

1978

Robert B. Hansen Guardian Ad Litem For Beverly Gossett, An Incompetent v. William P. Gossett : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF
THE STATE OF UTAH

ROBERT B. HANSEN,
Guardian Ad Litem for
BEVERLY GOSSETT,
an Incompetent,

Plaintiff and Appellant

v.

WILLIAM P. GOSSETT,

Defendant and Respondent

Case No. 15471

BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT OF DISTRICT COURT OF
WEBER COUNTY, STATE OF UTAH, HONORABLE
G. HAL TAYLOR, JUDGE

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Clerk, Supreme Court, Utah

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NATURE OF CASE

This is a suit to collect unpaid alimony and support due under a foreign divorce decree and to obtain a Utah court decree with respect to further alimony.

DISPOSITION OF CASE IN LOWER COURT

The District Court denied relief as to unpaid alimony and support on the basis of accord and satisfaction and ordered future alimony to be paid to plaintiff's guardian.

NATURE OF RELIEF SOUGHT ON APPEAL

Plaintiff seeks to have the lower court reversed with respect to past and due alimony and support of \$11,530/to modify its decree with respect to future alimony to eliminate a provision that requires money paid to plaintiff's guardian which is unremitted to be returned to defendant.

STATEMENT OF FACTS

Plaintiff was granted a decree of divorce from defendant in the Superior Court of Merced County, State of California, in 1949 (R. 160). That divorce decree ordered defendant to pay \$75.00 per month alimony and \$25.00 per month support for each of three minor children (R 160,161). The two older children were married in 1971 and 1972. The youngest child became of age on the 7th day of September, 1973 (R 178, 174). The following is a summary of the alimony and support due in applicable limitation period, paid, and the balance owing for the period 1963 - November 24, 1975, together with the proof in the record:

<u>Period</u>	<u>Sums Due</u>	<u>Sums Paid</u>	<u>Balance Owing</u>	<u>Page of Record</u>
1967-12/31/67 (1)	\$1,650	\$ 0	\$ 1,650	165
1968	1,600	0	1,800	165
1969	1,600	600 (5)	1,200	165
1970	1,600	100	1,700	165, 166
1971 (2)	1,600	155	1,345	166
1972 (3)	1,200	140	1,060	166
1973-9/7/73 (4)	1,100	0	1,100	166
1974	900	50	1,100	166
1975-11/24/75	825	0	<u>825</u>	166
Principal total due			\$11,530	

- (1) First month eliminated due to Utah's 8 year statute of limitations , the complaint having been filed on January 20, 1975 (R 160).
- (2) No support for oldest child being married that year.
- (3) No support for second child who was married that year.
- (4) Support for third child through August only as he became of age on September 7, 1973 (R 179).
- (5) Credit for both children for year in which defendant had custody (R 165).

On June 21, 1973, the Northwestern Mutual Life Insurance Company issued Policy Number 6-689-655 for \$50,000 (R 140). This policy was issued as a means by which defendant would pay the sums due to plaintiff by payment to her mother, Katherine M. Hansen, who raised the parties' children during their minority (R 180). Defendant failed and neglected to pay the premiums on said policy and it lapsed as a result (R 169, 182). At the time of the trial on November 24, 1975, the defendant was in the process of having a

different policy issued which was to have the number 7063551 (R 182, 183), It was his understanding then that he was insured for \$50,000 (R 184). Because of chronic incapacitating illness, the State of California has provided for plaintiff in a rest home for the period of time in question (R 178). The minor children of the parties were raised and provided for by their maternal grandmother, Katherine Hansen (R 180).

POINT I

THE COURT ERRED IN FINDING (SEE FINDING OF FACT No. 4 AND NO. 6) THAT ROBERT B. HANSEN "GRANTED CUSTODY OF SAID MINOR CHILDREN TO WILLIAM GOSSETT. . ." (R. 149).

Defendant made this claim and the Court Sustained it on the basis of defendant's Exhibit 2, an affidavit which reads as follows:

"1. He is a brother of Beverly Gossett, the former wife of William F. Gossett, who now resides at 64 "I" Street, Chula Vista, California.

2. He is an attorney at law and a member in good standing of the State Bar of California and the State Bar of Utah and advises the aforesaid Beverly Gossett in legal matters.

3. On July 16, 1962, he represented to the aforesaid William P. Gossett that it would be in the interest of the three minor children, to-wit: Steven, Doris Lee, and Kirk Gossett, issue of the marriage of Beverly and William P. Gossett, that the said father take these children into his custody because their mother who was then and still is a patient at the Modesto State Hospital was and is incapable of tending them because of physical and emotional difficulties, and their maternal grandfather, Cyril J. Hansen, had just suffered a second stroke and heart attack and, as a result, the material grandparents who had been taking care of them were not able to do so adequately without great hardship.

