1980

Frances E. Bernard v. John W. Attebury : Brief of Appellant

Utah Supreme Court

Wendell P. Ables; Attorney for Defendant and Appellant;
Ted Cannon; Attorneys for Plaintiff and Respondent;

IN THE SUPREME COURT

OF THE STATE OF UTAH

FRANCES E. BERNARD, Plaintiff and Respondent,	:	
vs.	:	Case No.
JOHN W. ATTEBURY, Defendant and Appellant.	:	16985

BRIEF OF APPELLANT

Appeal from a Consolidated Order of the

Third District Court in and for Salt Lake County

Honorable Raymond S. Uno, Judge

Wendell P. Ables
Suite 14, Intrade Building
1399 South Seventh East
Salt Lake City, Utah 84105
Attorney for Defendant and
Appellant

Ted Cannon
Salt Lake County Attorney
Sandra N. Peuler
Deputy County Attorney
243 East 400 South
Salt Lake City, Utah 84111
Attorneys for Plaintiff and
Respondent

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OF THE STATE OF UTAH

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BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

Plaintiff brought this action under the Uniform Reciprocal Enforcement of Support Act seeking support for her two minor children pursuant to a 1976 Wyoming divorce decree.

DISPOSITION IN LOWER COURT

1. That defendant pay to plaintiff the sum of $150 per month for the support of John Joseph Attebury the said support to commence on June 1, 1979.

2. That defendant pay to plaintiff the sum of $150 per month for the support of John David Attebury commencing August 1, 1979 through November 1, 1979 when the said minor child turns eighteen (18) years of age for a total amount due of $600.

3. That defendant owes to plaintiff the sum of $2,000 as arrearages for the two (2) minor children of the parties computed as

follows: $250 per month for each of the minor children of the parti for the months of February through May of 1979 for a total of $2,000 arrearages. The Court entering this Order waived support money for John David Attebury for the months of June and July of 1979 because of his employment during those months.

4. That the defense of res judicata, specifically that the Order of May 31, 1979 was res judicata as to the arrearages award in the Judgment and Order of September 5, 1979, be and the same is hereby determined to be not established, and that the Motion of defendant objecting to the Order of September 5, 1979 be and the same is hereby overruled.

RELIEF SOUGHT ON APPEAL

1. That all support ordered for John David Attebury be reviewed.

2. That the support order for John David Attebury and John Joseph Attebury be modified to the extent that their stepfather is obligated to provide support and in fact, did provide support.

3. That the judgment for arrearages be reversed.

STATEMENT OF FACTS

Plaintiff divorced defendant on September 7, 1976, in the District Court for Sweetwater County, State of Wyoming, and was awar ed custody of the two minor children of the parties, to-wit: John

David Attebury, d/o/b 11-30-61 and John Joseph Attebury, d/o/b 8-15-64 (R. 7). Defendant was not represented by counsel and a support order for the said minor children in the sum of $500.00 per month was entered (R. 7).

John David Attebury, hereinafter called John David, dropped out of school in the fall of 1976 (T. 94). In the fall of 1977 John David went to Idaho Falls, Idaho and secured employment as a prep man for Ace Hansen Chevrolet (T. 70). In March of 1978, John David came to Salt Lake City where he resided with defendant through December 8, 1978 (T. 70). In October of 1977 John Joseph Attebury, hereinafter called John Joseph, came to Salt Lake City to reside with defendant (T. 69;77). John Joseph lived with and was supported by defendant and attended school through December 8, 1978 (T. 69). John David would not attend school in Salt Lake City and went to work as a laborer for the BLM at the minimum wage (T. 70). Defendant purchased an El Camino and automobile insurance for John David and advanced monies to him which were repaid in part from John David's earnings at the BLM (T. 71). On November 29, 1978, plaintiff came to Salt Lake City, and established contact with John David and John Joseph (T. 78). On Decembe 7, 1978, plaintiff resumed custody of John David and John Joseph and immediately applied for public assistance from the State of Utah for them (T. 79). Plaintiff, in fact, received public assistance from the State of Utah for John David and John Jospeh for the month of December, 1978 and January, 1979 (T. 80).

On December 9, 1978, John David and John Joseph were requir to return to Green River, Wyoming by themselves with plaintiff return to Green River on January 1, 1979 (T. 80). Both boys have lived continuously with plaintiff in Green River, Wyoming from January 1, 1979 to the date of the hearing (T. 81). From December 9, 1978 to January 1979, John David and John Joseph resided temporarily with friends in Green River, Wyoming, until plaintiff was able to return (T. 79, 80,

On January 22, 1979, plaintiff married Willy Bernard in the Sweetwater County Clerk's Office (T. 81, 82). Mr. Bernard purchased a mobile home for plaintiff and the two boys (T. 82) and was employed as a "railroader" (T. 86). Plaintiff provided support for John David and John Joseph (T. 82; 86). Mr. Bernard provided support for John David and John Joseph (T. 82; 86) and in fact provided John David wit a 1966 Dodge Pickup truck for his personal use (T. 92).

