

1979

Rose O. Swedin (Wall) v. Thorsten Fred Swedin : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

E. H. Fankhauser; Attorney for Plaintiff-Respondent;

J. Franklin Allred; Attorney for Defendant-Appellant;

Recommended Citation

Brief of Respondent, *Swedin v. Swedin*, No. 16003 (Utah Supreme Court, 1979).

https://digitalcommons.law.byu.edu/uofu_sc2/1381

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 Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
OF THE STATE OF UTAH

ROSE O. SWEDIN (WALL), :
Plaintiff-Respondent, :
vs. : Case No. 16003
THORSTEN FRED SWEDIN, :
Defendant-Appellant. :

RESPONDENT'S BRIEF

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT OF SALT LAKE COUNTY
The Honorable G. Hal Taylor, Presiding

E. H. FANKHAUSER
COTRO-MANES, WARR,
FANKHAUSER & GREEN
430 Judge Building
Salt Lake City, Utah 84111
Attorney for Plaintiff-
Respondent

J. FRANKLIN ALLRED
321 South Sixth East
Salt Lake City, Utah 84102
Attorney for Defendant-Appellant

FILED

FEB 8 1979

IN THE SUPREME COURT
OF THE STATE OF UTAH

ROSE O. SWEDIN (WALL), :
Plaintiff-Respondent, :
vs. : Case No. 16003
THORSTEN FRED SWEDIN, :
Defendant-Appellant. :
:

RESPONDENT'S BRIEF

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT OF SALT LAKE COUNTY

The Honorable G. Hal Taylor, Presiding

E. H. FANKHAUSER
COTRO-MANES, WARR,
FANKHAUSER & GREEN
430 Judge Building
Salt Lake City, Utah 84111
Attorney for Plaintiff-
Respondent

J. FRANKLIN ALLRED
321 South Sixth East
Salt Lake City, Utah 84102
Attorney for Defendant-Appellant

TABLE OF CONTENTS

	<u>PAGE</u>
STATEMENT OF KIND OF CASE.	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL.	2
STATEMENT OF FACTS	2
ARGUMENT	
POINT I. DENIAL OF DEFENDANT'S MOTION FOR REFERRAL WAS PROPER AND IS SUPPORTED BY THE FACTS AND CIRCUMSTANCES OF THE CASE.	4
POINT II. DEFENDANT'S MOTION FOR REFERRAL WAS NOT PROPERLY BEFORE THE COURT.	8
POINT III. THE GRANTING OF JUDGMENT BY THE LOWER COURT UNDER THE DECREE OF DIVORCE WAS PROPER	9
CONCLUSION	10

CASES CITED

Palombi v. D & C Builders, 22 U.2d 297 452 P.2d 325, 328	9, 10
Potter v. Hussey, 1 Utah 249	10

STATUTES CITED

Section 78-7-19, Utah Code Annotated (1953).	6
Rule 6(d) Utah Rules of Civil Procedure.	8
Rule 6(e) Utah Rules of Civil Procedure.	9

Rule 54(c) Utah Rules of Civil Procedure	<u>PAGE</u> 9
Section 30-3-5, Utah Code Annotated (1953) . . .	9

IN THE SUPREME COURT
OF THE STATE OF UTAH

ROSE O. SWEDIN, :
Plaintiff-Respondent, :
vs. : Case No. 16003
THORSTEN FRED SWEDIN, :
Defendant-Appellant. :
:

BRIEF OF RESPONDENT

STATEMENT OF KIND OF CASE

Order to Show Cause in Re Contempt by plaintiff for delinquent support payments and to enforce provisions of the Decree of Divorce, requiring the defendant to pay all mutual joint family obligations; and for modification of Decree of Divorce to require the defendant to maintain medical insurance for the minor children and to continue support payments for post-high school education. (R. 48-53)

DISPOSITION IN LOWER COURT

The Court denied plaintiff's request for modification of the Decree of Divorce; ordered future support payments to be paid through the Clerk of the Court; denied defendant's motion for referral to Judge Winder; and held defendant liable for all debts and obligations of the marriage under the Decree of Divorce up to April 19, 1976, as a matter of law. (R. 60, 78, 84-93)

RELIEF SOUGHT ON APPEAL

Affirmance of the judgment and order of the trial court.