4. On or about the 11th day of August, 1962, William P. Gossett did assume the care, custody and control of the aforesaid minor children as a result of the request last referred to above and said children have been and now are in his care, custody and control and it is in the best interest of said children that this arrangement continue, particularly since the said Cyril J. Hansen passed away on the 20th day of August, 1962, and Katherine

Hansen, the maternal grandmother, is engaged full time as a school teacher during the school year.

5. Katherine Hansen and Keith M. Hansen, brother of the aforesaid Beveral Gossett and the only other member of the immediate family, concur in the view that the aforesaid children should remain with their father and that the mother, Beverly Gossett, who objects to this arrangement is not mentally competent to care for the children or to form an intelligent judgment concerning their welfare." (R 141)

Note that it does not purport to effect any legal change of custody. Indeed only a court would have such authority (Yee, 404 P.2d 370, Hawaii, 1965). At most it would establish an equitable defense against any claim for support money during the period the said William Gossett actually provided support for said children while they were living with him.

II, THE COURT ERRED IN FINDING (FINDINGS OF FACT NO. 9) THAT "KATHERINE HANSEN ENTERED INTO AN AGREEMENT WITH WILLIAM GOSSETT. . . . IN LIEU OF ANY CONTRIBUTION OF SUPPORT FOR THE MINOR CHILDREN ON BEHALF OF WILLIAM GOSSETT" (R 149, 150).

There is no evidence whatsoever that the said Katherine Hansen made any such agreement. In addition she had no legal authority or standing to do so. The fact is (see Third Course of Action of Plaintiff's Amended Complaint, R 125) Robert B. Hansen agreed that such insurance would be accepted in lieu of a court proceedings as long as defendant kept it in force and continued to pay \$50.00 per month until the back amount of \$15,000.00 was paid by continuing such payments after the youngest child became an adult. That agreement had nothing to do with support payments and alimony that was payable in the future.

POINT III

THE COURT ERRED IN FINDING THAT THE PAYMENTS MADE BY DEFENDANT AFTER SEPTEMBER 1973 WERE MADE VOLUNTARILY (FINDINGS OF FACT No. 11, R-150) RATHER THAN PURSUANT TO THE DECREE OF DIVORCE OF THE PARTIES.

There is no evidence in the record that such payments were made voluntarily. On the contrary, there is in the record abundant proof that the payments were made after threat of legal action to enforce the divorce decree (R-181).

IV. THE COURT ERRED IN FINDING THAT THE LAPSED INSURANCE POLICY WAS FULLY REINSTATED AND THAT NO DAMAGES HAVE OCCURRED (FINDINGS OF FACT No. 13, R-150).

There was some evidence that the defendant shortly before (and probably because of) the trial on November 24, 1975, obtained an insurance policy similar to the policy referred to in the Third Cause of Action of Plaintiff's Amended Complaint (#7063551, R-182). There was no competent evidence as to what the provisions of that policy were. In fact the Court expressly stated (R-208) "This ruling is contingent upon their satisfying you (Robert B. Hansen). This policy is to be issued in the manner which I indicated, a new policy. It's not the old one" (emphasis added). There is nothing in the Finding of Fact which carries out that part of the Court's ruling and the ruling itself contradicts the subject finding as it makes clear the Court's intent that a subsequently written policy (but with identical beneficiary provisions) would be accepted as a substitute (not reinstated) policy. No policy or certified copy of it has even been filed in this case or been served upon plaintiff. Plaintiff is not satisfied and should not be.

V. THE COURT ERRED IN CONCLUDING THAT ONLY THE STATE OF CALIFORNIA MAY RECEIVE ANY OF THE FUNDS ORDERED DEPOSITED IN THE SPECIAL TRUST ACCOUNT AND THAT IN THE

EVENT OF THE DEATH OF BEVERLY GOSSETT ANY FUNDS THEREIN SHOULD REVERT TO THE DEFENDANT (FINDINGS OF FACT NO. 4, R-143). ALSO PARAGRAPH NO. 5 OF THE JUDGMENT IS IN ERROR.

Neither the State of California nor Robert B. Hansen personally nor Katherine Hansen are or were parties to this case and therefore the Court clearly lacked jurisdiction to adjudicate the rights the latter two might assert against the former with respect to such funds on the basis of nursing or legal services provided to said states

VI. THE COURT ERRED IN MAKING ITS CONCLUSION NO. 5. AS SAID "CONCLUSION" IS A MIXTURE OF FACT AND CONCLUSION THAT OUGHT NOT TO BE COMINGLED. PARAGRAPH NO. 5 OF JUDGMENT BASED THEREON IS LIKEWISE IN ERROR.