After John David left Salt Lake City on December 9, 1978 to take up residence in Green River, Wyoming, he first worked at Covey's Little America from December 15, 1978 to January 17, 1979 (T. 83) where he earned $3.25 per hour (T. 88). Sometime between January 1979 and May, 1979, John David worked for Bill Robins installing the skirting at the bottom of mobile homes for 25¢ a foot (T. 83, 88, 89). John David kept his own earnings during this period of time but on occasion bought groceries for plaintiff (T. 84) and helped to buy his brother's glasses (T. 85).

In May of 1979, Mr. Bernard, who was a railroad foreman, secured employment for John David working on the railroad working on derailments (T. 83; 91). John David worked for a day or so at a time

and made $100 on one such occasion (T. 91). Between February and May of 1979 John David also worked for a month for the Oil Repair Service at Reliance, Wyoming for between $3 and $5 per hour (T. 96, 96).

In June of 1979 John David went to work as a truck driver for Jackman Refuse at a salary of $800 per month (T. 84; 89) and could have earned as much as $1,600 (T. 90) although he could not remember exactly how long he worked for Jackman Refuse (T. 91) even though it was but a few weeks before the hearing (T. 90).

John David next worked for the Burns Detective Agency in August of 1979 (T. 84) earning $4.77 per hour and apparently worked for them up until a few days before the hearing (T. 90).

During all of these employments John David kept his own salary and used it for his own expenses and personal debts (T. 84); did not pay rent (T. 91); on occasion bought groceries for plaintiff (T. 84; 92) and helped buy his brother's glasses (T. 85). He was engaged to be married but not until he turned 18 and could "get a job" (T. 91).

On March 21, 1979, plaintiff filed a petition for support under the Uniform Reciprocal Enforcement of Support Act claiming support from December 1, 1978. An Order to Show Cause was issued and service was accepted by defendant's attorney pursuant to agreement with plaintiff's attorney (R. 9, 10).

At this point an agreement was entered into by and between Deputy County Attorney Marcus Theodore, Dennis Kroll and the attorney

for defendant, stipulating for a reduction in the support money from $500 to $300 per month with $150 being paid to John Joseph effective immediately but with certain restrictions with reference to the payment to John David Attebury (T. 73). This agreement was supposed to have been reduced to writing in the order of May 30, 1979 (R. 11, 12). A stipulation correcting the order to what it should have been was prepared by defendant's counsel and executed by counsel on July 2, 1979 (R. 19) A corrected order effective as of May 30, 1979 was signed by Judge Dee on August 22, 1979, but to correct the erroneous order entered on June 8, 1979.

The issue of res judicata was raised at this time and was specifically reserved by the court in the minute entry (R. 16), and at (T. 56-59) and in fact on the judgment and order entered on August 22, 1979 (R. 18).

On September 5, 1979, a judgment and order was entered reflecting the decision of the court as a result of the hearing on August 22, 1979 (R. 20). Objection was taken to this judgment and order by defendant (R. 22) and on November 29, 1979, a new petition and order to show cause was issued against defendant (R. 24). A hearing was set for January 16, 1980 and on this date a hearing was held on the question of res judicata (T. 44-53) and resulted in the consolidated order of January 16, 1980 signed by Judge Uno (R. 40, 41)

ARGUMENT

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING SUPPORT FOR JOHN DAVID ATTEBURY UNDER THE UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT.

The Uniform Reciprocal Enforcement of Support Act, hereafter URESA, is a statute whose purpose is to provide a mechanism to enforce a duty of support in a foreign jurisdiction by someone who has a right to support. If a legal duty is found, the amount of support ordered under URESA by the trial court is discretionary. The trial court should judge the amount to be ordered independently based upon the ability of the obligor to pay and the need of the obligee to receive support.

The Wyoming URESA gives jurisdiction to decide the issue of support to the Utah courts. The Wyoming statute states:

> "Duties of support applicable under this Act are those imposed or impossible under the laws of any state where the obligor was present for the period during which support is sought. The obligor is presumed to have been present in the responding state during the period for which support is sought until otherwise shown." Wyoming Statute 20-111 1957 as Amended, 1973 Cum. Supplement.

