

1988

Renata Remington v. Earl D. Remington : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Richard Nemelka; Attorney for Respondent.

Randy S. Ludlow; Attorney for Appellant.

Recommended Citation

Brief of Respondent, *Remington v. Remington*, No. 880522 (Utah Court of Appeals, 1988).

https://digitalcommons.law.byu.edu/byu_ca1/1311

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

**UTAH COURT OF APPEALS
BRIEF**

UTAH
DOCUMENT
KFU

50
.A10

DOCKET NO. 880522

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

RENATA REMINGTON,)
)
Respondent,	) ARGUMENT PRIORITY
	) CLASSIFICATION 14(b)
v.)
)
EARL D. REMINGTON,	) Appeals Court No. 880522-CA
	) District Court No. C 21985
Appellant.)
)

BRIEF OF THE RESPONDENT

Appeal from Judgment in the Third District Court
in Salt Lake County, Honorable Homer Wilkinson, Judge

RICHARD S. NEMELKA (2396)
Attorney for Respondent
2046 East 4800 South, Suite 103
Salt Lake City, Utah 84117
Telephone: (801) 272-4244

RANDY S. LUDLOW
Attorney for Appellant
Suite 280, 311 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 531-1300

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

RENATA REMINGTON,)
)
Respondent,	) ARGUMENT PRIORITY
	) CLASSIFICATION 14(b)
v.)
)
EARL D. REMINGTON,	) Appeals Court No. 880522-CA
	) District Court No. C 21985
Appellant.)
)

BRIEF OF THE RESPONDENT

Appeal from Judgment in the Third District Court
in Salt Lake County, Honorable Homer Wilkinson, Judge

RICHARD S. NEMELKA (2396)
Attorney for Respondent
2046 East 4800 South, Suite 103
Salt Lake City, Utah 84117
Telephone: (801) 272-4244

RANDY S. LUDLOW
Attorney for Appellant
Suite 280, 311 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 531-1300

TABLE OF CONTENTS

	Page
STATEMENT OF JURISDICTION.....	1
NATURE OF PROCEEDINGS.....	1
STATEMENT OF ISSUE.....	2
DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES.....	2
STATEMENT OF THE CASE.....	2
SUMMARY OF THE ARGUMENT.....	5
ARGUMENT.....	5
CONCLUSION.....	10

TABLE OF AUTHORITIES

STATUTES

	Page
Utah Code Annotated Section 78-2(a)-3(2(g)).....	1
Utah Code Annotated Section 78-45-4.....	5

CASE LAW

<u>Martinez v. Martinez</u> , 754 P.2d 69 (Utah App. 1988)..	8
<u>McCrary v. McCrary</u> , 599 P.2d 1248 (1979).....	6
<u>Woodward v. Woodward</u> , 709 P.2d 393 (1985).....	5

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

RENATA REMINGTON,)	
)	
Respondent,	)	Appeals Court No. 880522-CA
	)	District Court No. C 21985
v.)	
)	
EARL D. REMINGTON,)	
)	
Appellant.)	
)	

BRIEF OF THE RESPONDENT

STATEMENT OF JURISDICTION

This court has jurisdiction pursuant to Utah Code Annotated Section 78-2(a)-3(2)(g).

NATURE OF PROCEEDINGS

The appeal of the Appellant is from a final judgment entered by the trial court pursuant to a Petition for Modification of Decree of Divorce filed by Appellant requesting custody of the parties' minor child together with child support and an Order to Show Cause filed by Respondent for child support arrearages. Respondent stipulated to the change of custody to Appellant and the child support arrearages were handled with an additional hearing.

STATEMENT OF ISSUE

The sole issue presented on Appeal is whether the trial court abused its discretion in ordering the Respondent to pay to the Appellant the sum of Fifty Dollars (\$50.00) per month as child support.

DETERMINATIVE CONSTITUTIONAL PROVISIONS

STATUTES, ORDINANCES AND RULES

Respondent adopts Appellant's statement and incorporates the same herein by reference.

