

1989

Kevin P. Gates v. Camille Henrie Gates : Reply Brief of Appellant

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.

John S. Adams; Taylor, Ennenga, Adams and Lowe; Attorney for Plaintiff/Appellant.

Craig M. Peterson; Littlefield and Peterson; Attorney for Defendant/Respondent.

Recommended Citation

Reply Brief, *Gates v. Gates*, No. 890235 (Utah Court of Appeals, 1989).

https://digitalcommons.law.byu.edu/byu_ca1/1800

This Reply Brief 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.

890235

IN THE COURT OF APPEALS

OF THE STATE OF UTAH

-----ooo0ooo-----

KEVIN P. GATES,	:	
	:	Case No. 89-0235-CA
Plaintiff and Appellant,	:	
	:	
v.	:	Argument Priority No. 14(b)
	:	
CAMILLE HENRIE GATES,	:	
	:	
Defendant and Respondent.	:	

-----ooo0ooo-----

REPLY BRIEF OF APPELLANT

-----ooo0ooo-----

Appeal from an Order of the Third Judicial District Court
in and for Salt Lake County, State of Utah
Honorable James S. Sawaya

-----ooo0ooo-----

Craig M. Peterson, #2579
LITTLEFIELD & PETERSON
Attorneys for
Defendant/Respondent
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

John S. Adams, #A0017
TAYLOR, ENNENGA, ADAMS & LOWE
Attorneys for
Plaintiff/Appellant
5525 South 900 East, Suite 200
Salt Lake City, Utah 84117
Telephone: (801) 263-1112

FILED

DEC 26 1989

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

IN THE COURT OF APPEALS

OF THE STATE OF UTAH

-----ooo0ooo-----

KEVIN P. GATES,	:	
	:	Case No. 89-0235-CA
Plaintiff and Appellant,	:	
	:	
v.	:	Argument Priority No. 14(b)
	:	
CAMILLE HENRIE GATES,	:	
	:	
Defendant and Respondent.	:	

-----ooo0ooo-----

REPLY BRIEF OF APPELLANT

-----ooo0ooo-----

Appeal from an Order of the Third Judicial District Court
in and for Salt Lake County, State of Utah
Honorable James S. Sawaya

-----ooo0ooo-----

Craig M. Peterson, #2579
LITTLEFIELD & PETERSON
Attorneys for
Defendant/Respondent
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

John S. Adams, #A0017
TAYLOR, ENNENGA, ADAMS & LOWE
Attorneys for
Plaintiff/Appellant
5525 South 900 East, Suite 200
Salt Lake City, Utah 84117
Telephone: (801) 263-1112

TABLE OF CONTENTS

<u>REPLY TO RESPONDENT'S "STATEMENT OF FACTS"</u>	1
<u>ARGUMENT</u>	9
POINT I	
THE TRIAL COURT WAS NOT ACTING WITHIN ITS EQUITABLE POWERS WHEN IT RAISED CHILD SUPPORT AND A RETROACTIVE AWARD FOR INCREASED CHILD SUPPORT WOULD LIKEWISE BE IMPROPER	9
POINT II	
RESPONDENT'S CLAIM OF ERROR BY THE TRIAL COURT IN AWARDED MR. GATES THE TAX EXEMPTION FOR THE PARTIES' MINOR CHILD IS CLEARLY NOT WELL TAKEN	11
POINT III	
THE COURT SHOULD AWARD APPELLANT COSTS AND REASONABLE ATTORNEY'S FEES FOR PROSECUTING THIS APPEAL	12
<u>CONCLUSION</u>	13

TABLE OF AUTHORITIES

Cases

<u>B.N.H. In re</u> , 112 Utah Adv. Rep. 26 (Utah 1989)	10
<u>Jolivet v. Cook</u> , 115 Utah Adv. Rep. 17 (Utah 1989) . .	10
<u>Motes v. Motes</u> , 121 Utah Adv. Rep. 50 (Utah 1989) . . .	11
<u>State v. Gibbons</u> , 740 P.2d 1309 (Utah 1987)	10

