

1980

# Joyce M. Despain v. Robert V. Despain : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

\* \* \* \* \*

JOYCE M. DESPAIN,  
Plaintiff and  
Respondent,

v.

ROBERT V. DESPAIN,  
Defendant and  
Appellant.

No. 17034

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BRIEF OF RESPONDENT

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Appeal from the Judgment of the  
Third District Court  
for Salt Lake County,  
Hon. Kenneth Rigtrup, Judge

---

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IN THE SUPREME COURT  
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JOYCE M. DESPAIN,

Plaintiff and  
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v.

ROBERT V. DESPAIN,

Defendant and  
Appellant.

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No. 17034

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BRIEF OF RESPONDENT

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NATURE OF THE CASE

This is an appeal from an order denying appellant's motion for termination of child support payments under a decree of divorce.

DISPOSITION IN THE LOWER COURT

Appellant filed a motion to modify the provisions of the divorce decree which required him to pay child support to his two children while they were full-time students and residing with respondent. Specifically, appellant's motion

was that the decree be modified to terminate appellant's responsibility to make payments after his children reached age 21. The district judge denied appellant's motion.

#### RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the district judge's ruling denying appellant's motion for modification of the divorce decree.

However, if the court grants the modification of the decree the appellant seeks, respondent requests the court to remand for a full review of the entire divorce decree.

#### STATEMENT OF FACTS

Respondent agrees with the statement of facts set forth in appellant's brief except she does not agree with appellant's characterization of the judicial decisions appellant refers to. Those decisions, discussed below in ARGUMENT, POINTS I and II, do not apply to a divorce decree based on a property settlement agreement. Furthermore, those decisions did not establish a new principle of law.

## ARGUMENT

### POINT I

ALTHOUGH A COURT MAY NOT ORDER  
CHILD SUPPORT BEYOND THE CHILD'S  
AGE OF MAJORITY, A COURT MAY  
ENFORCE A VOLUNTARY AGREEMENT  
FOR SUCH SUPPORT.

Appellant correctly states that absent special circumstances a parent "has no duty to support his children beyond the age of 18." Appellant's Brief on Appeal at 6. Appellant argues that this rule requires that the decree in this case be modified. In making this argument appellant overlooks the importance of the distinction between an order of the court made after trial and a voluntary agreement of the parties which is accepted by the court and incorporated into the decree. Although the law does not impose a child support duty beyond the child's age of majority absent unusual circumstances, Carlson v. Carlson 584 P.2d 864 (Utah 1978), a parent is free to voluntarily undertake this responsibility by agreement.

In spite of the general rule that a divorce court cannot order the support of an adult child,

the parents may agree that the father shall support a child after majority, as where the father is to support a child until he or she graduates from college, or until the child becomes self-supporting, and the court may adopt such an agreement and require the father to comply with the decree.

24 Am. Jur. 2d Divorce and Separation §832 (1966) (emphasis added) (footnote omitted).

In the case of Robrock v. Robrock, 150 N.E.2d 421 (Ohio 1958), the court held:



Where, as part of a valid agreement, a husband agrees to provide a college education for his children and further agrees to keep in effect insurance policies on his life in which such children are beneficiaries, and where such agreement is incorporated in a decree divorcing the husband from his wife, such decree becomes binding upon the husband even though the performance required by the decree may extend beyond the minority of the children.

Id. at 422-23. "We are of the opinion," the court stated, "that such agreements should not be impaired for the reason that the court, if acting without such agreement, would not have the authority to impose such an obligation." Id. at 428. The validity of the holding of Robrock was recently reaffirmed and relied on in Grant v. Grant, 396 N.E.2d 1037 (Ohio Ct. App. 1977)..