STATEMENT OF THE CASE

Respondent and Appellant were divorced on September 8, 1976 and pursuant to the Decree of Divorce Respondent was awarded the custody of the minor child, Michelle who was born on November 18, 1973. Further, the Appellant was ordered to pay to the Respondent the sum of Seventy-Five Dollars (\$75.00) per month as child support (R-23-24). The minor child resided with Respondent until May 21, 1983 at which time said minor child began living with the Appellant and then resided with him since said time except for visitation periods with Respondent. Prior to the minor child residing with the Appellant, the Appellant failed to pay the child support due and owing and a judgment was entered against the Appellant for child support arrearages in the sum of Nine Hundred Seventy-Six Dollars (\$976.00) together with Four Hundred Dollars (\$400.00) in attorney's fees (R-82).

During the period of time the minor child has resided with the Appellant the Respondent has paid approximately Six Hundred Dollars (\$600.00) per year for clothing for the minor child (R-94 at p. 35). Appellant did not file a Petition for Modification requesting child support until September 28, 1987, over three (3) years after the minor child began residing with Appellant (R-27). There was no evidence presented at the time of the hearing on the aforesaid Petition for Modification that the Appellant had made any demand for any support for the minor child from Respondent other than Respondent continuing to buy clothing for said minor child.

At the hearing on said Petition, the Appellant stated that in 1986 he and his wife had an annual gross income of \$68,192.00 plus \$350.00 investment income (R-94 at p. 15). Further, the evidence indicated that the minor child made \$20.00 a month from which she bought her own clothes and contributed to any clothes other than generic brands (R-94 at pp. 16 and 26). Further, the evidence presented indicated that the Appellant's monthly gross income at the time of the hearing was approximately \$3,800.00 per month and that Appellant's wife had quit her job just before the hearing on said Petition (R-94 at p. 15).

The evidence presented also indicated that the Respondent was making \$9.88 per hour which was approximately

\$1,700.00 gross per month. However, her net income per month was only \$524.34 every two weeks (R-94 at pp. 31 and 32).

Respondent presented at trial her living expenses which were approximately \$1,133.00 (R-94 at p. 33 and plaintiff's Exhibit P-6).

Appellant presented at trial the living expenses of the minor child of approximately \$847.00 per month and the same was calculated by taking 1/3 of Appellant's present families' expenses including groceries and housing (R-94 at p. 6). The evidence presented at the trial and from which the Court concluded indicated that the Appellant had \$68,000.00 per year income coming in for three people (R-94 at pp. 69 and 71). Although Appellant's counsel prepared the Amended Findings of Fact which stated that the Appellant supported himself, his wife, the minor child and two additional children, the Court did not find the same as is reflected in the Court's statement that there was no evidence presented as to the Appellant supporting anymore than three (3) people (R-94 at p. 69).

The trial court, after the presentation of the evidence and testimony and after considering the relative incomes of the two (2) parties and all of the circumstances involved in this matter awarded to the Appellant Fifty Dollars (\$50.00) per month child support from the Respondent (R-94 at pp. 71 and 72).

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in awarding Fifty Dollars (\$50.00) per month for child support based upon all of the circumstances of the parties. The Court had the right to take into consideration the fact that the Appellant had only paid to the Respondent the sum of \$75.00 per month for child support for a period of almost seven (7) years and further had for a period of three (3) years not requested any child support whatsoever. Based upon the relative incomes of the parties and the fact that the expenses of the Appellant were minimal based upon he and his present wife's income capacity the award of \$50.00 per month child support was reasonable. This Court should affirm the ruling of the trial court.

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN THE AMOUNT AWARDED APPELLANT FOR CHILD SUPPORT.

Since the minor child of the parties began residing with Respondent Appellant has paid approximately \$600.00 per year for clothing for the minor child. Respondent believes and is willing to continue to provide support for her minor child pursuant to Section 78-45-4, Utah Code Annotated. The Utah Supreme Court stated in Woodward v. Woodward, 709 P.2d 393 (1985) at page 394:

"in reviewing child custody and support proceedings we accord substantial deference to the trial court's

findings and give it considerable latitude in fashioning the appropriate relief. We will not disturb that Court's action unless the evidence clearly preponderates to the contrary or there has been an abuse of discretion."

Further, the Utah Supreme Court also stated in McCrary v. McCrary, 599 P.2d 1248 (1979) at page 1250

"it is not the rule of the appellant forum in such cases to evaluate the sagacity of the trial courts decision, being based as it is on shadings of fact and circumstances unavailable to the reviewing Court."