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

-----ooo0ooo-----

KEVIN P. GATES,	:	
	:	Case No. 89-0235-CA
Plaintiff and Appellant,	:	
	:	
v.	:	Argument Priority No. 14(b)
	:	
CAMILLE HENRIE GATES,	:	
	:	
Defendant and Respondent.	:	

-----ooo0ooo-----

REPLY BRIEF OF APPELLANT

-----ooo0ooo-----

REPLY TO RESPONDENT'S "STATEMENT OF FACTS"

Plaintiff is concerned about several representations in Respondent's brief which are made as "Statement of Fact" but which are actually arguments for Respondent's position rather than true factual representations.

Paragraph 14 of Respondent's "Statement of Facts" simply is not an accurate statement of facts as represented. Contrary to the indications therein, Plaintiff testified that he specifically informed Defendant "around October" of 1985 that his income had significantly increased to "about \$5,000.00 to

\$6,000.00 a month." [Transcript: page 72, line 16 through 19.] Appellant further testified that he continued to discuss his increase in income through January of 1986 and thereafter. [Transcript: page 72, line 20 through page 73, line 3.] For Respondent to represent that "the Defendant provided no information regarding his income at the time the parties entered into the Stipulation either by a verbal affirmation or by providing any documentation of his income" is simply a misrepresentation and an attempt to take improper license where supposedly setting out to the Court accepted "Statements of Fact". Respondent was informed at the time of the Stipulation that Appellant's income had significantly increased and that the increase in income was the reason why Appellant was willing to raise child support by stipulation in excess of that earlier ordered by the Court.

Like paragraph 14 of Respondent's Statement of Facts, paragraph 16 simply misstates an accepted fact in the case. Respondent alleges in her Brief that Exhibit "24" was "admitted ... to show the disparity between what Plaintiff claimed as income at the time of trial in July, 1985 and his actual income as shown on his 1985 tax return." The citation provided to the Court would seem to support that allegation. The next five lines of the transcript following that citation, however, clearly show that the Court corrected that indication and clarified that

Exhibit "24" was not intended to show income during July of 1985 but rather was "based on '84 income." [Transcript: page 54, line 24 through 25.] This is a critical misrepresentation by Respondent which continues throughout her brief. Respondent attempts continually to represent to this Court that Appellant misrepresented his income in July of 1985. She does so by using a year-end tax return for the year 1985 which simply averages Appellant's income over that year between the low figure earned in July of 1985 (at the time of the prior hearing before the Court) and the high figure during the fall and winter months of 1985 (long after the hearing before the Court).

Appellant clearly and concisely testified that in July of 1985 (at the time of previous hearing before the Trial Court) he was earning approximately \$2,131.58 per month as set out in Plaintiff's Exhibit "25" and that his income significantly increased in October and thereafter of 1985 to approximately \$6,000.00 per month. [Transcript: page 71, line 5 through page 73, line 13.] Using those facts out of context, Respondent has attempted to average Plaintiff's income throughout the year 1985 in an attempt to argue before this Court (and the Trial Court) that Appellant misrepresented his income in July of 1985. Such an attempt is clearly improper and not factual.

Respondent compounds her attempt at inaccurately stating fact in paragraph 17 when Respondent properly points out

that the Order entered in January 1986 "was not an accurate statement of the Plaintiff's income at 'that time'." It was not intended to reflect Plaintiff's income at "that time" but rather was clearly and properly intended to reflect Plaintiff's income as of the court hearing in July of 1985 and it clearly so states. It did in fact accurately reflect the Plaintiff's income as of July 1985 and there is no evidence whatsoever in the record to indicate otherwise. In other words, Plaintiff at no time misrepresented his income to the Court in July 1985 or thereafter.

