

2008

Kay Lynn Hansen v. Steven L. Hansen : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

KAY LYNN HANSEN,

Plaintiff/Respondent,

-vs-

STEVEN L. HANSEN,

Defendant/Petitioner.

**BRIEF OF
RESPONDENT**

Supreme Court No. 20090556 SC
Appellate Court No. 20080747 CA

Trial Court No. 03490024

ON A GRANT OF CERTIORARI
THIS IS AN APPEAL FROM THE UTAH COURT OF APPEALS'
DETERMINATION AND APPLICATION OF §78B-12-108

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**FILED
UTAH APPELLATE COURTS
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IN THE UTAH SUPREME COURT

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Plaintiff/Respondent,

-vs-

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**BRIEF OF
RESPONDENT**

Supreme Court No. 20090556 SC
Appellate Court No. 20080747 CA

Trial Court No. 03490024

Plaintiff/Respondent Kay Lynn Hansen (hereinafter “Respondent”) submits the following as her responsive brief in this case:

STATEMENT OF JURISDICTION

Jurisdiction of this Court is proper pursuant to Sec. 78A3-102(3)(a) U.C.A.

STATUTE OF DETERMINATIVE IMPORTANCE

Section 78B-12-108 UCA. Support follows the child is dispositive of this case. The statute is set forth below:

(1) Obligations ordered for child support and medical expenses are for the use and benefit of the child and shall follow the child.

(2) Except in cases of joint physical custody and split custody as defined in Section 78B-12-102, when physical custody changes from that assumed in the original order, the parent without physical custody of a child shall be required to pay the amount of support determined in accordance with Sections 78B-12-205 and 78B-12-212, without the need to modify the order for:

- (a) the parent who has physical custody of the child;
- (b) a relative to whom physical custody of the child has been voluntarily given; or
- (c) the state when the child is residing outside of the home in the protective custody, temporary custody, or custody or care of the state or a state-licensed facility for at least 30 days.

STATEMENT OF FACTS

1. The parties were divorced in the State of Iowa pursuant to a Dissolution Decree (R.5-13). They are the parents of two children, one of whom, Jessica, is a minor. The parties were granted joint custody with physical custody granted to the mother. (R.6). Thereafter, the father moved to California and the mother moved to Utah. The Dissolution Petition was domesticated in Utah on May 27, 2003 (R. 56-59).

2. On November 18, 2006, the father filed a Petition to Modify the Decree, seeking physical custody of Jessica and an Order awarding child support to him. (R. 184-186). In his brief, the father erroneously states that the child was living at the Volunteers of America and that was one of the grounds for his Petition (Brief of Petitioner, page 4). In fact,

she did not enter the VOA until July 18,2007. She left for a period of time, and then re-entered the VOA in October of 2007.

3. At no time since the Iowa decree has the child been in the physical custody of the father for any substantial period of time.

4. Mr. Hansen took no further steps to bring the Petition to Modify before the Court.

5. Mr. Hansen has never filed a Petition to Modify the Decree seeking modification of the Decree to provide for support payments to VOA.

6. Ms. Hansen has been, and still is, the legal physical custodian of Jessica. She remains liable for the support of the child.

7. There is no evidence in the record that the VOA is a state agency, and Mr. Hansen does not argue that it is.

SUMMARY OF ARGUMENT

Sec. 78B-12-108 is clear and unambiguous. It was the failure of the father to file a Petition to Modify the original Decree, as required by Subsection (2), that resulted in the decisions of the Commissioner, trial judge, and the Court of Appeals denying father's Motion to have child support directed to the VOA. There is no internal conflict with the subsections of 78-12-108. The first states a general principal and the second a roadmap for how and when the payment of child support is redirected. Without the roadmap, there might be chaos, as not every situation

would warrant a redirection of child support (i.e. if a child resides with her friend for a week, does child support automatically change? Two weeks? Months?)

In short, Subsection (2) sets out an orderly process for sorting through various scenarios with court oversight in all but three specified instances. Mr. Hansen failed to follow the roadmap, and the courts below appropriately denied his Motion.

ARGUMENT

I. THE CHILD SUPPORT OBLIGATION IN ALL CASES INVOLVING A CHANGE OF PHYSICAL RESIDENCE OF THE CHILD SHOULD BE DIRECTED FOLLOWING THE PROCEDURAL MANDATES OF SEC. 78B-12-108(2), WHICH EFFECTUATE THE IMPLEMENTATION OF SUBSECTION (1) OF THE STATUTE.