STATEMENT OF FACTS

For the purpose of clarification and convenience, the parties will be referred to as plaintiff and defendant as they appeared in the original divorce proceedings.

Plaintiff was awarded a Decree of Divorce from defendant on April 19, 1976, which Decree provided, among other things, that the defendant was "to assume and pay any and all mutual joint family financial obligations and debts incurred by plaintiff and defendant during their marriage, keeping the plaintiff harmless from any and all such creditors, excepting *** future house payments on the realty awarded to plaintiff". (R. 14-15)

Subsequent to the Decree of Divorce, on or about August 2, 1976, the plaintiff filed an Affidavit for Order to Show Cause, seeking to modify the Decree of Divorce in certain particulars, one of which was to require the defendant to assume and pay the mortgage obligation owing to defendant's mother on the real property awarded to plaintiff, which mortgage obligation plaintiff was ordered to assume and pay by the Decree of Divorce as stated above. (R. 16-17) At the time of hearing on plaintiff's Affidavit, she withdrew her request to modify the Decree of Divorce. (R. 36, 38; T. 145) Judge Winder dismissed this request with prejudice.

Thereafter, on February 16, 1978, plaintiff served defendant with an Order to Show Cause in Re Contempt in connection with her Verified Petition for non-payment of support and for modification of Decree of Divorce. (R. 48-53) Hearing was held on March 9, 1978, before the Honorable G. Hal Taylor. (R. 60) On March 6, 1978, just prior to hearing, defendant, through his attorney, filed a Motion for Referral to Judge David K. Winder (R. 55), which Motion the Court properly denied. (R.78) The lower court concluded as a matter of law that the defendant, under the Decree of Divorce, was obligated to pay any and all mutual and joint family financial obligations and debts incurred by the parties during their marriage, including payments on the real property awarded to plaintiff up to April 19, 1976; That plaintiff was obligated to pay all future mortgage or contract payments on the home awarded to her after April 19, 1976; and that there was insufficient evidence before the Court at that time to determine the amount which was delinquent and owing on the home awarded to plaintiff in the Decree of Divorce, which defendant should be responsible to pay; That such amount was to be determined in a subsequent action or hearing based upon the demand that had been made upon plaintiff by the mortgage holder for delinquent payments on the said real property. The Court further concluded that plaintiff would be entitled to a judgment against defendant for all delinquent mortgage or contract payments

that should have been paid on the mortgage or contract of purchase on the real property awarded to plaintiff up to and including April 19, 1976.

The Court also concluded as a matter of law that the prior Order entered by Judge Winder pursuant to the hearing on February 11, 1977, was not a determination of the issue of the delinquency of the mortgage payments or contract payments on the mortgage or contract on the real property and home awarded to plaintiff herein.

From the above rulings and conclusions arrived at by the lower court, defendant has appealed.

ARGUMENT

POINT I

DENIAL OF DEFENDANT'S MOTION FOR REFERRAL WAS PROPER AND IS SUPPORTED BY THE FACTS AND CIRCUMSTANCES OF THE CASE.

Defendant erroneously asserts that the claim of plaintiff to enforce the Decree of Divorce as set forth in her Verified Petition filed February 21, 1978 (R. 48-51), is identical to the request of plaintiff for modification of the Decree of Divorce which came before Judge Winder on February 11, 1977. A reading of the Order on Order to Show Cause prepared by defendant (R. 38), and the transcript of the proceedings before Judge Winder (T. 145), clearly establish that plaintiff sought a modification of the Decree of Divorce which required

plaintiff to pay "future house payments on the realty awarded to the plaintiff." (R. 14-15) Defendant without question understood the proceedings of February 11, 1977, to be a Petition for Modification of the Decree. The wording of defendant used in the Order on Order to Show Cause confirms this, to-wit:

