

1979

# Leatha M. Berrett v. Howard M. Berrett : Brief of Appellant

Utah Supreme Court

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APPEAL FROM SUPREME COURT  
JUDICIAL DISTRICT  
UTAH, HONORABLE CLERK

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IN THE SUPREME COURT OF THE

STATE OF UTAH

\* \* \* \* \*

LEATHA M. BERRETT, )

Plaintiff-Respondent, )

vs. )

Case No. 16204

HOWARD M. BERRETT, )

Defendant-Appellant. )

\* \* \* \* \*

BRIEF OF APPELLANT

\* \* \* \* \*

APPEAL FROM JUDGMENT OF THE SECOND  
JUDICIAL DISTRICT, WEBER COUNTY, STATE OF  
UTAH, HONORABLE CALVIN GOULD, DISTRICT JUDGE

\* \* \* \* \*

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## STATEMENT OF THE KIND OF CASE

Defendant filed a motion seeking to set aside a 1971 judgment in favor of Plaintiff on the ground that the court in the 1971 proceeding was without jurisdiction in the matter before it.

## DISPOSITION IN LOWER COURT

Defendant's motion was argued before the Honorable Calvin Gould, District Judge. Judgment in the form of a "Memorandum Decision" denying Defendant's motion was granted in favor of Plaintiff and against Defendant.

## RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment of the District Court entered in favor of Plaintiff.

## STATEMENT OF FACTS

Mr. and Mrs. Berrett were married in Pleasant View, Utah on May 18, 1940. Except for a brief sojourn of approximately one year in the State of Oregon, they resided in Utah as man and wife until the summer of 1947 or 1948 when Mr. Berrett moved to the State of New Mexico (R-60).

In 1948, after having established residency in New Mexico, Mr. Berrett filed for divorce in that state against Mrs. Berrett. On January 19, 1949, the New Mexico court granted Mr. Berrett a divorce decree. The decree provided in part that Mr. Berrett pay Mrs. Berrett as and for the support of the two minor children the sum of \$100.00 per month (R-6).

The parties herein are in dispute as to the exact time and under what circumstances that Mr. Berrett moved to New Mexico, but the court below was of the opinion that these factual disputes were immaterial (R-60).

In any event, two children had been born as issue of the marriage, namely, Caroline Sally Berrett born in 1943 and David James Berrett born in 1948. Both children were born in Weber County, Utah, and Mrs. Berrett and the children continued to reside in Utah after Mr. Berrett's departure until her death in 1973. Mr. Berrett resided in New Mexico for a period of time after the divorce, then California, and presently resides in Phoenix, Arizona. From and after his move from Utah to New Mexico, Mr. Berrett never again resided in the State of Utah (R-60).

On October 29, 1971, Mrs. Berrett filed a petition in the District Court of Weber County, Utah, requesting the District Court to enforce the New Mexico divorce decree insofar as it pertained to claimed child support in arrears. Mr. Berrett was personally served with a copy of said petition in Maricopa County, Arizona, on November 16, 1971. Jurisdiction over Mr. Berrett, according to the petition, was claimed to be valid under the Utah longarm statute, §78-27-24, §78-27-25, and §78-27-26, Utah Code Annotated, 1953, as amended. Mr. Berrett failed to plead, appear or otherwise respond to this petition and on December 28, 1971, a default judgment was granted Mrs. Berrett against Mr. Berrett for child support in

arrears in the sum of \$19,625.00 (R-61).

In 1973, Mrs. Berrett died intestate leaving as her sole heirs at law her two children, Caroline and David. The sole asset in her estate is the 1971 judgment against Defendant. Mrs. Berrett's heirs are seeking enforcement of the 1971 judgment by levying against a Utah inheritance left to Mr. Berrett by his deceased parents (R-61) and as indicated, Mr. Berrett is seeking to have the judgment voided (R-60).

Upon these facts, the court below found that in the 1971 proceeding, it did have jurisdiction over the matter before it and that its jurisdiction was exercised in a manner sufficient to satisfy basic due process (R-60, 61, 62).

#### POINT I

THE STATUTE EXPRESSLY RESTRICTS JURISDICTION  
TO ACTIONS BETWEEN HUSBAND AND WIFE; NO  
PROVISION IS MADE FOR CHILD SUPPORT ACTIONS

Utah's longarm statute, insofar as it might be pertinent to the facts of this case, provides as follows:

78-27-24 Jurisdiction over nonresidents - Acts submitting person to jurisdiction - Any person, notwithstanding section 16-10-102, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from: . . .  
(6) With respect to actions of divorce and separate maintenance, the maintenance in this state of matrimonial domicile at the time the claim arose or the commission in this state of the act giving rise to the claim.

Appellant believes that this Court must first address itself to the issue as to whether or not Utah's



longarm statute restricts jurisdiction to actions between husband and wife or whether it also allows for matters incidental to separation or divorce such as claims for child support.

