments one hundred and forty-five months or approximately twelve years.

POINT I

THE DISTRICT COURT ERRED IN ITS JUDGMENT AWARDING PLAINTIFF $5,800.00, BECAUSE THE COURT'S COMPUTATION OF DEFENDANT'S ARREARAGES IN BACK CHILD SUPPORT WAS ERRONEOUS.

The record shows that by judgment rendered 10 March 1960 based on stipulation of the parties, the defendant owed the plaintiff $260.00. (See Pages 21 and 23 of the Court Record) in unpaid child support and alimony through 6 March 1960. By this date the plaintiff had remarried and relinquished her claim to alimony. From 7 March 1960 through 6 December 1973 a total of 165 months had passed, and at $40.00 per month for the period, the total amount of accrued child support payments comes to $6,600.00. Of that amount the affidavit of the plaintiff at pages 31 and 32 of the court record admits payments by the defendant during the period of about $770.00, some part of which was received "within the last month" and $600.00 of which appears to have been received since plaintiff moved to Colorado but before she suffered a fire loss. The record is not clear on this point, but the affidavit seems to place

such payments as having been relatively recently made. By subtracting $700.00 from $6,600.00 one gets $5,830.00 or by rounding, $5,800.00.

Such computation is in error, because it fails, in accordance with the order of the court, to apply the Statute of Limitations to the computation.

In computing the amount of arrearages, one is concerned only with accrued installments which have not been paid by the defendant. For this reason it is error to consider in this appeal the divorce decree which ordered that some certain amount be paid monthly to the plaintiff by the defendant.

It is admitted that such a decree is modifiable in many respects, but in so far as the amount of any single accrued installment is concerned, the court is powerless to change it. The amount of an installment becomes fixed and finally determined once that installment becomes due and payable. *Myers v. Myers* (1923) 62 Utah 90, 218 P. 123. Any discussion of laches, Statute of Limitations, or any other defense in relation to the decree which established the requirement to pay monthly installments is deceiving and not in point here.

Utah Code Ann., Section 30-3-5 (Supp. 1973) does not apply to accrued monthly installments when it says, "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 mainten-

ance, or the distribution of the property as shall be reasonable and necessary," but is rather talking about things prospectively including future alimony and child support payments.

Changes in the amount of support can only be made with respect to future payments which may accrue under the terms of the divorce decree, the Court being powerless to alter the amounts which have accrued in favor of a party prior to the time of the making of an order. *Cole v. Cole,* 101 Utah 355, 122 P.2d 201, and cases there cited.

There are four possible answers to the question of whether or not the Statute of Limitations applies to actions involving attempts to obtain payments of overdue installments of child support (and by analogy Alimony): (a) Neither laches nor the Statute of Limitations applies. (b) Laches applies exclusively. (c) Statute of Limitations applies exclusively. (d) Both laches and the Statute of Limitations may apply in a particular case.

The public policy of the law is to avoid stale claims and to finally put to rest all litigation, and such policy mitigates against a conclusion that neither Laches nor the Statute of Limitations applies.

Defendant concedes that as a general proposition the doctrine of laches is appropriate to actions similar to the one which resulted in the judgnmet being appealed herein. *Kaiser v. Kaiser,* (1921), 213 Mich. 660, 181 N.W. 993; *Herzog v. Bramel,* (1933), 82 Utah 216, 223, 23 P.2d

345; *Smith v. Smith,* (1930), 77 Utah 60, 291 P. 298; *Hollis v. Bryan,* (1932), 166 Miss. 874, 143 So. 689; *McGill v. McGill,* (1917), 100 Kan 324, 166 P. 501.

The Statute of Limitations in the State of Utah applies by its terms to all civil actions without regard to whether or not they are actions at law or actions at equity. "Civil actions can be commenced only within the periods prescribed in this chapter, after the causes of actions shall have accrued, . . ." Sec. 78-12-1, U.C.A. (1953). "The sought enforcement of the order or decree with respect to the payment of the decreed alimony (is) . . . a proceeding civil in nature, . . ." *Herzog v. Bramel,* 82 Utah 216, 223, 23 P.2d 345.

This case arose out of efforts of plaintiff to enforce a divorce decree in so far as it ordered the payment of child support, so by Herzog above, it and other cases like it are civil and subject to the statute of limitations.

Since the defense of the statute of limitations must be pleaded, the defendant often is in control of whether or not in a particular case it is used exclusively, but in the general case it seems obvious that both Laches and the Statute of Limitations may be pleaded for consideration by the court, and often when only Latches is pleaded the court will weigh its appropriateness in a particular case against a Statute of Limitations.

