1979

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

Utah Supreme Court

STEPHEN L. JOHNSTON
P. O. Box 1025
431 South 3rd East
Salt Lake City, Utah 84110

Attorney for Appellant

FILED

NOV 16 19

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATUTES

IN THE SUPREME COURT

OF THE STATE OF UTAH

JOSEPHINE O. GARRAND, for herself and as Guardian Ad Litem for JOSEPH PHILLIP GARRAND,	:	
Plaintiff-Respondent,	:	
vs.	:	Case No. 16622
LEONARD J. GARRAND,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is an action brought for support of an incapacitated child, now over the age of twenty-one (21) years, pursuant to Sections 78-45-3 and 4, U.C.A. (1953).

DISPOSITION IN LOWER COURT

The District Court held that the plaintiff had pursued appropriate procedure and required defendant to pay $150 per month for the support of the child and awarded $300 attorney's fees and costs (R. 51).

The defendant had moved to dismiss the action on the ground that the divorce decree in civil action No. 18[illegible] Third District Court was res judicata of this acti[illegible]

motion prayed alternatively for consolidation of the divorce action with this action. The Motion to Dismiss was denied and the Court ordered consolidation of action No. 186725 into this action No. 78-6783, and that all subsequent pleadings and proceedings be under No. 78-6783 (R. 16 and 17).

Paragraph 4 of defendant's Answer (R. 18) sought to raise again the issue of res judicata. The Motion to Strike made by the plaintiff (R. 21) was granted (R. 32).

STATEMENT OF FACTS

The testimony at the trial has not been transcribed. Appellant's Statement of Facts must, therefore, be limited to the pleadings and other court records and there are no record references to any of the statements in appellant's Statement of Facts. Likewise, as to the material on pages 5 and 6, these are largely gratuitous statements not supported by any references and not supportable in the testimony because that has not been transcribed.

The Notice of Appeal was captioned in Case No. 186725 (R. 261) and respondent, therefore, submits that the issue on appeal is limited to the ruling of Judge Croft that the decision in No. 186725 was not res judicata of the action under 78-45-3 and 4 (R. 259 and see R. 57 in # C78-6783).

Appellant sought an interlocutory appeal from that ruling. Appellant's petition is not in the record, but the

objections of respondent to that petition have been included (R. 43-46). This matter was given Case No. 16303 in the Supreme Court.

The Notice of Appeal having been given in civil action No. 186725 (R. 261 in that record), the Affidavit of the respondent appearing in No. 186725 at R. 263-264 must be ignored, since the District Court no longer had jurisdiction of that action. That is the sense of the respondent's Motion to Dismiss that petition dated September 7, 1979, which also appears in the transcript of No. 186725 (R. 266).

The District Court awarded attorney's fees in this matter (R. 55) and respondent requests that additional attorney's fees be allowed for the handling of this appeal, in the event the Judgment of the District Court is affirmed.

POINTS RELIED ON

Point I. The trial court was right in denying appellant's Motion to Dismiss based on the doctrine of res judicata.

Point II. Appellant's point that the order of the Court is inequitable cannot be considered in the absence of the transcript of testimony.

Point III. This Court should allow additional attorney's fees to the respondent.

ARGUMENT

POINT I

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

In divorce actions in Utah, the Court has continuing jurisdiction as to matters of support for children. Section 30-3-5(1), U.C.A. (1953, As Amended).

Josephine Garrand brought an Order to Show Cause on for hearing before the District Court on April 12, 1977 (R. 191 in 186725). The minute entry of the Court states:

> "The Court holds that the defendant is entitled to receive support for the boy until he reaches the age of 21 and orders the plaintiff to continue until that time. The child support on the boy will be increased to $240 per month ($190 for April) until he reaches 21 years of age, at which time it will terminate."

Finding of Fact No. 3 recited that Joseph would become 21 years of age on November 15, 1977 (R. 193), and Conclusion of Law No. 4 states:

> "4. Under the original Decree in this action, the obligation for support continued as to the son Joseph until he reached age twenty-one, which matter continues to be justiciable under the amendment to Section 15-2-1, U.C.A. 1953, by this Court and because of special circumstances as to Joseph, the support should continue to age twenty-one." (R. 196)

And the Decree makes the support for Joseph continue:

> ". . . through November, 1977 shall be payable on the first of each month."

The statute which Judge Banks was applying was enacted in 1975

and provides:

> "15-2-1. The period of minority extends in males and females to the age of 18 years; but all minors obtain their majority by marriage. It is further provided that courts in divorce actions may order support to age 21." U.C.A. (1953, As Amended).

Dehm v. Dehm (January 14, 1976), 545 P.2d 525, considered Section 30-3-5 and holds that the court has continuing jurisdiction on support matters and also considered Section 78-45-3 and 4 as well as 78-45-2(4), which defines a child as a son or daughter under the age of 21 years:

> ". . . or a son or daughter of whatever age who is incapacitated from earning a living and without sufficient means."

Section 15-2-1 was not before the court in Dehm, as that action arose before the amendment to the statute. Dehm holds that support for an incapacitated child over 21 can be obtained in a divorce action or in an action under Chapter 45 of Title 78 (P. 528). Judge Banks placed his decision under Section 15-2-1, which prescribed the jurisdiction of the divorce court to continuing support until the period of minority is past.

It is, therefore, plain that Chapter 45 of Title 78 was not before Judge Banks; there was no issue as to support beyond age 21; and Judge Banks made no finding or conclusion or provision in the Decree to preclude application for support for an incapacitated child.