In the instant case, the obligor, herein the defendant, has been present in Utah during the period in which support is being sought. Utah, as the responding state, must therefore apply its laws. In Thompson v. Kite, 214 Kansas 700, 522 P.2d 327 (1974), the Supreme Court of Kansas stated:

care of both himself and his brother. There doesn't seem to be any reason not to assume that he would be able to continue to work and support himself until he reaches 18. If anyone is able to take care of oneself, he is. John David Attebury is also receiving support from his stepfather (who has a duty to provide it under Utah law) and mother, thus showing the lack of need of any support money.

POINT II

RESPONDENT IS ESTOPPED FROM RECOVERING CHILD SUPPORT BECAUSE SUCH SUPPORT WAS ALREADY BEING PROVIDED AND SHE IS NOT REQUESTING REIMBURSEMENT

The basic right of a child to support is unquestioned. In the instant case, however, John David Attebury was being fully supported by his mother, his stepfather, and himself.

The contention of plaintiff that John David Attebury is also entitled to be supported by defendant for the same period is contrary to the case of Wasescha v. Wasescha, Utah 548 P.2d 895 (1976). In that case the court held that where the children were supported by the mother and her second husband and where she was not seeking reimbursement but rather was planning to place all the sums in trust for the future of the children, that the husband was not obligated to provide double support. The court said:

> "There is no prayer for reimbursement for past support under such conditions, but there seems to be an admission that the children's right to support amply was supplied by someone, which would eliminate their claim for support, or, if you please,

> double support, and which admission would seem to be an abandonment of a parent's claim for reimbursement, and certainly an estoppel to assent an anti-ethical claim for past child support, - unless a case were instituted refutedly to assert the children's right to support, which, of course, is theirs, but seems not to be the case extant here."

Similarly in the instant case there is no prayer for reimbursement and John David Attebury was clearly, under the testimony of his mother, being supported by his mother, stepfather and to a large extent, by himself. Defendant should not also be required to support John David Attebury for that same period of time and the order requiring him to do so is an abuse of discretion on the part of the trial court. In Carter v. Carter, 19 Utah 2d 183, 429 P.2d 35, 36 (1967), this court stated:

> "When the child becomes self-supporting or ceases to be a minor the court will make such an order regarding the distribution of the property as shall be reasonable and proper."

POINT III

JOHN DAVID ATTEBURY IS AN EMANCIPATED CHILD AND IS NOT ENTITLED TO SUPPORT

There are no guides under Utah law regarding the determination of whether a child is emancipated. The only Utah case dealing with emancipation in any way is Sparks v. Hinckley, 78 Utah 502, 5 P.2d 570 (1931) which is not applicable to the case at hand.

In Sparks, the child claimed that wages earned had been given to his aunt, with whom he was residing, for purposes of investment by her for him. This court held that the aunt standing in loco parents to the child and was entitled to the wages and earnings of [illegible]. The court also stated that merely reaching the age of

majority did not ipso facto terminate the relationship and emancipate the child.

The Sparks case talks about emancipation and that it does not occur automatically, but does not give any quidline as to when it does occur or what factors are to be considered in determining whether or not there has been an emancipation. Also in Sparks, the plaintiff was asking for his money back because he was an emancipated child, in the instant case the appellant is claiming that his child is emancipated, thus there is no need for him to support the child.

The power to emancipate a minor resides in the parents who have a duty to support the child. The parents intentions control, Frevig v. Frevig, 90 New Mexico 51, 559 P.2d 839 (1977). The intentions of the parents may be implied from the conduct of the parents and the surrounding circumstances. In re Marriage of Weisbart, Colorado 564 P.2d 961 (1977).

In the case of Frevig v. Frevig, supra, the New Mexico Supreme Court held:

> "An express emancipation of a minor takes place when a parent freely and voluntarily agrees with his child, who is able to care and provide for himself, that he may leave home, earn his own living, and do as he pleases within his earnings."

In the instant case, John David Attebury, was free to do as he wished. Neither parent placed any restrictions upon him. He was able to care and provide for himself and the record is replete with evidence of this proposition. This is proven by the fact that

he was employed in Twin Falls, Idaho, and in Salt Lake City, Utah. on a full time basis.

This court should find John David Attebury emancipated as of October 1977, the time he began living and earning his own living, and the he is not entitled to support from defendant.

POINT IV

JOHN DAVID ATTEBURY AND JOHN JOSEPH ATTEBURY ARE NOT ENTITLED TO SUPPORT FROM APPELLANT SINCE MAY 8, 1979 BECAUSE OF BEING SUPPORTED BY THEIR STEPFATHER

In 1979 the Utah Legislature amended Utah's laws concerning support. They enacted section 78-45-4.1 and 78-45-4.2 of the Code.

78-45-4.1 provides:

> "A stepparent shall support a stepchild to the same extent that a natural or adoptive parent is required to support a child. Provided, however, that upon termination of the marriage or common law relationship between the stepparent and the child's natural or adoptive parent or in cases where there is a filed pending divorce action with separation or a legal separation between the stepparent and the child's natural parent, the support obligation shall be as if the marriage had never taken place."