In considering which of the specific periods of limitations apply to the present case we should observe what has taken place.

When a court awards a decree of divorce it often awards either or both alimony and child support in indefinite amount to be paid over an indeterminate period in monthly installments of a fixed amount. In rendering such a decree the court retains authority over the matter until the alimony and child support obligations end, but until that time the court may by its equity power make any modifications to the amounts of future payments it desires. The court however, has no power whatsoever to alter the amounts of such payments which have accrued, whether paid or not. It was the decree that awarded the amount of each monthly installment and such amount may be changed from time to time, so in that sense the decree is not final. The decree, however, becomes final as to each installment as that installment becomes due and payable. It is for this reason that to say that "orders for child support payments are not judgments" recognizes only half the fact and misses the problem entirely.

If one concentrates on only the single accrued and unpaid installment of child support, which has been said to be a lien as it became due, and if he considers the effect of the plaintiff's failure over an extended period to foreclose the lien, it becomes evident that at some point she should be estopped from doing so. *Openshaw v. Openshaw,* (1943), 105 Utah 574, 144 P.2d 528. It is only when one thinks of the sum total of all accrued installments that he is confused.

A search of the Sections of Chapter 78-12, Utah Code Annotated discloses no statutory time limit expressly

applicable to bringing actions to enforce payment of child support or alimony, but there is Section 78-12-25, Utah Code Annotated which prescribes in subparagraph (2) a four year limitation for "An action for relief not otherwise provided by law." Applying this limitation period would result in a maximum awardable arrearage of $1,820.00, but if the $770.00 amount admittedly paid by the defendant had been paid during the most recent four years, the maximum awardable amount would have to be reduced to $1,150.00.

Section 78-12-22, Utah Code Annotated, prescribes an eight year limitation during which an action based on "a judgment or decree" may be brought. Applying this period of limitation would result in a maximum awardable arrearage of $3,840.00, and again if the $770.00 admittedly paid by the defendant had been paid during the most recent eight years, the maximum awardable amount would have to be reduced to $3,040.00.

Certainly, since the general Statute of Limitations is by its own terms applicable to all court actions, one of the periods of limitations specified therein must be applicable to actions to recover arrearages in child support and alimony, therefore, it is submitted that one or the other of the above provisions of limitations applies to cases similar to the present case. Since Section 78-12-25 is both the most severe against a plaintiff and by its

terms a catchall provision for any situation not otherwise covered, we should first explore the applicability of Section 78-12-22.

Applying the analysis found at page 29, 49 C.J.S., Judgments, to accrued installments of alimony and child support it must be concluded that such accrued installments are more like judgments than they are like orders:

> "Judgments generally are distinguished from rules or orders in that a judgment is the final determination of the rights of the parties ending the suit, whereas a rule or order is an interlocutory determination of some subsidiary or collateral matter, not disposing of the merits."

The acrual of an installment finally determines the rights of the parties in the amount of the installment and thus ends all debate on the subject. The suit is finished. There is no more issue as to that installment.

Other sources confirm this conclusion. "Judgment" as used in the Utah Rules of Civil Procedure includes a decree and any order from which an appeal lies. See Rule 54(a). A decree is a judgment of a court of equity and may be interlocutory or final. Black's Law Dictionary, Revised Fourth Edition, 1968. An order is a decision on a motion, while a judgment is a decision on a trial. *Cox v. Dixie Power Co.*, 81 Utah 94, 16 P.2d 916. Before the court in the present case established the amount of the installments generally there was a trial. He issued a decree. Such decree was interlocutory in those respects dealing with future child support, because the amount of such support was subject to change. The

amount of any one installment was left undecided until the day it became due. In effect the decree as it related to that one installment became final on that day, and it was the result of a trial, but it could have been the result of an order. It really doesn't matter, because, if it is an order, on the day the installment accrues it becomes an order to pay a specific amount of money to the plaintiff, and Rule 7(b)((2), Utah Rules of Civil Procedure states, "An order for the payment of money may be enforced by execution in the same manner as if it were a judgment." The effect is the same whether the installment be considered a judgment or an order.

Kansas law recognizes such a conclusion: "It is well settled that where alimony or child support is ordered paid in installments, each installment when due is to be regarded as a judgment taking effect as of the date due (*Sharp v. Sharp,* 154 Kan. 175, 117 P.2d 561; *Burnap v. Burnap,* 144 Kan. 568, 61 P.2d 899), . . ." *McKee v. McKee,* (1941), 154 Kan. 340, 114 P.2d 544.