When Joseph turned 21, there were two alternatives to get support: Plaintiff could have re-opened the divorce action under Dehm, supra, or could have proceeded under Chapter 45 of Title 78 as, in fact, she did. The decision in Dehm was a three to two decision, and the reasoning suggests plainly that the better approach to the problem is to treat childhood as terminating at age 21 and to proceed on a different theory and a different cause of action thereafter.

With this background, appellant raises the question of whether res judicata applies to this proceeding. He correctly refers to Searle Brothers v. Searle as a late pronouncement on this subject. It is reported at 588 P.2d 689. Searle establishes three tests to determine whether res judicata applies. They are: (1) The same parties or their privies; (2) the same cause of action; (3) attempt to relitigate all issues that could have been litigated or were in fact litigated (P. 690). Dehm, supra, establishes that there are two causes of action, one under the divorce statute and one under the Civil Liability for Support Act, 78-45-3 and 4, U.C.A. (1953, As Amended). Judge Banks limited himself to the cause of action under the divorce proceeding and Section 15-2-1 and the liability after age 21 was not before the Court. Res judicata does not apply.

Appellant urges collateral estoppel if res judicata does not apply. Searle at page 691 establishes four tests for

application of collateral estoppel:

> "1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
>
> "2. Was there a final judgment on the merits?
>
> "3. Was the party against whom the plea is asserted a party or in privity with the party to the prior adjudication? * * *
>
> "Fourth test: 'Was the issue in the first case competently, fully and fairly litigated?'"

Respondent does not contend that Test No. 3 was not satisfied, since the plaintiff here is acting for the son as his guardian and appeared by herself but actually in the son's behalf in the divorce action. But the other tests fail.

The first test fails because the issue in the divorce action was to determine need for support while the child was under age 21 with no litigation of the child's need as an adult and incapacitated child. The Findings and Conclusions disclose that.

The second test also failed because there was no final judgment on the status of the child and the need for support for him under the Civil Liability for Support Act after he reached the age of 21.

There is failure of the fourth test also because there is no evidence that the issue as to the child's status and need after age 21 was before the Court or was considered by the C[illegible] or was anything except left open by the Court's decision.

The factual situation in Searle, supra, is [illegible] ferent and of no help. The factual situation in D[illegible]

quite similar and holds that two alternative routes were available. Respondent submits that if a person becomes an adult at age 18 but that minority may be extended to 21 for a male child, it is forcing language to treat an adult as a "child". Particularly is this true when the majority of courts, according to Dehm, terminate the jurisdiction of the divorce court at the majority of children, in the absence of a specific statute. The specific statute in Utah places incapacitated children under the Civil Liability for Support Act, 78-45-2, 3 and 4.

A significant difference in the causes of action is noted in the Findings of Fact and Conclusions of Law. In the proceeding to modify the order in the divorce action and increase the support money, the Findings of Fact show the increase in needs of the child and the ability of the father to pay (R. 193-199 of 186725). On the other hand, the Findings of Fact in this proceeding share the expense between the father and the mother and make Findings of Fact both as to the ability of the plaintiff to pay and the ability of the defendant to pay, apparently dividing the expense equally between the parties.

POINT II

APPELLANT'S POINT THAT THE ORDER OF THE COURT IS INEQUITABLE CANNOT BE CONSIDERED IN THE ABSENCE OF THE TRANSCRIPT OF TESTIMONY

The Findings of Fact and Conclusions of Law (R. 52-53 of C78-6783) support the Decree, requiring the defendant to

pay approximately half of the support for Joseph commencing with June, 1979, and in the absence of the transcript of testimony, there is no basis for attacking these Findings of Fact and the order consequent thereon.

POINT III

THIS COURT SHOULD ALLOW ADDITIONAL ATTORNEY'S FEES TO THE RESPONDENT

The trial court awarded $300 to the plaintiff for the use of her attorney (R. 53 and 55).

The defendant brought the matter to this Court on a petition for interlocutory appeal, in which plaintiff's attorney filed a responsive pleading and memorandum (R. 43-46 of C78-6783).

This Court has discretion to award attorney's fees on appeal. Bates v. Bates (Utah 1977), 560 P.2d 706; Swain v. Salt Lake Real Estate (1955), 3 Utah 2d 121, 279 P.2d 709.

CONCLUSION

Since the Court has continuing jurisdiction in child support matters, and presumably has similar continuing jurisdiction in civil liability for support cases, the doctrine of res judicata does not have application to this type of case.

And if the tests for application of the doctrine of res judicata and of collateral estoppel were applied to this case, the application would fail because this is a different cause of action, because the issue here litigated was not decided previously, Joseph now being an adult, and the issue of fixing

the burden of what appears to be permanent support between father and mother was not litigated previously. Plaintiff was confronted with a choice of proceeding under the divorce action or under the statute for civil liability support of a handicapped child and made what appeared then and now to be the more reasonable choice. The Court should award additional attorney's fees to be fixed on remand to the District Court.

DATED this 15th day of November, 1979.

Respectfully submitted,

Richard L. Bird, Jr.

RICHARD L. BIRD, JR.
333 East Fourth South
Salt Lake City, Utah 84111

Attorneys for Respondent

Received copies of the within Brief this _____ day of November, 1979.

Attorney for Appellant
431 South 3rd East
Salt Lake City, Utah 84111