The statute seems to clearly state the the stepparent, during the marriage, is the one responsible for the support of his stepchildren. The duty of support of the natural parent only comes back into active existence if there is á divorce or a separation with a filed divorce pending between the stepparent and the natural parent. The stepfather in the instant case has provided support for his stepchildren. He has provided with a trailer home to live in, a motor vehicle, as well as other necessities. The stepfather

by these actions, has relieved the natural father of any active duty to support his children.

78-45-4.2 provides:

> "Nothing contained herein shall act to relieve the natural parent of adoptive parent of the primary obligation of support, furthermore, a stepparent has the same right to recover support for a stepchild from the natural or adoptive parent as any other obligee."

This section does not relieve the stepfather of the active duty to support his stepchildren. It also does not require the natural parent to pay support to the child if the stepfather is doing so, but it does require the natural father to pay support for his children if there is a need for it.

These sections of the Utah Code Annotated are very vague and unclear as to their meaning and purpose. Since they are subject to many interpretations there is a need for judicial review of them to guide both the bench and the bar.

Since the stepfather is still married to the mother at the time of these proceedings, the natural father should be relieved of any active duty to support his children until there is a need for him to do so.

POINT V

APPELLANT IS NOT OBLIGATED TO PAY FOR ARREARAGES FOR EITHER JOHN DAVID ATTEBURY OR JOHN JOSEPH ATTEBURY BECAUSE THE COURT ORDER OF MAY 31, 1979 IS RES JUDICATA AS TO THESE SUMS

The URESA grants to the Utah courts the jurisdiction over the issue of arrearages. In Wyoming Statutes 20-113, 1957 as amended 1973 Cum. Supplement it states:

> "All duties of support, including the duty to pay arrearages, are enforceable by a proceeding under this act."

The URESA also gives Utah the duty of applying its laws to all matters concerning support under this Act by its choice of law section (Wyoming Statutes 20-111, 1957, as amended, 1973 Cum. Supplement). Therefore, we must look at Utah law to decide the issue of res judicata.

Res judicata is a doctrine by which a final judgment of a court of competitive jurisdiction is conclusive upon the parties in all subsequent litigation, involving the same cause of action. This is to avoid duplication and the possibility of subjecting a party to multiple law suits that could result in an unjust result.

The case of East Millcreek Water Company v. Salt Lake City, 108 Utah 315, 159 P.2d 863 (1945) is dispositive on this issue. The Utah Supreme Court stated:

> " . . . there are two kinds of cases where res judicata is applied: In the one the former action is an absolute bar to the maintenance of the second; it usually bars the successful party as well as the loser, it must be between the same parties or their privies, it applies not only to points and issues which are actually raised and decided herein, but also to such as could have been therein adjudicated, but it only applies to where to claim, demand or cause of action is the same in both cases."

further it states:

> ". . . if one of the parties fails to raise any point or issue or to litigate any part of his claim, demand or cause of action and the matter goes to final judgment, such party may not again litigate that claim, demand or cause of action or any issue, point or part thereof which he could have but failed to litigate in the former action." East Millcreek Water Company v. Salt Lake City, 108 Utah 315 159 P.2d 863 at 866 (1947)

In the instant case there was a court order dated May 31, 1979 in which the same parties to the August 22, 1979 order were involved. This court order referred to future support for the children and no reference was made to past support. Both sides had an opportunity to be heard. If we follow the holding of East Millcreek Water Company v. Salt Lake City, supra, the respondent is unable to claim any past support. The doctrine of res judicata, by the holding of this case, can be applied to all points and issues that could have been therein adjudicated. Respondent was able to have the issue of arrearages adjudicated at the May 31, 1979 hearing if she desired, but failed to press the issue. The issue of arrearages was present at the May 31st hearing, some past support was due at that time.

Therefore, since this was a subsequent claim the arrearages at the August 22nd hearing, before a court of competent jurisdiction, between the same parties which involved the same cause of action for support and the respondent had an opportunity to adjudicate the issue of arrearages if she desired, but she did not do so, this claim for past support can't be upheld because the matter is res judicata.

CONCLUSION

Defendant is entitled to relief from all orders of support based on this record.

Respectfully submitted,

Wendell P. Ables
Attorney for Defendant and Appellant
Suite 14, Intrade Building
1399 South Seventh East
Salt Lake City, Utah 84105

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of August, 1980, I mailed a true and correct copy of the foregoing Brief, postage prepaid, to Sandra H. Peuler, Deputy County Attorney, attorney for plaintiff, 243 East 400 South, Lower Level, Salt Lake City, Utah 84111.