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Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

BONNIE L. RANDALL, formerly BONNIE L. BRICKER, Plaintiff and Respondent, vs. DANNY E. BRICKER, Defendant and Appellant.	)	Civil No. 16230

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an action by Plaintiff-Respondent Bonnie L. Randall, formerly, Bonnie L. Bricker, to renew a judgment based upon child support, that was originally entered on February 26, 1970.

DISPOSITION IN LOWER COURT

Both Plaintiff-Respondent Bonnie L. Randall and Defendant-Appellant Danny E. Bricker moved for summary judgment and the lower court held that:

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1. The divorce court in the State of Utah did not maintain jurisdiction over the Appellant while he was temporarily absent from the state, for the purpose of renewing a judgment based upon child support;

2. Absence from the state tolls the statute of limitations, regardless of whether the Utah court maintained jurisdiction over the Appellant and whether service of process could have been effected;

3. Respondent is entitled to renew her judgment even though she filed her complaint to renew said judgment in excess of eight years from the date of the original judgment.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of summary judgment in favor of Respondent and requests that summary judgment in favor of Appellant be granted, or, in the alternative, seeks a remand to the district court for trial.

STATEMENT OF THE FACTS

Judgment in the amount of $2,150.00 was entered against the Appellant on the 26th day of February, 1970,

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based upon support payments allegedly due and owing pursuant to a prior divorce decree. (R.29,30) Appellant was not represented by counsel at said hearing. (R.29) On or about June 30, 1978, (approximately eight years and four months after the entry of said judgment) Plaintiff-Respondent filed a complaint to renew said judgment. (R.2,3)

During the period of time between February 26, 1970, and June 30, 1978, Appellant resided in North Carolina for a period in excess of one year. (R.27) While in North Carolina, Appellant made support payments to the Respondent by check that had his address where personal service of process could be effected, printed thereon. (R.27) On or about the 2nd day of September, 1974, while Appellant was residing in North Carolina, Respondent did, in fact, serve Appellant, with an Order to Show Cause in connection with said divorce action. (R.27,31)

Respondent knew, or could have known, with little effort, Appellant's whereabouts the entire time he resided in North Carolina.

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ARGUMENT

I. RESPONDENT'S ACTION HEREIN IS BARRED BY THE STATUTE OF LIMITATIONS.

It is uncontested that Respondent filed her complai to renew the judgment eight years and four months from the date said judgment was entered. Section 78-12-22, Utah Code Ann., 1953, limits plaintiff's rights to bring an action "to enforce any liability due . . . for failure to provide support or maintenance for dependent children," to eight years. The only issue is whether Respondent falls within an exception to said statute of limitation.

Respondent's only defense to the statute of limitation was her allegation that Appellant was absent from the state, which tolled the limitation. Section 78-12-35, Utah Code Ann., 1953, states:

> " . . . [I]f after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

Appellant is not denying that he was out of the state in excess of one year, however, Appellant claims that Section 78-12-35, which Respondent solely relies upon, is not applicable in this case.

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Absence from the state does toll the statute of limitations except under certain circumstances as outlined in the case of Snyder v. Clune, 15 Utah 2d 254, 390 P.2d 915, 916-17 (1964). This Court held that where the Utah court maintained jurisdiction over the defendant, the defendant's absence did not toll the statute of limitations, and Section 78-12-35 was inapplicable. The court explained that the objective of Section 78-12-35 was "to prevent a defendant from depriving plaintiff of the opportunity of suing him by absenting himself from the state during the period of limitation." The court then concluded:

> "[Defendants] were thus not 'absent' from the state in the sense contemplated by the statute, that is, unavailable for the service of process. Therefore, the plaintiff was not prevented from commencing her action at any time she desired. That being so, there exists no reason for tolling the running of the statute. When the reason for the rule is gone, the rule should vanish with it.
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> . . . [I]t is our opinion that for the reasons we have hereinabove expressed, the view which is sounder and better considered is that followed by the greater number of jurisdictions, that where the plaintiff could have pursued her remedy at any time she desired, she was obliged to commence her action within the statute of limitations or it is barred. (Emphasis added)

The court reasoned that the policy considerations and legislative intent behind the statute of limitations would be

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circumvented if the limitations could be tolled indefinitely because of defendant's absence, when plaintiff could commence a suit and serve process at any desired time.