In White v. White, 223 S.E.2d 377 (N.C. 1976), it was held that "a court may enforce by contempt proceedings its order, entered by consent, that child support payments be made beyond the time for which there is a duty to provide support." Id. at 379. In the recent Colorado case of Haynes v. Haynes, 586 P.2d 1010 (Colo. Ct. App. 1978), the court upheld a decree adopting a property settlement agreement requiring support for post-high school education. In the Kansas case of Clark v. Chipman, 510 P.2d 1257 (Kan. 1973), the court sanctioned the validity of a divorce decree which incorporated a property settlement requiring the husband to pay for the college education of his children "regardless of their age." Id. at 1261.

Appellant argues that upholding the parties agreement in this case would discourage future property settlements. Appellant's Brief on Appeal at 9. On the contrary, such a holding would actually encourage property settlements. This was recognized by the court in Robrock when it explained why divorce decrees adopting agreements such as this should be enforced:

It is entirely possible, perhaps probable, that a wife may be willing to give up, by way of agreement with her husband, much to which she would be entitled in consideration of the husband doing more than he might be required to do for their children. To disregard such agreements when incorporated in a divorce decree, at least so far as the power of the court to enforce them is concerned, would discourage the settlement of differences between husband and wife or reduce such agreements, when made, to cloaks to be put on or shed at will.

Robrock v. Robrock, 150 N.E.2d 421, 427 (Ohio 1958).

The Utah Supreme Court has explicitly recognized that decrees based on property settlement agreements must be given special treatment. In Land v. Land, 605 P.2d 1248 (Utah 1980), the court noted that although a decree based on an agreement is modifiable,

when a decree is based upon a property settlement agreement, forged by the parties and sanctioned by the court, equity must take such agreement into consideration. Equity is not available to reinstate rights and privileges voluntarily contracted away simply because one has come to regret the bargain made. Accordingly, the law limits

the continuing jurisdiction of the court where a property settlement agreement has been incorporated into the decree, and the outright abrogation of the provisions of such an agreement is only to be resorted to with great reluctance and for compelling reasons.

Id. at 1250-51 (footnotes omitted). In the present case, the district judge acted properly by giving deference to the agreement freely entered into by the parties. Although the district judge had discretion to modify the parties' agreement in this case, he did not abuse his discretion by refusing to do so.

In the relief appellant seeks he implicitly recognizes that a court can enforce an agreement to provide support where a duty could not otherwise be imposed. Appellant has requested modification of the decree but "has accepted that pursuant to his agreement, support should continue to age 21." Appellant's Brief on Appeal at 9 (emphasis added). Since, in the absence of special circumstances, a court cannot order support beyond age 18, appellant has taken an inconsistent position in making this request. By so doing, appellant has clearly recognized that the rule which prevents a court from ordering child support beyond the child's age of majority does not destroy the right of a father to voluntarily agree to provide such support.

Appellant cites three cases in support of the principle that absent special or unusual circumstances a parent has no duty to support his children beyond the age of 18: English v. English, 565 P.2d 409 (Utah 1977); Carlson v. Carlson, 584 P.2d 864 (Utah 1978); and Harris v. Harris, 585 P.2d 435 (Utah 1978).

While these cases do support that principle, they go no further. In none of these cases did the court face a situation where the order in question was based upon an agreement between the parties.

Appellant then cites Kerr v. Kerr, 610 P.2d 1380 (Utah 1980) in further support of this principle. However, as in the other cases cited by appellant, in Kerr there was no agreement between the parties.

Appellant cites Ferguson v. Ferguson, 578 P.2d 1274 (Utah 1978), for the proposition that a court has no power, absent compelling special circumstances, to order a parent to pay for his child's college education. The Ferguson case is likewise not on point. In Ferguson the child's mother was seeking a modification of a divorce decree to require her former husband to continue to make support payments to her daughter beyond age 18, apparently to finance her college education. Unlike the present case, the parties had made no agreement that such support would be provided.