Mr. Hansen argues for a very literal reading of Subsection (1), ignoring the necessary language of Subsection (2), which merely effectuates the premise that child support is intended for the benefit of the child. Taking Mr. Hansen's argument literally, is in essence that Subsection (1) requires the redirection of child support in all cases, which presumably would include staying at a friend's house, residing with a boyfriend or girlfriend, or residing with a drug dealer. Obviously, the Legislature intended no such thing, and that is why Subsection (2) cannot be ignored, as the father would have this Court do.

In fact, the statute, read in its entirety, expands and codifies non-judicial redirection of child support by setting forth three exceptions to the rule that a change of payment of child support requires the filing and granting of a Petition to Modify custody and

support. In the past, a non-custodial parent whose child came to live with him or her would have to seek Court modification of the existing support and custody order in order to have support redirected. If Jessica had gone to live with her father, presumably he would not be arguing that Subsection (2) be ignored, as child support would become payable to him without the necessity of filing a Petition to Modify.

It is unclear why Mr. Hansen is so invested in having the support payments changed in the absence of complying with the statute. The record does not reflect any attempt by the Volunteers of America to seek payment for the care of Jessica, either in court or by demand to the parents. In fact, as admitted by Mr. Hansen in front of Commissioner Evans, VOA is, in counsel's words, "...a volunteer program that's run by private donations." And the record reflects that Ms. Hansen was concerned by the non-payment of support to her since September of 2006, long before the child entered the VOA (letter from Ms. Hansen to counsel for Mr. Hansen, R. 208).

II. THE STATUTE, TAKEN IN ITS ENTIRETY, IS UNAMBIGUOUS AS TO THE REQUIREMENTS FOR HAVING CHILD SUPPORT REDIRECTED. MR. HANSEN SIMPLY FAILED TO FOLLOW THE STATUTE, AND THUS HIS MOTION WAS PROPERLY DENIED.

Subsection (2) clearly and unambiguously states that child support can be directed to another payee only by obtaining an Order modifying the original custody order, with three exceptions. Mr. Hansen does not fit into one of the excepted classes, and thus

would be required to file a Petition to Modify and obtain an Order changing the Decree. He did not do so.

Mr. Hansen states: “The Statute requires that the child support payments follow the child, it does not say anything about having to file a Petition to Modify first, or having to establish a change in custody first, in order to have the payments follow the child.” (Brief of Petitioner, page 14) Of course the statute does exactly that. Then, he states that nevertheless a Petition to Modify had been filed with the court, as required by the Statute (Brief of Petitioner, pages 3-4). He then argues, in footnote 2 of his Brief at page 14, that the Court, with a Petition to Modify pending, could have issued temporary orders in the best interests of the child to redirect support payments, even if the Petition to Modify had not been decided. Thus, Mr. Hansen is not only acknowledging the requirement of modifying the original order as set forth in the statute, but argues that the appropriate Petition had been filed and temporary orders could have been issued pursuant to his Motion.

Mr. Hansen's assertions regarding his filing of a Petition are not supported by the record. (At page 13 of his brief, Mr. Hansen states that the Petition was filed in November of 2007, an obvious typo, as the filing date was November of 2006). First, the filing date was almost one year prior to the time that Jessica began her residence at VOA. Mr. Hansen could not have possibly filed a Petition satisfying the requirements of Sec. 78-12-108, as he presumably would have had no idea that his daughter would end up at the VOA several months in the future.

A serious problem with Mr. Hansen's argument regarding the Petition is that in his brief, Mr. Hansen falsely asserts that one of the grounds set forth in his Petition to change custody was that the child was residing at Volunteers of America. (Brief of Petitioner, page 4). There is no such language in his Petition (R.284-286) which is not surprising given the fact that it would be nine months before Jessica first stayed at the VOA. It is an obvious attempt to lead this court into the false impression that he had complied with Subsection (2).

Finally, Mr. Hansen concludes with the argument that since Subsection (2) allows for support to be redirected without a court order, it implies that the court can order the redirection of support (Brief of Petitioner, page 16). It is unclear what his point is. If it is the proposition that in cases other than the three exceptions the court can make an order redirecting support, Ms . Hansen agrees wholeheartedly. That is precisely what the statute provides. What Mr. Hansen consistently ignores is the requirement that the original order of custody be modified, at which time the court can order the non-custodial parent to pay an entity or person not covered by the three exceptions.

Mr. Hansen relies on *Doyle v. Doyle*, 2009 UT App 306 (October 29, 2009) for the proposition that the Court can redirect support even where no request is made. Doyle is not relevant to this case in any respect. The simple issue decided by the Court of Appeals was whether the trial judge, after changing custody in a divorce proceeding, had the discretion to modify the support award as between the parents, even in cases where a modification of support was not pleaded op cit. at p. 10.