In paragraph 19 of Respondent's supposed "Statement of Facts" Respondent again mischaracterizes the clear facts by indicating that "the Plaintiff at no time disclosed his income to the Defendant when the parties entered into the Stipulation to increase child support." The Court is referred to the clear and concise testimony otherwise as referred to hereinabove.

Respondent properly makes a statement of fact in paragraph 20 but attempts to draw a mischaracterized conclusion therefrom. Respondent does factually state that her counsel was not involved in the negotiations which resulted in the increase in child support in the fall of 1985. In fact, only the Plaintiff and Defendant themselves were involved in those negotiations. Respondent attempts, in her brief, however, to infer that the absence of discovery or direct involvement of her

counsel was at the behest of or an attempt by Plaintiff to misrepresent certain facts to her. On the contrary, Plaintiff clearly testified that he informed Defendant of his increase in income and his resulting willingness to pay additional child support which in and of itself resulted in the Stipulation to increase child support significantly over that previously ordered by the Court. Respondent continues the improper inference in paragraph 21 stating that Defendant's Motion to modify the pleadings to conform to the evidence were "based upon misrepresentations to the Court, misrepresentations to the Defendant and material omissions of fact by the Plaintiff." Nothing could be further from the truth. Plaintiff made no misrepresentations to the Court, to Defendant or to anyone else at any time and to state otherwise as a "Statement of Fact" is clearly misleading and improper.

Respondent further attempts to mischaracterize the facts surrounding the Stipulation by omitting to indicate that both parties were represented by counsel at all times and that counsel for both parties were fully involved in drafting and preparing the Stipulation itself for signature by their respective clients. The Stipulation went through several drafts in order to contain specific language acceptable to both parties and their counsel.

ARGUMENT

I. THE TRIAL COURT WAS NOT ACTING WITHIN ITS EQUITABLE POWERS WHEN IT RAISED CHILD SUPPORT AND A RETROACTIVE AWARD FOR INCREASED CHILD SUPPORT WOULD LIKEWISE BE IMPROPER

Appellant does not disagree in principle with the "Principles of Review" or the "Utah Legal Principles Regarding Child Support" as set out in Point I, sub-points A. and B. of Respondent's Brief. Those principles do not, however, support the conclusion drawn by Respondent that the Court's increase in child support is an appropriate exercise of its equitable powers. The contrary is in fact true. Both case law and legal principles require that, where no substantial change of circumstances has occurred, the Court has no equitable power to modify a child support award. The Trial Court in the case at bar specifically and uncontradictingly found that no substantial change in circumstances had occurred and, as a result thereof, improperly modified the child support award. This Court is referred to the case law set out in Appellant's principal brief in this matter which will not be repeated hereat.

Respondent goes further in the arguments in her brief before this Court in an attempt to allege that the Trial Court "should have increased the child support and made it retroactive to January, 1986 when Mr. Gates began making \$6,000.00 per month". Such a request is neither justified nor proper before this Court. A claim for retroactive child support was not made

before the Trial Court and is not proper to be raised for the first time upon appeal. See Jolivet v. Cook, 115 Utah Adv. Rep. 17 (Utah 1989) wherein the Supreme Court of the State of Utah cites the well settled principle that "we have held that in the absence of exceptional circumstances, this court will not entertain a claim raised for the first time on appeal." Id. at 19. See also B.N.H., In re, 112 Utah Adv. Rep. 26 (Utah 1989) and State v. Gibbons, 740 P.2d 1309 (Utah 1987).

Not only is Respondent's claim in this regard improperly raised for the first time on appeal, but the facts of the case clearly show no merit to the claim. The Stipulation entered into by and between the parties in April of 1986 states unequivocally that "the parties acknowledge that this Stipulation

". . . is based upon circumstances of each party as they presently exist and, subject to the Court's approval, the Divorce Decree and subsequent orders may be modified upon this Stipulation and subject to its terms being incorporated therein." [Emphasis added]

At the time of entering into the Stipulation between the parties, Appellant was making the \$6,000.00 per month income referred to by Respondent in her brief. Clearly, therefore, those circumstances existed at the time of the Stipulation and are not subject to a retroactive child support order.