Washington State has come to a similar result. The court there held that, "As each separate installment awarded by a divorce decree for support of a minor child of the parties constitutes a judgment as it becomes due, . . ." *Schumacher v. Schumacher,* (1946), 26 Wash. 23, 172 P.2d 841, 812.

Other states have concluded that installments of alimony and child support are judgments when they became due, and such states are indicated by the following citations to cases standing for the proposition: *Arndt*

v. Burghardt, (1917), 165 Wis. 312, 162 N.W. 317; *Simmons v. Simmons,* (1940), ... S.D. ....., 290 N.W. 319; *Simonton v. Simonton,* (1920), 33 Idaho 255, 193 P. 386; *Bennett v. Tomlinson,* (1928), 206 Iowa 1075, 221 N.W. 837; *Gaston v. Gaston,* (1896), 114 Cal 542, 46 Pac 609; *Kaiser v. Kaiser,* (1921), 213 Mich 660, 181 N.W. 993.

Even in Utah the Supreme Court has held that a "Divorce decree for payment of alimony operates as a judgment lien as to all past due and unpaid installments." *Openshaw v. Openshaw,* (1943), 105 Utah 574, 144 P.2d 528.

Having now established that an individual accrued installment is a judgment, it follows that Section 78-12-22, Utah Code Annotated, 1953, applies in the present case.

When does the statute of limitations commence running? It starts running when the judgment becomes final, and the judgment became final the day on which the installment became due and payable. The court in *McKee v. McKee,* (1941), 154 Kan. 340, 118 P.2d 544, in addition to showing that child support payments which are in arrears take on the characteristics of judgments went on to say ". . . that the statute of limitations, G.S. 1935,60-606, Par 6, begins to run as of that date (the date the support payment becomes due and is not paid) the same as any other judgment. 34 C.J. 10088, par 1534, 34 Am. Jur. Section 143, . . ."

Although not a case in which installments of child support are being enforced, *Buell v. Duchasne Mercantile Co.,* (1924), 64 Utah 391, 231 P. 123 is to the point. The court there said, "When a judgment is rendered payable in installments, the statute of limitations begins to run against it from the time fixed for the payment of each installment for the part then payable." quoting from 23 Cyc. 1510. Citing Section 6455, Comp. Laws Utah 1917 (the provision of which is now found at U.C.A. 78-12-22,) said, ". . . that action on a judgment must be instituted within eight years." and so held in the case to support the trial court's decision accordingly.

The fact that Buell is not a child support case, and had an established fixed total amount to be paid in a series of installments does not invalidate its message as applied to the running of the statute of limitations against individually accrued installments, because it is applying the statute applicable to enforcement of judgments to single installments, just as must be done in the present case. In a case seeking to enforce payment of installments awarded by a final judgment, the rule of law is that the statute of limitations begins to run on each installment as it becomes due and payable. Such a rule is even more appropriate in the situation where the plaintiff is attempting to enforce a modifiable divorce decree which ordered child support or alimony to be paid in installments, because the rule provides greater predictability and certainty of the law than would a rule

predicted on the divorce decree itself. In each case the amount of the individual installment became fixed when it became due. The result in both cases should be the same.

SUMMARY AND CONCLUSION

The computation of the defendant's arrearages in child support payments must include application of some statute of limitations because of the policy of the law that dictates that litigation be finally put to rest and stale claims be abolished. Laches is appropriate defense, but requires more than mere passage of time, something more must be shown which in far too many cases cannot be shown. The Statute of Limitations Section 78-12-1, Utah Code Annotated, 1953, by its terms is applicable to all civil actions. Actions of the type of the present action are civil, so the statute of limitations applies to all actions for payment of accrued alimony and/or child support. Since each installment that has become due and payable is like a final judgment ,the eight year period of limitation or Section 78-12-22, Utah Code Annotated, 1953, applies to each installment and begins running on the day the installment becomes due.

For that reason, in any computation of arrearages in alimony or child support only those accrued and unpaid installments occurring within the eight year period preceding a determination by the court of the arrearage may be considered.

In the alternative, should the court conclude that Section 78-12-22, Utah Code Annotated, 1953, does not apply then it follows that Section 78-12-25 would apply, and the period of limitation applicable to the present case would be four years.

Under Section 78-12-22, the arrearages of the defendant and therefore the judgment appealed from should be revised by the court to be $3,040.00. Under Section 78-12-25, the amount of the judgment appealed from should be reduced to $1,150.00.

In the alternative, the Court should reverse the judgment appealed from and remand the case to the District Court for the purpose of recomputation of the judgment amount and directing a judgment in the recomputed amount.

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