

1979

Maxine K. Blackburn v. Terrell M. Blackburn : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MAXINE K. BLACKBURN,)

Plaintiff-)

Appellant,)

vs.)

No. 16651

TERRELL M. BLACKBURN,)

Defendant-)

Respondent.)

BRIEF OF APPELLANT

Appeal from the Judgment of the Third District Court
in and for Salt Lake County
Honorable Dean E. Conder, Judge

CRAIG STEPHENS COOK
3645 East 3100 South
Salt Lake City, Utah 84109

Attorney for Appellant

Earl Jay Peck
Newhouse Building
Salt Lake City, Utah

Attorney for Respondent

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NOV 28 1979

Clerk, Supreme Court, Utah

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NATURE OF THE CASE

This is an appeal from a judgment entered by the Third District Court, the Honorable Dean E. Conder presiding, in which Plaintiff-Appellant sought judgment for delinquent child support in the amount of \$2,425.00 and in which Defendant sought to reduce his monthly obligation of child support from \$125 to \$100 per month per child.

DISPOSITION IN LOWER COURT

This matter was heard on July 18, 1979 before the Honorable Dean E. Conder. At the conclusion of the testimony of Defendant the trial court entered judgment against Defendant and in favor of the plaintiff in the amount of \$2,425 which represented delinquent child support payments due and owing through April of 1979. (R., p. 27).

The court also reduced Defendant's obligation from \$125 per month per child to \$100 per month per child. (R., p. 27).

At the conclusion of the hearing upon the court's own motion the delinquent child support judgment was suspended until such time as Defendant became delinquent for a period of two months at which time the suspension would be withdrawn. (R., pp. 27-28; 41-42).

RELIEF SOUGHT ON APPEAL

Appellant seeks dismissal of the stay granted by the trial court as to the delinquent payments and seeks attorney's fees for this appeal.

STATEMENT OF FACTS

The plaintiff and defendant were married and lived in Texas. In June of 1971 a divorce decree was entered by the Court of Domestic Relations of Harris County, Texas. The decree stated that Defendant was to pay the sum of \$250 per month as child support. (R., p. 18).

Defendant failed to meet this obligation and an action was commenced by Plaintiff in the State of Utah on May 17, 1979 for the delinquency of \$2,425 (R., p. 2).

Defendant filed his answer denying the amount of arrearage and requesting modification of the monthly child support payment (R., pp. 12-14).

The matter was heard on July 18, 1979 before the Honorable Dean E. Conder. A short hearing was held with the defendant testifying as to his financial status. The judgment in the amount of \$2,425 was stipulated to by the parties and the court.

ordered a judgment in that amount. However, the court also upon its own motion made the following Order:

I'm going to order Mr. Blackburn to pay \$200 per month for the support of the children and suspend the collection on the arrearage as long as he keeps those payments current.

Now, if you get behind, Mr. Blackburn, more than two payments, then the suspension is off and they can come after you for the full arrearage. I want to use that as kind of a club to keep you making these payments. (R., pp. 41-42).

The court then reduced the total monthly obligation from \$250 to \$200 and then stated the following:

And by doing it that way, then it would make it \$200 a month on the current and nothing on the arrearage unless you get behind. That will help Mrs. Blackburn also.

Plaintiff's attorney then asked if a judgment for the arrearage would be entered. The court then replied:

Oh yes. You have your judgment for that amount, but suspended any collection of it as long as he is making payments. If he fails to make payments, then he is going to face the consequences. Very well. That will be the order. (R., p. 42).

A judgment and order were entered on July 30, 1979. (R., pp. 27-28). It is from this order and judgment that this appeal is taken. (R., p. 31).

ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN STAYING EXECUTION OF THE JUDGMENT INDEFINITELY AND SUCH ORDER SHOULD BE VACATED.

Appellant will concede that the trial court is vested with discretion in deciding numerous matters concerning the subsequent modification of a divorce decree. Appellant, for example, does not dispute the trial court's order reducing the monthly child support obligation based upon the circumstances of the defendant at the time of the hearing. Of course, Appellant may later request this amount to be increased when Defendant's circumstances improve. In any case, however, such a decision rests with the discretion of the court.

However, the indefinite staying of the delinquent judgment by the trial court was clearly an abuse of discretion. This Court has held that installments of alimony become vested when they become due and that a court has no power to modify the decree as to them. In Bates v. Bates, 560 P.2d 706 (Utah 1977) this Court held that the trial court erred in refusing to reduce accrued and unpaid alimony installments to judgment.