An important distinction between a decree of the court which is based on an agreement of the parties and one that is not was recognized in Ferguson. In affirming the trial court's refusal to order child support beyond the age of 18, the court explained,

Ordinarily a parent will be more than willing to aid and assist an adult child in securing a college education; however, one should not be compelled to do so by court order, except perhaps in some unusual circumstance, not present here. If he does not

have the interests of his children at heart,  
that is and should be a matter of his own  
conscience and not of the court's.

Id. at 1275 (emphasis added).

In the present case, appellant was not compelled by the court to accept the obligation of supporting his two children during their college education. This was a responsibility he freely and voluntarily entered into as part of the 1976 property settlement agreement. The rule that a court cannot order child support beyond the age of 18 absent special circumstances is not applicable.

#### POINT II

THERE WAS NO RELEVANT, SUBSTANTIAL  
CHANGE IN THE LAW BETWEEN THE ENTRY  
OF THE DIVORCE DECREE AND APPELLANT'S  
MOTION TO MODIFY THE DECREE. DURING  
THAT PERIOD THE SUPREME COURT MERELY  
ARTICULATED MORE CLEARLY A WELL-  
ESTABLISHED RULE.

Appellant characterizes the cases of English v. English, 565 P.2d 409 (Utah 1977); Carlson v. Carlson, 584 P.2d 864 (Utah 1978); and Harris v. Harris, 585 P.2d 435 (Utah 1978) as establishing "a substantial change in the law which require[s] a re-examination of the Decree." Appellant's Brief on Appeal at 5. It is true that these cases did clearly articulate the principle that a parent, absent special circumstances, has no duty to support his children beyond the age of their majority. However, this principle was not a new one.

In Carlson, the court described it as a "time-honored and universally recognized rule that when a child reaches the



age of majority, the child becomes emancipated and the legal obligation of the parents to support the child and the reciprocal legal obligation of the child to the family, terminate." Carlson v. Carlson, 584 P.2d 864, 865 (Utah 1978) (footnote omitted).

In Dehm v. Dehm, 545 P.2d 525 (Utah 1976) the court held that a court may extend the child support obligation beyond the age of majority upon a showing of special circumstances. The clear implication of Dehm, decided and published ten months before the entry of the divorce decree in the present case, was that absent such special circumstances the court could not impose such a duty.

Thus, since there was no relevant change of law, the cited decisions of the Utah Supreme Court created no relevant change of circumstances requiring a modification of the decree.

### POINT III

EVEN IF THERE WAS A CHANGE IN THE  
LAW, THE PARTICULAR CHANGE ASSERTED  
BY APPELLANT IS NOT A MATERIAL  
CHANGE IN CIRCUMSTANCES WHICH WOULD  
REQUIRE MODIFICATION OF THE DECREE.

Child support provisions of divorce decrees are modifiable under Utah Code Ann. §30-3-5(1) (Supp. 1979). Appellant cites no authority to support his assertion that a change of law can constitute a change of circumstances requiring such modification. Nor does appellant show how the supposed change of law in this case would be material to the divorce decree involved here.

"In order that a change of circumstances may be deemed sufficient to overcome the principle of res judicata it must be substantial and material." 24 Am. Jur. 2d Divorce and Separation §847 (1966) (footnotes omitted). Even if the decisions cited by appellant are considered to represent a change in the law, the only changed circumstance would be that whereas before these decisions appellant might have believed a court might order child support beyond the age of 18 absent special circumstances, after these decisions appellant would know that a court could not. This kind of changed circumstance would not be material to the modification of the divorce decree.

First, it would not be material because, as discussed above, the principle enunciated in the cited decisions does not apply to an agreed-upon property settlement.

Second, the change would not be material because the ultimate tests a court must apply in considering a motion to modify a child support decree are "the needs of the child and the ability of the father to pay." Id. (footnote omitted). See generally Owen v. Owen, 579 P.2d 911, 913 (Utah 1978) (considering "the needs of the children and the ability of the father and mother to provide for them"). When these circumstances change, the decree is modifiable. In the present case, however, no such circumstances have changed. The asserted change in the law has nothing to do with the children's needs or the parents' ability to pay.