**II. RESPONDENT'S CLAIM OF ERROR BY THE TRIAL COURT IN
AWARDING MR. GATES THE TAX EXEMPTION FOR THE
PARTIES' MINOR CHILD IS CLEARLY NOT WELL TAKEN**

Like Respondent's request for retroactive child support, Respondent's claim that the Trial Court erred in awarding Mr. Gates the tax exemption for the parties' minor child is raised for the first time in Respondent's Brief. It was neither raised in the Trial Court nor, of perhaps more significance, did Respondent appeal from that decision in a timely fashion before this Court. As such, Respondent is clearly barred from raising the same for the first time in her Respondent's Brief.

Of perhaps more importance, however, is the fact that Respondent's claim is simply wrong under the principles of law adopted by and stated by this Court. This Court is specifically referred to its opinion in the case of Motes v. Motes, 121 Utah Adv. Rep. 50 (Utah 1989) wherein the court clearly and unequivocally stated, after considering exactly the arguments put forth by Respondent in her brief that,

. . . we conclude the 1984 amendment to Section 152 does not divest state courts of their traditional power to allocate federal tax dependency exemptions, and state courts have the power to order a custodial parent to execute a declaration in favor of the non-custodial parent. The contrary position followed by only a minority of jurisdictions was not intended by Congress, especially given the lack of an expressed termination of the traditional approach of state courts to dependency-exemption allocation. Finally, the practical effect of a contrary ruling would

essentially prevent state courts from taking permissible advantage of progressive tax brackets and maximizing the resources available to support divorcing parents and their families. [Emphasis added] Id. at 55.

The Trial Court properly continued the exemption for the parties' minor child in favor of Appellant in light of the traditional equitable principles considered in such a decision but also due to the fact that the parties themselves had so stipulated in the April 10, 1986 Stipulation from which the court found there had been no material change in circumstances. Respondent's raising of said issue in this appeal is without merit and is frivolous.

III. THE COURT SHOULD AWARD APPELLANT COSTS AND REASONABLE ATTORNEY'S FEES FOR PROSECUTING THIS APPEAL

Appellant has argued in his main brief that this Court should set aside the award of attorney's fees made by the Trial Court in favor of Respondent and that this Court should in fact award Appellant his attorney's fees in connection with the proceedings in the Trial Court. For those same reasons as well as the reasons and principles set out in Respondent's Brief in Point IV, this Court should likewise award Appellant his costs and a reasonable attorney's fee for the prosecution of this appeal.

CONCLUSION

The Trial Court was clearly not acting within its equitable powers when it raised child support in light of a finding of no material change of circumstances and where there was no misrepresentation of any kind. Likewise, any consideration of a retroactive award for increased child support would clearly be improper at this stage of the proceedings.

The Trial Court acted well within its discretion in awarding the continuing tax exemption for the minor child to Appellant.

This Court should set aside the Trial Court's award of attorneys' fees to Respondent below and should award Appellant reasonable attorneys' fees for the proceedings below and for the prosecution of this Appeal.

RESPECTFULLY SUBMITTED this 26th day of December, 1989.

TAYLOR, ENNENGA, ADAMS & LOWE

By:


John S. Adams
Attorneys for Appellant

CERTIFICATE OF MAILING

I hereby certify that on this 26th day of December, 1989, I caused a correct copy of the foregoing REPLY BRIEF OF APPELLANT to be served upon Craig M. Peterson, LITTLEFIELD & PETERSON, 426 South 500 East, Salt Lake City, Utah 84102.

A handwritten signature in black ink, appearing to be "R. J. Hillman", is written over a horizontal line. The signature is stylized and somewhat cursive.