CONCLUSION

The courts below properly denied Petitioner's Motion to Redirect Child Support. Read in its entirety, Sec.78B-12-108 clearly sets forth the procedure to be followed in cases where the redirection of child support is sought in cases not falling with the exceptions delineated in Sub.(2) of the statute. Mr. Hansen was required to obtain an Order modifying the physical custody provisions of the governing Decree, and he failed to do so. His attempt to use the prior filing of a Petition to Modify to change physical custody to himself as proof that he had complied with the statute is not well-taken. Neither he, nor the Volunteers of America, ever filed the required Petition to Modify seeking an order redirecting payment to the VOA. As such, the relief sought by Petitioner should be denied.

DATED this 5th day of January 2010.

WOODALL & WASSERMANN

A handwritten signature in black ink, appearing to read "Ann L. Wassermann", is written over a horizontal line.

ANN L. WASSERMANN

Attorney for Plaintiff/Respondent

ADDENDUM

Exhibit A

Doyle v. Doyle	1
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CERTIFICATE OF SERVICE

I hereby certify that I caused to be sent by U.S. Mail, first class, postage prepaid, two true and correct copies of the foregoing *Brief of Plaintiff/Respondent* on this 5th day of January 2010, to:

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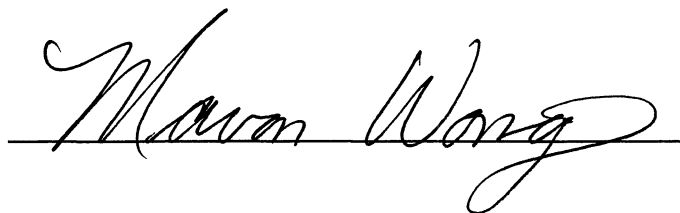
A handwritten signature in cursive script, reading "Maureen Wong", is written over a horizontal line.

Exhibit “A”

IN THE UTAH COURT OF APPEALS

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Douglas Patrick Doyle,

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MEMORANDUM DECISION

)

(Not For Official Publication)

Petitioner and Appellant,

)

)

Case No. 20060716-CA

v.

)

F I L E D

)

(September 21, 2006)

Robin Elaine Doyle,

)

)

2006 UT App 379

Respondent and Appellee.

)

Third District, Salt Lake Department, 034903528

The Honorable Denise P. Lindberg

Attorneys:

Steve S. Christensen and Jeffrey J. Steele, Salt Lake
City, for Appellant

Suzanne Marelus, Salt Lake City, for Appellee

Before Judges Davis, McHugh, and Orme.

PER CURIAM:

Douglas Patrick Doyle (Husband) appeals the trial court's minute entry denying his motion to clarify and denying, with one exception, his objections to the commissioner's recommendations.

This is before the court on Robin Elaine Doyle's (Wife) motion for summary disposition based on lack of jurisdiction due to the absence of a final order.

Generally, this court does not have jurisdiction over an appeal unless it is taken from a final judgment or order. See *Loffredo v. Holt*, 2001 UT 97, ¶10, 37 P.3d 1070. In domestic cases, several orders in a divorce proceeding may be final and appealable. See *Copier v. Copier*, 939 P.2d 202, 203 (Utah Ct. App. 1997) (per curiam). But, for an order to be final, even in a divorce case, it must end the specific controversy between the

parties. See *id.*; see also Loffredo, 2001 UT 97 at ¶12.
Husband asserts that the signed minute entry is a final order because it was a final interpretation of a prior order. However, the minute entry did not finally determine any substantive rights of the parties nor end the litigation. See *Harris v. IES Assocs., Inc.*, 2003 UT App 112, ¶56, 69 P.3d 297.

The pending controversy between the parties is Wife's petition to modify the divorce decree. The minute entry noted that the petition was pending and continued temporary orders until the final determination of the petition. In addition, the court denied Husband's motion to clarify the decree, noting that the issue and arguments raised had already been addressed. In sum, the minute entry did not finally dispose of any part of the litigation, nor did it adjudicate the substantive rights of the parties. It was clearly an interlocutory order rather than a final order subject to appeal. Because the minute entry is not a final order, this court lacks jurisdiction and must dismiss the appeal. See Loffredo, 2001 UT 97 at ¶11.

Accordingly, this appeal is dismissed without prejudice to the timely filing of a notice of appeal after the entry of a final order.

James Z. Davis, Judge

Carolyn B. McHugh, Judge

Gregory K. Orme, Judge
20060716-CA