The court in this case effectively committed the same error as in the Bates case since effectively the judgment granted by the court may never be enforceable assuming that the defendant meets his present obligation.

The stay of execution in this case is particularly detrimental in that the eight-year period of limitations upon a final judgment applies to delinquent support. Seeley v. Park, 532 P.2d 684 (Utah 1975). Thus, at the termination of eight years Plaintiff would have the burden of attempting to preserve any judgment.

ment existing against the defendant and, under the court's Order, would not even be entitled to the statutory interest which would be applicable to a judgment which is in full force and effect.

This court in a similar case has previously held that a stay such as this is unwarranted. In Palmquist v. Palmquist, 312 P.2d 779 (Utah 1957) a judgment was entered by the trial court for a delinquency amount. However the judgment also provided that execution should not issue on such judgment until expiration of ten days after its entry to give the defendant opportunity to commence an action against the plaintiff for alleged damages on a cause of action for withholding certain title papers on a horse.

Appellant claimed that the trial court erred in staying execution on the judgment since there was no statutory or equitable grounds which justified the court's discretion. This Court noted that Rule 62(a) of the Utah Rules of Civil Procedure allows the court discretionary power to stay judgment but this Court noted that some showing of circumstances must be contained in the record to justify such a stay. As noted by this Court:

We shall assume, however, that equitable grounds for granting a stay of execution may be invoked. See 33 C.J.S. Executions Section 139, p. 313. We find none such in this case. The defendant asserted that he had an unliquidated claim for damages for withholding of title papers to the

horse. Nothing further was shown. That he would be in any way irreparably injured were execution to issue, that the defendant was insolvent, was about to depart from the jurisdiction, or any other ground except the bare assertion of an unliquidated claim does not appear.

Equitable relief from the enforcement of a judgment is not granted on the grounds that the parties have cross demands, merely, but rather that some injustice would result were execution not stayed. Id. at 780.

In the Palmquist case this Court struck down a stay of only ten days. In the present case the stay granted by the trial court could last indefinitely as long as Defendant does not fall two payments behind in his support. In addition, Plaintiff is suffering a financial loss in that the stay of the execution prevents the accrual of the statutory interest which would otherwise be applicable against Defendant.

The record is void of any showing which would justify a stay in this case. The stay was granted entirely on the court's own motion since no demand was sought by the defendant. The only reason given by the trial court was that the stay would act as "a kind of a club to keep you making these payments." (R., p. 42).

In effect, then, if Defendant maintains the obligation which by court order he is required to do he is essentially for given of his past transgressions and Plaintiff is denied the opportunity to collect money which is rightfully due and owing to her. The "club" which the trial court referred to should be

Defendant's fear of being held in contempt of court rather than the incentive of allowing Defendant to escape an obligation of the past by maintaining a present obligation.

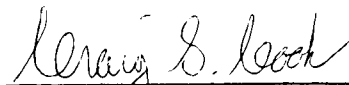
In conclusion, Appellant submits that there is no equitable or legal justification for the granting of this perpetual stay and that an injustice is actually resulting against Plaintiff who is unable presently to seek collection of this past amount or to even negotiate with Defendant as to how such amount should be satisfied. Under the present circumstances, moreover, Defendant is given a lag period of two months of delinquency before any penalty attaches. Thus, as long as he is only 1-1/2 months behind his payments at any given time the suspension is not vacated. Such a lag obviously creates a hardship on the part of Plaintiff who has no effective tool to require prompt payment.

Finally, the court's order of stay places the expense and burden upon Plaintiff to go back to court and to prove that a delinquency of two months had occurred in order to vacate the trial court's suspension. Again, such a burden is an obvious injustice and hardship upon the plaintiff who is the innocent party in this dispute.

The order of the trial court in indefinitely suspending a judgment based upon delinquent child support was clearly an abuse of discretion and a patently erroneous order. For this

reason, Appellant should be entitled to a reasonable attorney's fee for prosecution of this appeal. Bates v. Bates, 560 P.2d 706 (Utah 1977).

Respectfully submitted,

A handwritten signature in cursive script, reading "Craig S. Cook". The signature is written in dark ink and is positioned above a horizontal line.

CRAIG STEPHENS COOK