Snyder v. Clune, impliedly overrules Keith-O'Brien Company v. Snyder, 51 Utah 227, 169 P. 954 (1917), and Buell v. Duchesne Mercantile Company, 64 Utah 391, 231 P. 12 (1924).

This rule of law as outlined in Snyder v. Clune is consistent with the overwhelming majority of the courts in other jurisdictions. The Supreme Court of Arizona defined "absence from the state" to mean "out of the state in the sense that service of process in any of the methods authorized by rule or statute cannot be made upon the defendant to secure personal jurisdiction by the trial court." Selby v. Karman, 110 Ariz. 522, 521 P.2d 609, 611 (1974).

In Lipe v. Javelin Tire Company, Inc., 96 Ida. 723, 536 P.2d 291, 294-95 (1975), the court held that where the defendant who was absent from the state could have been located for service of process by reasonably diligent efforts and the Idaho Court had continuing jurisdiction over the absent defendant, the statute of limitations was not tolled by reason of defendant's absence.

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For similar holdings, see Tarter v. INSCO, 550 P.2d 905 (Wyo. 1976); Summerrise v. Stephens, 454 P.2d 224 (Wash. 1969); Kennedy v. Lynch, 84 N.M. 479, 513 P.2d 1261 (1973); McCullough v. Boyd, 475 P.2d 610 (Okla. 1970); Brown v. Vonsild, 541 P.2d 528 (Nev. 1975); and 55 A.L.R.3d 1158 and Supplement.

The basis of this rule is stated in 55 A.L.R.3d 1158, 1165:

> " . . . [T]o toll the statute of limitations during the absence or nonresidence of a party who continues to be amenable to suit would allow a plaintiff in such a situation to postpone commencement of proceedings even though he has the capacity to obtain jurisdiction, and would therefore be inconsistent with the purpose of the general statute of limitations, which is designed to eliminate stale claims."

In the present case, Appellant was subject to the jurisdiction of Utah's divorce court during the entire time he was out of state.

II. UTAH COURTS HAVE CONTINUING JURISDICTION OVER A PARTY TO A DIVORCE ACTION WHEN SAID PARTY LEAVES THE STATE.

Section 30-3-5, Utah Code Ann., 1953, expressly states that the court maintains continuing jurisdiction over

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the parties in matters relating to support. This was clearly pointed out in the case of Plumb v. Plumb, 555 P.2d 1205, 1206 (Utah 1976) where the husband had served his ex-wife, who was residing in South Dakota, with an Order to Show Cause and the Court held "the parties were personally subject to the continuing jurisdiction of the court under 30-3-5 U.C.A., 1953."

In the case of Brown v. Vonsild, 541 P.2d 528 (Nev. 1975) the divorced wife brought an action for arrearages in child support against the divorced husband who had been absent from the state. Said action was brought subsequent to the statutory limitation period but the wife claimed that said limitation period was tolled because of the defendant's absence from the state. The court held that since the husband was continuously subject to service in the original divorce proceedings, the statute which would have tolled the limitation period because of defendant's absence, was inapplicable and the wife's claim was barred.

Utah's Long Arm statute also vests jurisdiction over a party who has left the state, as it relates to claims for support and maintenance. Section 78-27-24, Utah Code Ann., 1953, as amended, states:

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> "Any person . . . whether or not a citizen or resident of this state . . . submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from:
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> * * * *
>
> (6) with respect to actions of divorce and separate maintenance, the maintenance in this state of a matrimonial domicile at the time the claim arose or the commission in this state of the act giving rise to the claim."

Utah's Long Arm statute further states in Section 78-27-28, "Subject to the applicable statute of limitations, jurisdiction established under this act shall be exercised regardless of when the claim arose." (Emphasis added) There would be an inherent inconsistency in the statutory language if the court were to hold that the Long Arm statute, giving jurisdiction over nonresidents, is "subject to the applicable statute of limitations," yet, the said statute of limitations is tolled while the defendant is a nonresident. There would never be a limitations. Since this position is absurd, it appears clear that the legislators did not intend that defendant's absence from the state would toll the statutory limitations when the Utah court has jurisdiction by reason of the Long Arm statute.