There is an extensive Law Review article on Utah's longarm statute in Utah Law Review, Volume 1970 commencing at Page 222 entitled "In Personam Jurisdiction Expanded: Utah's Longarm Statute." Beginning at Page 241 of the Note, the writers discuss subsection (6) of Section 24.

The writers analyze that the primary benefit of subsection (6) is to permit a wife residing in this state to sue her deserting husband for divorce or separate maintenance and obtain an enforceable order for support without being required to make service in Utah. The writers go on to note that the "act" committed in Utah must be a type of act giving rise to a claim for divorce or separate maintenance and does not provide for jurisdiction in claims for annulment or in claims for the custody or support of children. Utah Law Review 1970, Pages 242-245. A strict application of the statute would therefore preclude jurisdiction of the court under subsection (6).

There are a number of jurisdictions where longarm statutes expressly include not only acts giving rise to divorce or separation, but also to claims involving actions for annulment or to claims incidental to divorce such as custody and support of children. See 76 ALR3d 708 titled

"Longarm Statutes: Obtaining Jurisdiction Over Nonresident Parents in Filiation or Support Proceedings." Appellant submits that had the legislature intended to include claims in addition to those expressly included in the statute, it would have been a simple matter to do so and that under the circumstances, this Court should strictly interpret the language of the statute in its application to the facts of this case. The statute in question is limited to acts giving rise to claims for divorce or separate maintenance and jurisdiction is not extended to claims for nonsupport as in the case before this Court.

#### POINT II

##### MATRIMONIAL DOMICILE IN UTAH TERMINATED WITH THE ENTRY OF THE NEW MEXICO DIVORCE DECREE AND PRIOR TO ANY CLAIM ARISING

As indicated in Point I, Utah's longarm statute, insofar as it is pertinent to the facts of this case, provides for jurisdiction over nonresidents "with respect to actions of divorce and separate maintenance, the maintenance in this state of matrimonial domicile at the time the claim arose or the commission in this state of the act giving rise to the claim" See 78-27-24(6), U.C.A., 1953, as amended.

It is difficult to determine whether in 1971 the Court below found jurisdiction because it found "maintenance in this state of a matrimonial domicile at the time the claim arose," or because it found that Mr. Berrett had committed in this state some type of act or acts giving Mrs. Berrett a claim for action, or for both reasons. This is because the

file, insofar as it refers to the 1971 proceedings, is devoid of any transcript, findings of fact, or conclusions of law in support of the decision of the Court at that time (R-1 through R-8).

It appears clear, however, that the Court below in the instant proceedings here appealed from found jurisdiction not because of acts committed in Utah by Mr. Berrett giving rise to a claim by Mrs. Berrett, but rather because matrimonial domicile continued in the State of Utah even though Mr. Berrett had left the state sometime prior to the entry of the New Mexico divorce decree (R-61, 62).

The Court below apparently found that the so-called "minimal contacts" test for the statute had been met by the existence at one time of a matrimonial domicile in the State of Utah and that Mr. Berrett's duties and obligations, including that of support for his children, were thereby fixed and continued despite the fact that he thereafter established residency elsewhere (R-61, 62).

The reasoning of the Court below may have some merit had Mrs. Berrett's 1971 petition been based on some common law duty of support arising out of Mr. Berrett's having fathered these children with or without the benefit of wedlock. However, Plaintiff's 1971 petition was not based upon the foregoing concept or theory, but was based on a specific order for support arising out of the New Mexico divorce decree (R-1, 2). With the entry of that decree, matrimonial domicile

terminated for both Mr. and Mrs. Berrett and each party then assumed domicile independently of the other, Mr. Berrett by continuing to reside in the State of New Mexico and Mrs. Berrett by continuing to reside in the State of Utah. It is important to note that Mrs. Berrett's domicile in Utah from and after the entry of the New Mexico decree of divorce was in no way based upon matrimony, but on individual and independent selection. See 25 Am Jur 2d Domicile §61. Clearly and chronologically, Mrs. Berrett's claim as outlined in her 1971 petition arose after the severance of matrimonial domicile in the State of Utah and the statute, insofar as it provides for "maintenance in this state of a matrimonial domicile at the time the claim arose," was not present.

### POINT III

#### APPELLANT DID NOT COMMIT ACTS IN THE STATE OF UTAH GIVING RISE TO A CLAIM FOR NONSUPPORT

As noted previously, the longarm statute provides for jurisdiction with respect to claims not only where there is matrimonial domicile at the time the claim arises, but also in cases where an individual commits in this state an act or acts giving rise to a claim for divorce or separate maintenance (or claims incidental thereto if this Court should so hold).

