1978

Barbara Boyle Warner and the State of Utah By and Through the Utah State Department of Social Services v. Sterling Jay Warner : Appellant's Brief

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

Barbara Boyle Warner)
and the State of Utah)
by and through the Utah)
State Department of Social)
Services,)

Plaintiff and Respondent,)

v.

Sterling Jay Warner,

Defendant and Appellant.

APPEAL

Appeal From the
District
Hon.

R. Paul Van Dam
Salt Lake County Attorney
543 East Fourth South,
Lower Level
Salt Lake City, Utah 84111

Attorney for
Respondent

IN THE SUPREME COURT

OF THE STATE OF UTAH

Barbara Boyle Warner and the State of Utah by and through the Utah State Department of Social Services,	)	
Plaintiff and Respondent,	)	No. 15607
v.	)	
Sterling Jay Warner,	)	
Defendant and Appellant.	)	

APPELLANT'S BRIEF

Appeal From the Judgment of the 3rd
District for Salt Lake County
Hon. Maurice Harding, Judge

Arthur J. Ritter
414 Walker Bank Bldg.
Salt Lake City, Utah 84111

Attorney for
Appellant

R. Paul Van Dam
Salt Lake County Attorney
243 East Fourth South,
Lower Level
Salt Lake City, Utah 84111

Attorney for
Respondent

TABLE OF CONTENTS

Authorities Cited

Texts, Statutes and Regulations

STATEMENT OF THE KIND OF CASE

The Third Judicial District Court held a hearing on an Order to Show Cause filed by Plaintiff, The State of Utah, by and through the Department of Social Services, why judgment should not be entered against Defendant-Appellant for accrued and unpaid child support.

DISPOSITION IN LOWER COURT

Judgment was entered against Appellant for accrued and unpaid child support in the sum of $1,600.00 to be paid to the Respondent (Plaintiff) State of Utah, by and through the Utah State Department of Social Services.

Appellant's Motion to the Court to dismiss Respondent's (Plaintiff's) Order to Show Cause, based on a lack of due process through failure to comply with Notice requirements of §78-45-b-4, Utah Code Annotated, 1953, (as amended) was denied.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the Judgment reversed and the Appellee's Order to Show Cause dismissed with prejudice; or, in the alternative, to have the case remanded to the Office of Recovery Services for an administrative hearing as set forth in Administrative Rule 32-01-4(4).

STATEMENT OF FACTS

On June 10, 1975, Appellant, Sterling Jay Warner, and Barbara Boyle Warner were both granted a Decree of Divorce from the other in the District Court for the Third Judicial District. Custody of their two children was given to Barbara

Warner with Appellant obligated to pay to her the total sum of $125.00 per month as child support.

Shortly after this Decree was entered, Barbara Warner departed from the State of Utah with the children. Despite repeated efforts to locate her, Appellant was unable to discover her whereabouts. He had hoped to be able to modify the Decree so that he would have custody, or in the alternative to lower the support payment based on changed circumstances, however, his inability to find her meant that she could not be personally served so that the court could not obtain the necessary jurisdiction to order a change.

Unbeknownst to Appellant, Barbara returned to the State in July, 1976. At that time Barbara applied for and began receiving public assistance. In order to receive that assistance she assigned her child support "past due and to become due" to the Respondent, Bureau of Recoveries and Child Support Enforcement of the Department of Social Services. Neither Barbara nor the Bureau ever notified Appellant of this fact.

On August 2, 1977, the Department of Social Services was joined as a party in interest in an action to recover unpaid sums of child support from Appellant. On the 3rd day of October, 1977, the lower court held a hearing which was continued to November 3, 1977. Appellant (Defendant) raised the issue of lack of due process because of the failure to comply with the notice provisions of §78-45b-4 and other issues on October 3, 1977 and was given a continuance of one month to prepare a memorandum of law. This memorandum was submitted to

the Court on November 2, 1977 with a Motion to Dismiss The State of Utah's Order to Show Cause. This motion was denied in an Order signed November 2 , 1977 by Judge Maurice K. Harding for the Court.

ARGUMENT

IF THE DEPARTMENT OF SOCIAL SERVICES ELECTS TO RECOVER FROM AN OBLIGOR UNDER TITLE 78 WHERE THERE IS A COURT ORDER, IT IS REQUIRED TO MEET THE NOTICE PROVISIONS SET FORTH IN TITLE 78, 45b-4.

(A) FAILURE TO GIVE APPELLANT THE STATUTORY NOTICE AMOUNTED TO A VIOLATION OF THE DOCTRINES OF DUE PROCESS AND FUNDAMENTAL FAIRNESS.

Appellant contends that when the Department of Social Services first received this case, it should have issued to him "a notice of a support debt accrued or accruing based upon [a] court order" as set forth in Title 78, §45b-4 of the Utah Code Annotated 1953. This failure of notice deprived Appellant of an opportunity to establish changed circumstances which would have provided the basis for a court ordered reduction of his child support obligation. Furthermore, it deprived Appellant of the opportunity to settle his past due amounts by an accord and satisfaction. Moreover, the lack of notice prevented Appellant from substantiating the ongoing obligation for child support. In sum, the Department's failure to give notice to Appellant amounted to a violation of the doctrines of due process and fundamental fairness.

(B) INTERPRETING THE STATUTE TO REQUIRE NOTICE

This appeal focuses on Chapter 45b of Title 78-"Public Support of Children Acts". However, the official legislative title for the Act includes the phrases "providing for notice of support owed. . .Providing for hearing and hearing procedures". Laws of Utah, 1975, ch.96 (page 381). From the official title it is obvious that the Legislature was concerned that the obligor be provided with sufficient notice of his debt and with an opportunity for a hearing. To this end it enacted Sections 4 and 5 of the Chapter which provides in part, for notice in the event there was or was not respectively a court order providing for support.