#### POINT IV

IF AN ESSENTIAL TERM OF THE  
DIVORCE DECREE IS MODIFIED,  
THE ENTIRE DECREE SHOULD BE  
REVIEWED AND REVISED.

The complaint in this case was filed on November 15, 1973. It was not until three years later, on November 24, 1976, after a lengthy period of detailed bargaining, that the terms of the property settlement were finally agreed upon. In addition to providing for child support, the agreement specifically provided for the disposition of motor vehicles, the home, securities, rights in a limited partnership, certain liqueur glasses, and a particular painting. It specifically provided for life insurance, medical insurance, and dental expenses. Each element of the agreement was carefully considered and negotiated, and each element was an important part of the consideration for the entire agreement.

The modification of child support and property distribution provisions of a divorce decree must be reasonable. Utah Code Ann. §30-3-5(1) (Supp. 1979). In this case it would not be reasonable to abrogate that portion of the agreement which provides that the appellant shall assist with his children's college education without reviewing the effect of this change on the other terms of the agreement. As in Robrock, it is possible that the respondent in this case gave up "much to which she would be entitled in consideration of the husband doing more than he might be required to do for the children." Robrock v. Robrock, 150 N.E.2d 421, 427 (Ohio 1958). Since this provision for



continued child support was a bargained-for term which became an essential and material part of the divorce settlement, if it is to be changed there should be a full review of the entire divorce settlement and not merely one aspect of it.

Although a contractual arrangement can be modified, "the law does not countenance a change in the contractual status which would result in unfair advantage to one or impose an undue burden on the other . . . ." 17A C.J.S. Contracts §373 (1963). To allow the modification appellant seeks without reviewing its effects on the entire property settlement would give appellant an unfair advantage and unfairly burden respondent with a financial responsibility which was not originally intended to be hers under the terms of the agreement.

The law concerning the partial termination and partial rescission of contracts is analogous to the situation presented here. "Usually a partial termination of a contract is not favored by the courts unless the parties have expressly agreed thereto." 17A C.J.S. Contracts §403 (1963) (footnote omitted). Similarly, "[a] rescission of a contract generally must be in toto. A party cannot affirm it in part and repudiate it in part. He cannot accept the benefits on the one hand while he shirks its disadvantages on the other." Id. §416 (footnote omitted). See Pickinpaugh v. Morton, 519 P.2d 91, 95 (Ore. 1974). A partial rescission is generally only possible "where the parts of a contract are so severable from each other as to

form independent contracts." 17A C.J.S. Contracts §416 (1963) (footnote omitted). The child support provisions of the property settlement agreement in this case do not form a separate contract. They are an integral part of the entire agreement. The abrogation of a portion of the agreement without a re-examination of the entire agreement would unfairly benefit appellant and deprive respondent of her bargained-for consideration.

### CONCLUSION

The order of the district judge in favor of respondent should be affirmed. The rule that a court may not order child support beyond the child's age of majority does not prevent a court from enforcing a voluntary agreement to provide such support. The cases which articulate this rule did not change the law, but even if they did, such a change would not be the kind of changed circumstance which would require the modification of the parties' property settlement agreement.

If the order of the district judge is not affirmed and the child support provisions of the property settlement

agreement are modified, the court should order a full review of the entire property settlement agreement to prevent an unjust result.

RESPECTFULLY SUBMITTED this 28 day of August, 1980.

GREENE, CALLISTER & NEBEKER

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H. Russell Hettinger  
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MAILING CERTIFICATE

I hereby declare that I caused to be mailed two (2) correct copies of the foregoing BRIEF OF RESPONDENT in Case No. 17034, postage prepaid, this 28 day of August, 1980, to David S. Dolowitz, Parsons, Behle & Latimer, Attorneys for Appellant, 79 South State Street, Post Office Box 11898, Salt Lake City, Utah 84147.

H. Russell Hettinger  
H. RUSSELL HETTINGER