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Respondent argued at the trial court that the domestic court did not have jurisdiction over the Appellant while absent from the state, for the purpose of renewing a judgment based upon child support. In other words, once child support becomes a judgment, the domestic court somehow loses its right to renew that judgment.

By accepting Respondent's position, the trial court significantly narrowed the domestic court's authority and jurisdiction over nonresidents. Section 30-3-5, Utah Code Ann., 1953, and the cases cited by this Court which interpret said language, are all very general and broad in terms of granting jurisdiction by the Utah court over a nonresident party. The Long Arm statute cited above also has broad, nonrestrictive language. A judgment based upon support, is still directly related to "support and maintenance", which is the jurisdictional foundation of a domestic court, regardless of whether a party temporarily leaves the state.

This Court held in Seeley v. Park, 532 P.2d 684 (1975), that "installments under a decree of divorce for alimony or support of minor children become final judgments as soon as they are due." (Emphasis added) If a support

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payment becomes a final judgment as soon as it is due, the 1970 judgment herein had to have been a renewal of previous past due support payments (judgments) which had accrued prior to said 1970 judgment. Either the domestic court had the power to renew judgments, or the 1970 judgment herein is not a renewal and the limitation period would commence at the time each support payment was due, and not at the time of the 1970 judgment. This would require a reversal of the summary judgment granted herein since the trial court used the 1970 judgment for the basis of its decision.

The domestic court has traditionally had broad authority and jurisdiction concerning child support. A judge may find the defaulting party in contempt of court for failing to pay past child support payments (which payments are judgments, Seeley v. Park, supra). The law allows special privileges to judgments based upon child support, such as in the area of garnishment, execution, and homestead rights.

In the case (such as the present case) where both parties were residents at the time of the divorce, the legislators have clearly stated their intention to allow the court to maintain jurisdiction over said parties, even

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though one of the parties may subsequently move from the county or state:

> "The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children and their support and maintenance, or the distribution of the property as shall be reasonable and necessary." Section 30-3-5, Utah Code Ann., 1953. (Emphasis added)

A child support payment, whether delinquent for a day or for years, is still "support and maintenance" of the children. Just because a child support payment becomes delinquent, thereby becoming a judgment, does not alter the fact that said payment is for the support and maintenance of said children.

The trial court below ruled that once a child support payment becomes a judgment, the domestic court no longer maintains jurisdiction over the nonresident party. Such a position would encourage delinquent fathers to intentionally leave the state for the purpose of taking away the Utah court's jurisdiction to enforce child support payments. This position would further mean that the court only has continuing jurisdiction over future support payments, and not past payments. Clearly, such a position would be bad policy and against the legislative intent and prior judicial law.

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In the present case, Respondent could have commenced this action at any time while Appellant was absent from the state either through the divorce court or by reason of the Long Arm statute. Respondent could have effected service of process whenever she desired, which is evidenced by the fact that Respondent did serve an Order to Show Cause upon Appellant while he was in North Carolina. (R.31) Respondent knew, or could have known, with little effort, where the Appellant was located the entire time he was absent from the state. While in North Carolina, Appellant was making child support payments to the Respondent with checks that had his address printed thereon. Service of process could have been accomplished by any number of ways as described in Rule 4(f)(1), (2), and (3), Utah Rules of Civil Procedure, or Section 78-27-25, Utah Code Ann., 1953, as amended, but, Respondent was derelict and failed to commence her action within the eight year statutory limitation period. Therefore, the Respondent's claim is barred and should be dismissed.

Respectfully submitted this 16th day of April, 1979.

CHRISTENSEN, JENSEN, KENNEDY & POWELL

By L. Rich Humpherys
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Attorneys for Appellant

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CERTIFICATE OF SERVICE

I hereby certify that on this 16 day of April, 1979, two copies of the foregoing Brief of Appellant were mailed, postage prepaid, to Robert F. Orton, Esq., HANSEN & ORTON, Attorneys for Plaintiff-Respondent, 2020 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah 84111.

Paula Fillmore

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