Again reference is made to the annotation found in 76 ALR3d 708 in consideration of the issues presented under this point. A careful reading of the annotation and the cases cited therein would indicate that the courts in each fact situation were looking at one or more of three factors, namely:

1. Were there certain "minimal contacts" between the father and the forum state?

2. What interests does the forum state have in the controversy that is the subject of the litigation?

3. May a nonact such as failure to pay child support constitute a "tort" within the meaning of the statute?

Thus in cases involving paternity, certain jurisdictions found merely fathering a child in the forum state constituted "minimal contacts." Backora v. Balkin (1971) 14 Ariz App 569, 485 P2d 292; Neill v. Ridner (1972) 153 Ind App 149, 286 NE2d 427.

It is to be noted that the above cases are distinguishable from the case at hand because the issue in them obviously concerned an act (i.e., fathering a child) in the forum state, whereas in our case, the claim in the 1971 petition failed to allege any acts by Appellant in Utah (R-1, 2).

Mrs. Berrett predicated her 1971 petition for judgment for nonsupport expressly upon the New Mexico divorce decree entered January 19, 1949. The time of the decree is critical because the file is devoid of any facts or circumstances that could be construed as "acts" or "minimal contacts" by Appellant within the State of Utah from and after the entry of the decree. All contacts of Appellant prior to that time, namely, (1) marriage in Utah, (2) living in Utah in matrimony, and (3) fathering children in Utah, necessarily become immaterial because they precede the document and event upon which Mrs.

Berrett predicated her claim for relief.

Next the cases cited above, namely, Backora and Neill, and others have discussed the interests of the forum state in the subject of the litigation. See also Poindexter v. Willis (1970) 23 Ohio Misc 199, 51 Ohio Ops 2d 157, 256 NE2d 254; Van Wagenburg v. Van Wagenburg (1966) 241 Md 154, 215 A 2d 812, 27 ALR3d 379, cert den 385 US 833, 17 L Ed 2d 68, 87 S Ct 73. Emphasis is made in these cases upon the fact that the minor children involved may become wards of the forum state and that the state therefore has a direct financial interest in the litigation.

It seems as though these cases in discussing the presence of the minor children within the forum state ignore the "in personam" issue before them and assume a type of "in rem" jurisdiction because of the presence of the minor children they are seeking to protect. It must be pointed out that conversely to the foregoing illustrations, the 1971 petition by Mrs. Berrett did not in the least involve facts that would give the Court this type of "in rem" interest in the litigation. In 1971, the State of Utah had no past, present, or future interest in the support of Mrs. Berrett's children who by that time had attained their adulthood.

In addition, the reasoning of Poindexter has been criticized and not followed in a number of other jurisdictions, namely, A.R.B. v. G.L.P. (1973) 180 Colo 434, 507 P2d 468; State of Kansas ex rel Carrington v. Shutts (1975) 217 Kan 175, 535 P2d 982; Inkelas v. Inkelas (1968) 295 NYS 2d 350.

Finally, some of the cases found in the annotation have determined that the failure to support a child constitutes a "tort" within the meaning of their longarm statute.

Poindexter, supra; see also State ex rel Nelson v. Nelson (1974) 298 Minn 438, 216 NW2d 140; Gentry v. Davis (1974) Tenn 512 SW2d 4.

Respondent could argue that the alleged failure to pay support under the divorce decree constitutes the commission by Appellant of a "tort" under subsection (3) of the statute which provides for longarm jurisdiction over a nonresident who causes tortious injury within the State of Utah. See §78-27-23(3), U.C.A., 1953, as amended.

Black defines "tortious" as "of the nature of a tort." "Tort" is defined as "a private or civil wrong or injury. A wrong independent of contract." See Black's Law Dictionary, Revised Fourth Edition (1968), Pages 1660-1661. In Poindexter, Nelson and Gentry, the courts were faced with an alleged existing duty of support between a putative father and minor children then living in the forum state. They found an existing duty of support from father to child that if breached, would cause resulting damage or injury to the child. In this sense, Appellant can follow the reasoning of those cases where those facts then existed, although again this reasoning is criticized and not followed in A.R.B., Carrington and Inkelas.

In 1971, Mr. Berrett owed no duty of support to




the Berrett children (R-1, 2). The Order to Show Cause served on Mr. Berrett required that he appear and show cause why the New Mexico decree "should not be enforced in the State of Utah" and "why you should not be found and held in contempt of Court. . ." (R-3). Does the petition or the directive of the Court sound in tort in the sense defined by Black? Nor do the facts as they existed in 1971 contemplate the commission of a tort by Appellant as contemplated by the statute.

In summary, it becomes clear that Mr. Berrett did not commit any acts in the State of Utah nor were there any significant contacts with the State of Utah at the critical point in time, namely, from and after January 19, 1949.

#### CONCLUSION

At the time Mrs. Berrett's alleged cause of action arose, matrimonial domicile in this state was nonexistent. Nor did Mr. Berrett commit acts in this state satisfying the "minimum contacts" requirements contemplated by the longarm statute. The judgment of the Court below should be reversed.

Respectfully Submitted,

  
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