It is erroneous factually as there is no evidence to support the statement that no damages were sustained as a result of defendant's breach of contract. Certainly legal action was required as a result of that breach and the following legal services were performed in connection therewith

Complaint (2 pages)	R-1
Request for Admissions & Interrogatories (5 pages)	R-6
Notice of Deposition	R-14
Objection to Taking of Deposition & Motion	R-17
Hearing on Above Motion (April 1, 1975)	R-16
Motion for Appointment of Guardian Ad Litem	
and Motion for Summary Judgment (3 pages)	R-19
Hearing on Review (April 22, 1975)	R-36
Memorandum of Law (7 pages)	R-37
Notice of Motions	R-45

Hearing and Motion (May 6, 1975)	R-51
Hearing on Motion (May 13, 1975)	R-57
Notice of Pre-trial	R-58
Order Appointing Guardian Ad Litem	R- 59
Letters to Judge Hyde and Attorney Gary L. Gale	R-60
Plaintiff's Reply to Defendant's Memorandum of Law (6 pages)	R-61
Taking Defendant's Deposition (April 3, 1975 - 40 pages)	R-67
Supplemental and Amended Complaint (3 pages)	R-117
Notice of Deposition and Written Interrogatories (2 pages)	R-120
Pre-trial Hearing (July 15, 1975)	R-123
Pre-trial Hearing (October 7, 1975)	R-135
Affidavit	R-136
Pre-trial hearing (October 20, 1975)	R-137
Trial (November 24, 1975)	R-139
Letter to Attorney Gary L. Gale	R-142
Motions and Notice	R-143
Total Time (conservative estimate)	45 hours
Time value (\$40.00 per hour)	\$1,800.00

It is an erroneous conclusion as there no findings of fact to justify the conclusions that neither guardian nor ward "are entitled to receive any child support or alimony whatsoever." On the contrary, Conclusion of Law No. 3 requires payment of both past due alimony from June 1973 and future alimony

payments of \$75.00 per month. It is also erroneous as a conclusion concerning the insurance policy as it does not provide what specific interest therein Katherine Hansen and Robert B. Hansen should have and that their interests are assignable and coupled with an interest such that defendant may not alter said provisions. Also they refer to Northwestern Life Insurance Policy #6-689-655, whereas the correct number of the policy is 706 3551 (R-182).

VII. THE COURT ERRED IN CONCLUDING THAT THE SUBJECT POLICY HAS BEEN REINSTATED AND THAT HAS "CURED ANY BREACHES." PARAGRAPH NO. 6 OF JUDGMENT IS ALSO ERRONEOUS.

Same as last error set forth on page 7 above. It also implies that there may not have been "any breaches." That flies in the teeth of Findings of Fact No. 9 that "said policy lapsed. . ." and also Conclusions of Law No. 5 "that same lapsed for a period of two years" (emphasis added).

VIII. THE COURT ERRED IN CONCLUDING THAT NO ATTORNEY'S FEES SHOULD BE AWARDED, PARAGRAPH NO. 7 OF JUDGMENT, BASED ON SAID CONCLUSION, IS LIKEWISE ERRONEOUS.

Defendant readily admitted he had not paid the sums required by the California divorce decree (R-163-166). He also admitted that he had breached the agreement he made with respect to insurance policy #6-689-655 (R-192).

IX. THE COURT ERRED IN ENTERING PARAGRAPH NO. 1 OF ITS JUDGMENT.

This part of the judgment is inconsistent with the Court's Conclusion No. 3 and Paragraph No. 3 of the Judgment that \$75.00 per month

alimony (as provided in the original divorce decree of 1955) should be paid each month into a separate trust account (R-151).

X. THE COURT ERRED IN ENTERING PARAGRAPH NO. 2 OF ITS JUDGMENT.

Robert B. Hansen, as guardian of Beverly Gossett, should pay any sums which the Court determines proper in the guardianship proceedings and any claims of Katherine Hansen have not nor could they have been adjudicated in the instant case as she was not a party thereto.

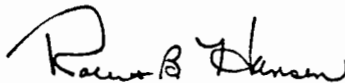
Although defendant did not plead or prove a defense of accord and satisfaction, the lower court apparently reached its decision on the basis of such a defense. This was clearly erroneous, however, as one may not discharge an existing contract through a "satisfaction" which is not performance of the substituted "accord" contract. 1 Am. Jur. 2d 344, Accord and Satisfaction, Sec. 47.

It is particularly critical to a continuing satisfaction of an agreed accord that the accord be the one created by the parties and not one imposed upon one of them by the court in substitution thereof, as one may well be agreeable at a given point in time to accept a certain performance but be unwilling at a later date to accept the same when the continuation of the satisfaction may well require periodic legal proceedings when there was good will and trust between the parties at the time of the initial accord but distrust and enmity between the parties at the time the promised substituted satisfaction is claimed to create a defense to enforcement of the original obligation.

CONCLUSION

The lower court was in error in imposing upon plaintiff an accord and satisfaction to which neither she nor her guardian had agreed; also in adjudicating future ownership of funds to be paid into a special account upon plaintiff's death without other interested persons being joined as parties. Judgment should be entered in favor of plaintiff and against defendant for \$11,530 principal and interest thereon since November 24, 1975, and the probate court in plaintiff's guardianship proceedings should handle any questions of claims upon the assets of plaintiff's estate.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of January, 1978, a true and correct copy of the foregoing Appellant's Brief was mailed to Gary Lee Gale, Attorney for Respondent, 2438 Washington Blvd., Ogden, Utah.