"Plaintiff's Order to Show Cause requesting that the Court enter judgment against the defendant for an arrearage in chils (sic.) support payments and find him in contempt for violation of the Decree heretofore entered, for the modification of the Decree to require the defendant to pay the monthly installments on the real property contract in connection with the real property awarded to plaintiff ****" (Emphasis Added)

The transcript of the hearing before Judge Winder on February 11, 1977, also confirms that the parties regarded plaintiff's petition to be that for modification, to-wit:

MR. ALLRED: Before we get into that, may I at least inquire. I think there are three things in the Petition. One is a modification of the Decree to require payment on an obligation on which plaintiff now owes, **** (Emphasis added) (T. 145)

The Petition of plaintiff filed on February 21, 1978, heard before Judge Taylor on March 9, 1978, was brought to enforce the obligation and Order of the Court contained in paragraph 5 of the Decree of Divorce, which reads as follows:

5. Defendant is ordered to assume and pay any and all mutual and joint family financial obligations and debts incurred by the plaintiff and defendant during their marriage, keeping the plaintiff harmless from any

and all such creditors, excepting the following obligations which the plaintiff is ordered to assume and pay, to-wit: future house payments on the realty awarded to plaintiff." (R. 14-15)

The Verified Petition of plaintiff clearly sought to enforce the above provision and requested the Court to enter a judgment against the defendant for all delinquent payments due to defendant's mother on the realty awarded to plaintiff which payments had accrued and were due and owing prior to April 19, 1976. (R. 50-53) From the foregoing, it is apparent that the prior Order entered by Judge Winder pursuant to the hearing on February 11, 1977, was not a determination of the issue of the delinquency of the mortgage payments or contract payments due on the real property awarded to the plaintiff as part of the debts and obligations ordered by the Court in the Decree of Divorce to be paid by defendant. Section 78-7-19, U.C.A. (1953) as cited by defendant in his brief as authority for the reversing of Judge Taylor's ruling has no application to this particular case and the situation that was before the lower court. Therefore, Judge Taylor properly concluded and ruled as a matter of law that the prior Order of Judge Winder was not a determination of the issue of delinquency of the mortgage payments or contract payments due on the real property awarded to plaintiff under the Decree of Divorce which had accrued and were due and owing prior to April 19, 1976, in that the issue of delinquency was never before Judge Winder and was

raised only for the first time in plaintiff's Verified Petition heard before Judge Taylor. This fact is verified by the exhibit which is part of the Record on Appeal, plaintiff's Exhibit #2, which is a letter dated July 5, 1977, from A. Dennis Norton, an attorney representing defendant's mother, claiming a delinquency or an arrearage on the real property awarded to plaintiff. No claim of delinquency had been made on plaintiff until after the ruling of Judge Winder and therefore, could not have been part of the request of plaintiff to modify the Decree of Divorce, seeking an Order requiring defendant to pay the future mortgage payments on the real property awarded to plaintiff which, in fact, was the relief sought by plaintiff at that time.

A reading of the transcript of the proceedings before Judge Taylor sets out the basis upon which Judge Taylor made his ruling and that Judge Taylor recognized the ruling of Judge Winder. The applicable portions of the transcript are as follows:

"The Court holds as a matter of law that Judge Winder did not rule on that."

"The wording, the way it is, he was talking about an attempt to get him to pay current payments."

"The original Decree -- I can find nothing in the file that has been ruled upon, and the Court holds as a matter of law that under the original Decree, the defendant was obligated to pay all sums due and owing as of the 19th of April, 1976, and that she, the plaintiff was obligated to pay all future payments becoming due and owing after the 19th day of April, 1976." (T. 105)

"Judge Hall ruled that he was to pay all of the marital obligations except future payment. Now I don't have any trouble interpreting that at all, and of course, I have to interpret it to make my ruling." (T. 110)

"Judge Winder ruled that he was not going to order the defendant to pay house payments after 19 April, 1976, this Court recognizes that ruling ****" (T. 116)

From the foregoing, it is clear that the judgment and order of Judge Taylor is not contrary to that of Judge Winder and is, in fact, enforcement of the obligation of the defendant to pay the debts and obligations of the marriage, that included all contract and mortgage payments that had accrued and were owing on the real property awarded to plaintiff up to April 19, 1976. The Order and Judgment of Judge Taylor was proper and should be affirmed.

