

1979

Josephine O. Garrand v. Leonard J. Garrand : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

JOSEPHINE O. GARRAND,

for herself and as Guardian

ad Litem, of Joseph Phillip Garrard

Plaintiff-Respondent

vs.

LEONARD J. GARRARD,

Defendant-Appellant

APPEAL

IN

HONORABLE

RICHARD L. BIRD
333 East 400 South #200
Salt Lake City, Utah 84111

Attorney for Respondent

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NATURE OF RELIEF

Appellant, requests this court to rule that the trial court erred in requiring Leonard J. Garrand to continue paying support for Joseph Phillip Garrand.

STATEMENT OF FACTS

Leonard J. and Josephine Garrand were divorced in 1969. Mr. Garrand, pursuant to stipulation was ordered to pay alimony to Josephine in the sum of \$250.00 per month and was ordered to pay support for Carla Garrand and Joseph Phillip Garrand in the sum of \$150.00 per month per child. At that time, an acknowledged fact taken into consideration by the court was that Joseph Phillip Garrand was a retarded person. (See paragraph 3, Findings of Fact, Conclusions of Law, dated 10 October 1969). In 1976 Josephine filed a petition to increase the alimony and support. The trial court, acting through Judge Jay Banks, increased the support for Joseph Phillip Garrand to a sum of \$250.00 per month, effective 15 April 1977. The court terminated support money for Carla Garrand as of March 1977 for the reason that Carla reached her 18th birthday at that time. The alimony was increased from \$250.00 per month to \$375.00 per month, commencing 15 April 1977. The modification order was appealed and the Utah Supreme Court held that the District Court was not bound to terminate the daughter's support payments on her 18th birthday, but could continue them until she reached 21. The case was remanded on that point. The result of the decision in the Supreme Court and the remand order was that the trial court was to take evidence

on the question as to whether or not extraordinary circumstances existed which would justify an order of child support for Carla between her 18th and 21st birthday. This point has not been pursued and Carla has now passed her 21st birthday.

Josephine Garrand then (in October of 1978) brought a separate action as Guardian ad Litem for Joseph Phillip Garrand which had as its objective support past majority. It is from the ruling of Judge Leary which awarded Josephine Garrand \$150.00 per month support that Leonard Garrand appeals.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS BASED ON THE DOCTRINE OF RES JUDICATA.

The case of Garrand vs. Garrand, District Court Civil No. 186725 litigated the issue of support for Joseph Phillip Garrand and disposed of that issue when it modified Leonard Garrand's obligation with regards to the payment of child support. (See Paragraph 3, Order Modifying Decree, 19 April 1977). What Josephine Garrand is attempting to do in this action is to fasten Leonard Garrand with an obligation for support, which Judge Banks refused to do in his order of 19 April 1977, after the question of support for Joseph Phillip Garrand had been litigated. See Paragraph 4, Conclusions of Law, dated 19 April 1977, signed by Judge Banks, which states as follows:

"Under the original decree in this action, the obligation for support continued as to the son Joseph until he reached age 21, which matter continues to be justicible under the amendment to Section 15-2-1, UCA, 1953 by this court and because of special circumstances as to Joseph, the support should continue to age 21."

See also Paragraph 3 of Order Modifying Decree, 19 April, 1977, which increased the support for Joseph Phillip to \$250.00 per month.

The court's attention is also invited to Paragraph 5 of Josephine's Petition for Modification, dated October, 1976, which states as follows: ...

V. "Plaintiff has never threatened to discontinue support for the son, Joseph, and the silence of the decree as to the period of this support should be clarified and should continue as long as such help is needed."

Leonard Garrand's response to this allegation and to the allegation that Carla should receive support past majority are contained in Leonard Garrand's Counter Petition, Paragraph 5, wherein Leonard Garrand denies Josephine's claim for support for Joseph Phillip past majority. These allegations are alluded to indicate to this court the fact that the issue asserted by Josephine in this action were, in fact, thoroughly litigated in her Petition for Modification in 1976. If Josephine objected to Judge Banks' order regarding ongoing support for Joseph Phillips, she should have appealed this issue. Instead she appealed another issue and then brought a new law suit.

The recent case of Searle Bros. et al vs Edlean Searle, 6 December 1978, Supreme Court Case No. 15604 discusses the application of the doctrine of res judicata to divorce cases. Justice Ellett, speaking for the court, states the rule which is applicable to facts of this case:

"In general, a divorce decree, like other final judgments, is conclusive as to the parties and their privies and operates as a bar to any subsequent action. In order for judicata to

apply, both suits must involve the same parties or their privies and also the same cause of action; and this precludes the relitigation of all issues that could have been litigated as well as those that were in fact litigated in the prior action."

The court then states the rule as to the doctrine of collateral estoppel as follows:

"Collateral estoppel, on the other hand, arises from a "different cause of action" and prevents parties or their privies from relitigating facts and issues in the second suit that were fully litigated in the first suit."

Thus, even if the subsequent lawsuit brought by Josephine Garrand to compel support from Leonard Garrand is characterized as a different cause of action, the doctrine of collateral estoppel is applicable to bar her claim due to the fact that the facts and issues in the subsequent suit were fully litigated in the 1976 Petition for Modification.

POINT II

THE TRIAL COURT'S RULING THAT LEONARD GARRAND SHOULD BE REQUIRED TO CONTINUE CHILD SUPPORT FOR JOSEPH PHILLIP GARRAND BEYOND THE AGE OF 21 IS INEQUITABLE AND SHOULD BE VACATED CONSIDERING ALL THE FACTS AND CIRCUMSTANCES.

Dehm vs. Dehm 545 P2d 525 (1976) established authority of the court to make an order of support beyond age 21, but it doesn't make such an order manditory. The judge is empowered to consider the wife's increased alimony, her employability and all other relevant circumstances in determining the husband's obligation.

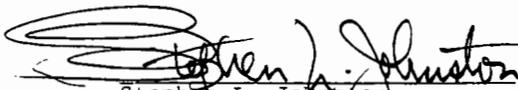
The evidence adduced at the original hearing for Modification 1976 - 1977 and at the subsequent hearing in 1979, indicated that Josephine Garrand is a woman with a profession possessing the qualifications to be employed as a registered nurse. The evidence further indicated that Josephine Garrand is a woman who has substantial means, i.e. \$7,000.00 in a checking account and

a home located on the east bench in Salt Lake City, which is free and clear of any incumbrances. Notwithstanding these resources Mrs. Garrand has refused to work, by her own admission, because she "just doesn't want to". Mrs. Garrand, notwithstanding these facts, recieves \$375.00 per month by way of alimony pursuant to Judge Banks' order in April of 1977. Leonard Garrand has faithfully paid his child support and alimony obligations plus attorney's fees since the original divorce decree in 1969. It is extremely unjust and inequitable to require to pay ongoing support and \$375.00 per month alimony under these facts.

For the reasons submitted above, Leonard J. Garrand, Appellant, through counsel, Stephen L. Johnston, esq. requests the court render an order which has the effect of vacating the order requiring Leonard J. Garrand to continue child support payments for Joseph Phillip Garrand beyond the age of 21 years.

DATED this 29th day of October, 1979.

Respectfully submitted,



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