The trial court in the present case had before it evidence in regards to not only the Appellant's disregard of the Court's Order in regards to pay child support since a judgment was entered for child support arrearages, but also the evidence before that for a period of approximately seven (7) years, even though the Appellant's income was substantial, he only paid to the Respondent the sum of \$75.00 per month as child support. The Respondent struggled financially during the period of time she had custody of the minor child and had to take out bankruptcy since she did not have enough income to support the child as well as pay her financial obligations.

The available income to the Appellant was three times that available to the Respondent for the year 1986 and even after Appellant's wife decided to quit her job just prior to the hearing in this matter Appellant's income was still more than twice that of the Respondent. Respondent's expenses, although they were only for her

alone, still were reasonable expenses and left her no available income to pay support other than the approximately \$50.00 per month which she had been paying for clothes for the past few years for the minor child. On the other hand, if Appellant's wife had not conveniently quit her job Appellant would have had approximately \$2,000 a month more available income which could leave him with a surplus after paying expenses. It is also interesting to note that although Appellant claims that he has to support five (5) people, in determining the expenses allocated to the minor child of the parties herein, he only takes into consideration the support of three (3) people. Apparently, Appellant's present wife has some ability to support herself and her two children. Therefore, the critical point which the trial court considered was the fact that Appellant, in reality, only has to support himself and the minor child of the parties with over two times as much income as the Respondent who has to support herself.

Appellant argues in his brief that a woman should be required to pay the same amount of support as would be required by a man. Respondent agrees with the same, and apparently so did the trial court. The Appellant, although earning more than twice as much as Respondent, only paid \$75.00 per month as child support. Based upon said circumstances the Appellant should probably only be paying

child support in a sum less than one-half (1/2) of the amount that the Appellant paid to the Respondent. Further, Appellant's comment in its brief regarding an alleged statement made by the trial court as to a gender is totally inappropriate and without foundation and/or evidence. The trial court was not concerned whatsoever about the gender of the parties but only the equitable circumstances of the parties in their totality regarding available income, needs of the minor child and previous payments of support.

Appellant cites the case of Martinez v. Martinez, 754 P.2d 69 (Utah App. 1988), to support his position that the trial court abused its discretion. The Martinez case does not indicate that just because the trial court does not award an amount of support based upon child support guidelines and/or schedules that it is an abuse of discretion. In the Martinez case there were certain circumstances which suggested that had the child support remained at the level that was awarded by the trial court that the mother and the children would be left in a precarious financial situation wherein the father would be left in a relatively affluent situation. In fact, in the Martinez case the father had substantial income over and above his expenses upon which to live even after paying the

increased amounts of support and alimony wherein the present case Respondent can barely meet her own obligations and support herself while paying to the Appellant the \$50.00 per month child support. The Appellant in the present case is in a lot better financial situation than Respondent and would have substantial income available each month had his present wife not decided to quit her job and rely upon him to support her and her children.

Appellant relies upon the child support schedules dated September 1984 and September 1987 in support of his position that the Court should have awarded a higher amount of child support. However, Appellant fails to realize that said support schedules do not fully take into consideration the diversity of incomes between the custodial and non-custodial parent. Further, the Court was not bound by said schedules in any event since the circumstances of the present case were not the normal circumstances upon which said schedules were based. Had the Respondent retained custody of the minor child, remarried with available income of more than three times that of the Appellant, the Court would have fashioned a child support payment based upon said circumstances and not the support schedules. It is precisely for cases like the present one that the appellate court's have allowed the trial court discretion in determining the amount of child support to be paid.

CONCLUSION

The trial court did not abuse its discretion in awarding \$50.00 per month child support from the Respondent to the Appellant. It was a reasonable amount based upon all of the circumstances and the totality of the evidence presented to the Court. This Court should affirm the trial court's order.

Respectfully submitted this 12th day of January,
1989.



RICHARD S. NEMELKA
Attorney for Renata Remington

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the above and foregoing Brief of the Respondent by depositing the same in the United States mail, postage prepaid, this 12th day of January, 1989, to the following:

Randy S. Ludlow
Attorney for Appellant
Suite 280, 311 So. State Street
Salt Lake City, Utah 84111