POINT II

DEFENDANT'S MOTION FOR REFERRAL WAS NOT PROPERLY BEFORE THE COURT.

Defendant's Motion for Referral was not timely filed and proper notice for hearing thereon was not given to the plaintiff. The Motion for Referral was filed with the Court on March 6, 1978, three (3) days before the hearing date requested in the Notice of Hearing attached to the Motion. The Motion was mailed to plaintiff's attorney on March 3, 1978. Rule 6(d) of the Utah Rules of Civil Procedure requires that notice of hearing of motions shall be served not later than five (5) days before the time specified for the hearing unless a different period is fixed by the rules of the Court. Rule 6(e)

of the Utah Rules of Civil Procedure requires three (3) days to be added to the Notice of Hearing when service is made by mail as was done in this case.

The fact that defendant's Motion was not timely filed and proper notice was not given was sufficient grounds for the Court to deny the defendant's Motion for Referral and the lower court's decision to deny the same should be affirmed.

POINT III

THE GRANTING OF JUDGMENT BY THE LOWER COURT UNDER THE DECREE OF DIVORCE WAS PROPER.

The ruling of the lower court as a matter of law that defendant under the Decree of Divorce was obligated to pay and was liable for the arrearages on the real property awarded to plaintiff was within the discretionary powers of the Court under Rule 54(c) of the Utah Rules of Civil Procedure, and the powers of the Court under its continuing jurisdiction of divorce proceedings to enforce and modify Decrees of Divorce. (See 30-3-5 U.C.A. 1953) Rule 54(c) provides as follows:

(c) Demand for Judgment.

(1) Generally. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves. (Emphasis added)

A liberal construction must be given to the above cited rule in order to effect its purposes. (See Palombi v. D & C Builders,

22 U.2d 297, 452 P.2d 325, 328) The Judgment granted by Judge Taylor was upon an issue of law and is overwhelmingly supported by the evidence that was before the Court. The fact that a dollar amount was not determined and was left to be determined by other action would not invalidate the ruling and judgment of Judge Taylor. In the case of Potter v. Hussey, 1 Utah 249, the Supreme Court of Utah stated:

"Under the former Practice Act, an order was a judgment upon an issue of law for a plaintiff, even though the amount for which plaintiff was entitled to judgment was not stated and had not been ascertained since that amount could be determined by reference."

The judgment and ruling of the lower court is based upon the Decree of Divorce entered in this action and constitutes a judgment on an issue of law which is supported by the evidence and record before the Court and should be affirmed.

CONCLUSION

The claim of defendant that the Order and Judgment of the lower court rendered by Judge Taylor was based upon the claim of the plaintiff, already decided upon by Judge Winder in a previous hearing, is not supported by the evidence and the record before this Court. The denial of defendant's Motion for Referral was properly denied by Judge Taylor where the issue involved was the enforcement of the Order and Decree of Divorce requiring the defendant to pay debts and obligations of the marriage up to April 19, 1976, and not for the purpose of seeking modification

of the Decree of Divorce, which was the issue before Judge Winder and ruled upon by Judge Winder. The Judgment granted by Judge Taylor to plaintiff based upon the Decree of Divorce entered in this action is a judgment on an issue of law and was a proper exercise of the discretionary powers of the lower court under the laws of the State of Utah. The Order and Judgment of the lower court should be affirmed and the appeal of defendant be dismissed with costs to be awarded to plaintiff.

DATED this 8 day of February, 1979.

RESPECTFULLY SUBMITTED,



E. H. Fankhauser
Attorney for Respondent
430 Judge Building
Salt Lake City, Utah 84111

MAILING CERTIFICATE

I hereby certify that I mailed two copies of the Respondent's Brief, postage prepaid, to J. Franklin Allred, Attorney for Appellant, 321 South Sixth East, Salt Lake City, Utah 84102, this 9 day of February, 1979.

A handwritten signature in cursive script, appearing to read "E. H. Hansen", is written over a horizontal line.