The Section relevant to the case sub judice provides:

> "The department may issue a notice of a support debt accrued or accruing based upon any court order. . . ."Utah Code Annotated §78-45b-4(1).

This statutory notice must include a demand for immediate payment. Id. It should also provide that in lieu of making such payment, the obligor can file a written statement setting forth his defenses to liability and requesting a hearing thereon. Id. A period of 20 days is allowed for the obligor's response. Id. The notice also is to provide that if the Department fails to receive a response from the obligor within that period of time, then he will be subject to appropriate collection actions. Id.

The Section indicates that notice "may" issue. It could be argued that this language allows the Department to use the

notice procedure in its absolute discretion. Since the statute then would not provide standards for determining the cases for which notice should and should not be provided, such an interpretation would raise serious equal protection questions.

A reading more in line with legislative intent would require the Department to use the notice procedure if, in its discretion, it decides to attempt collection of support money. However, the Legislature understood that there would be cases where, for various reasons (equity, costs greater than return, lack of administrative resources, etc.), the Department would not want to attempt collection. Therefore, the word "shall", which would appear to require such an effort in every case, was avoided.

Maine has enacted a statute which is very similar to Utah's "Public Support of Children Act". The Maine act provides that "[W]hen the department is subrogated to a court Order of support..., the commissioner may issue...a notice of debt accrued or accruing. . ."Maine Rv. Stat. Ann. 19§500 (Emphasis added). However, it provides further that "[N]o action under [the sections relating to collection of the support debt] may be taken until the notice requirements of (the above section) are met." Id. (Emphasis added) This additional language requires the Maine statute to be interpreted in the same manner as the above suggested interpretation of the Utah Act.

(C) THE REGULATIONS OF THE DEPARTMENT OF SOCIAL SERVICES INDICATE THAT NOTICE IS REQUIRED.

While the above comparison with the law of Main provides a reasonable and sufficient basis for interpreting the Act, fortunately it is not the only reliable means extant for construing the statute. In fact, the Utah Department of Social Services has previously construed the "Public Support of Children Act" and its interpretation is to be found in the regulations which it promulgated pursuant to §78-45b-3(7), Utah Code Annotated 1953 (As amended).

The rules of procedure for the office of Recovery Services state that "[a] appropriate location resources must be utilized within sixty days of case referral." Utah Adm. Rules §A32-01-2(b) (Emphasis added) In addition, that subsection requires that if the obligor's address is discovered, then personal or mail service is to be initiated "immediately". Id. Such service is to include a Notice of Support Debt and to set an assessment conference date. Id., §A32-01-2(c). If the obligor makes a timely request for a hearing, then hearing procedures are to be initiated "immediately". Id. §A32-01-4(4).

From these regulations, it is plain to see that the Department is of the opinion that the Act requires a notice to the obligor in all cases where it is trying to collect a support debt. This interpretation should be given considerable weight by the Court and should be binding on counsel for the Department.

The mere recital of these rules makes it apparent that Appellant did not receive the notice required under the Act and the regulations. Moreover, he should have received a hearing and an assessment conference.

(D) THE DEPARTMENT VIOLATED ITS OWN REGULATIONS IN FAILING TO PROVIDE APPELLANT WITH NOTICE AND AN ADMINISTRATIVE HEARING.

Rules enacted by an administrative body pursuant to a valid delegation of power have the force and effect of law. 2 Am. Jur. 2d Administrative Law §292. As such, they bind the agency to the same extent as the public and must be obeyed. Id., §§291.309.

It should be noted that these regulations went into effect on the 10th of May 1977 and the obligee first contacted the department in July of 1976. It could be argued that, therefore, they do not apply to this action. However, even accepting that position, they still indicate the proper construction to be given to §78-45b-4. That would mean that Appellant was entitled to notice and a hearing if he so chose. Since he did not receive the benefit of same, he was denied due process of law.

Notwithstanding the above, Appellant contends that the regulations should rightly have been applied to this case. The State did not join the proceedings until August 1977. If the Department had utilized its location assets for the sixty days following the effective date of the regulations, Appellant would have had sufficient time to request a hearing, seek a modification of the child support order or settle his past due support amounts before the State joined the proceedings. Since the Department was handling the case on the effective date, no good reason appears for it not having followed the procedures set forth in the Rules and Regulations.

The State of Utah also contends that it may proceed under the purpose clause enacted by the legislature in 1977 as §78-45b-1.1 which retains all the remedies formerly provided in the common law [laws of Utah, 1977, Chapter 145 (page 627)] and is not required to give notice. If this contention were given any validity it would make the amendment to Section 78-45b-4 enacted at the same time as 78-45b-1.1 mere surplusage.

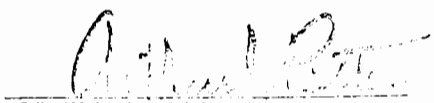
CONCLUSION

Under Title 78, if the Department of Social Services elects to pursue an obligor where there is a court order, it must follow the notice provisions set forth in §45b-4.

Appellant submits that the judgment of the district court deprived Appellant of the statutorily required notice and denied him due process. Accordingly, that judgment should be reversed and Appellee's Order to Show Cause dismissed with prejudice; or, in the alternative, that the case be remanded to the Office of Recovery Services for an administrative hearing as set forth in Administrative Rule 32-01-4(4).

Appellant should be awarded his cost.

Respectfully submitted,



ARTHUR J. RITTER
Attorney for Appellant-Defendant
414 Walker Bank Building
Salt Lake City, Utah 84111