

1989

Karen Adams and State of Utah, Department of Social Services v. Howard H. Adams : Brief of Respondent

Utah Court of Appeals

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R. Paul Van Dam; Attorney General; Blaine R. Ferguson; Assistant Attorney General; Attorneys for Appellant; Karen Adams (Hill); Plaintiff pro se.

Recommended Citation

Brief of Respondent, *Adams v. Adams*, No. 890690 (Utah Court of Appeals, 1989).
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DOCKET NO. 890090

IN THE UTAH COURT OF APPEALS

KAREN ADAMS and STATE OF UTAH,
DEPARTMENT OF SOCIAL SERVICES,

Plaintiff-Appellant,

vs.

HOWARD H. ADAMS,

Defendant-Respondent,

)

)

)

)

)

BRIEF OF
DEFENDANT-RESPONDENT

Case No. 890690-CA

Priority 14(b)

BRIEF OF RESPONDENT HOWARD H. ADAMS

ON APPEAL FROM A JUDGMENT AND DECREE OF
THE SECOND JUDICIAL DISTRICT COURT
DAVIS COUNTY, STATE OF UTAH
HONORABLE DOUGLAS L. CORNABY, JUDGE PRESIDING

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IN THE UTAH COURT OF APPEALS

KAREN ADAMS and STATE OF UTAH,)	
DEPARTMENT OF SOCIAL SERVICES,)	
)	BRIEF OF
Plaintiff-Appellant,)	DEFENDANT-RESPONDENT
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)	Case No. 890690-CA
HOWARD H. ADAMS,)	
)	Priority 14(b)
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BRIEF OF RESPONDENT HOWARD H. ADAMS

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STATEMENT OF ISSUES PRESENTED ON APPEAL

POINT ONE

THE TRIAL COURT HAS THE POWER TO AWARD ATTORNEY'S FEES TO ENABLE A PARTY TO DEFEND AN ACTION.

POINT TWO

THE COURT COULD HAVE ALSO AWARDED ATTORNEY'S FEES UNDER THE FACT AND CIRCUMSTANCES IN THE INSTANT CASE PURSUANT TO SECTION 78-27-56 UCA.

POINT THREE

ISSUES AND ARGUMENTS WAIVED, NOT OBJECTED TO OR ELIMINATED AT PRE-TRIAL CONFERENCE CAN NOT BE RESURRECTED AT THE TIME OF TRIAL.

POINT FOUR

ISSUES OR LEGAL THEORIES NOT PRESENTED AT TRIAL OR
WAIVED PRIOR TO TRIAL CAN NOT BE RAISED FOR THE
FIRST TIME ON APPEAL.

POINT FIVE

THAT RESPONDENT IS ENTITLED TO BE AWARDED COSTS AND
ATTORNEY'S FEES INCURRED IN RESPONDING TO THIS
APPEAL.

IN THE UTAH COURT OF APPEALS

KAREN ADAMS and STATE OF UTAH,)	
DEPARTMENT OF SOCIAL SERVICES,)	Case No. 890690-CA
Plaintiff-Appellant,)	
vs.)	Priority 14(b)
HOWARD H. ADAMS,)	
Defendant-Respondent.)	

BRIEF OF DEFENDANT-RESPONDENT

STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction over the Appeal by virtue of the provisions of Utah Code Annotated 78-2a-3(2)(b).

NATURE OF PROCEEDINGS

This is an Appeal from the District Court Judgment and Decree from a domestic relations, Bureau of Recovery Services case.

STATEMENT OF ISSUES PRESENTED FOR APPEAL

The issues presented in this appeal are:

1. Can the trial court award attorney's fees to the prevailing party in a domestic relations case under the facts and circumstances of the case on appeal?

2. If issues were waived or not preserved or objections made at pre-trial by Appellant, can said issues be raised again at the time of trial by Appellant?

3. Can issues or legal theories not raised in the pleadings, or presented at the time of trial be raised on appeal?

4. In a domestic relations matter or a "frivolous" appeal

can the Respondent be awarded attorney's fees and costs incurred?

DETERMINATIVE STATUTES AND RULES

The following statute is determinative in this case:

Utah Code Annotated Section 30-3-3 (1953) as amended.

The Court may order either party to pay ... to enable such a party to prosecute or defend the action.

The following rule is determinative in this case:

Rule 16(b)(1) Utah Rules of Civil Procedure.

(b)(1) The formation and simplification of the issues, including the elimination of frivolous claims, and defenses.

STATEMENT OF THE CASE

The proceedings started when Respondent was served with a Notice of Income Withholding by Appellant. Mr. Adams sought judicial review of the matter by filing an Order to Show Cause and served the same upon the Appellant (R. 25-30). Respondent sought judicial review of the Department's actions, asked for recognition of a stipulation entered into nine (9) months prior to the Department's involvement, sought relief from the threatened judgment and garnishment of his wages and an award of attorney's fees.

The matter was then heard before the Domestic Commissioner who found in favor of Respondent with Appellant agreeing to the Recommended Order. Appellant then filed an objection to the Order without setting forth any basis for the objection.

The objection hearing was held before the Honorable Douglas L. Cornaby on the 8th day of August, 1989 and pro offers made. The trial court turned the hearing into a pre-trial with the parties

agreeing and resolving all the issues before it except for attorney's fees, which issue was then set for trial. Appellant agreed with the trial court's resolution of the issue before it, failed to voice any objection and agreed that the sole issue for trial would be that of whether Respondent should be awarded attorney's fees and costs in this matter. At pre-trial the Court sustained the Domestic Commissioner's recommendations (Transcript of Proceedings, August 8, 1989, P20 L5, R. 22 L22-25).

The trial was heard on September 14, 1989 in which the District Court found that the Appellant had acted unreasonably in this matter and in bad faith; that the Respondent was forced to defend the Department's actions and was therefore awarded attorney's fees (R. 76-77, 79-81 and 82-83).

Appellant appealed the trial court's decision (R. 86-87).

STATEMENT OF FACTS

1. The parties, Karen Hatch Adams and Howard Adams were married to each other in 1975 and had two children from the marriage. On March 6, 1979 the parties were granted a Decree of Divorce, in which Mrs. Adams was awarded custody of the children and Mr. Adams was ordered to pay \$100.00 per month per child as and for child support (R. 13-15)

2. Prior to July, 1988, Mr. Adams rented a home that he owned to Mrs. Adams. The rental value of the home was \$300-350.00 per month. The parties agreed that in lieu of child support payments to Mrs. Adams, Mrs. Adams could stay in the home without having to pay any rent (R. 23-24). Mr. Adams is employed as a

school teacher (Transcript of Trial Sept. 14, 1989, P38 L14).

3. Mr. Adams had an attorney prepare the parties' Agreement in writing and Mrs. Adams filed it with the Clerk's Office. The parties agreement was filed in their divorce file. Mr. Adams's Attorney did not prepare an Order so the parties' agreement was not reduced to an Order (Transcript of Trial, Sept. 14, 1989, P44, L19-22).

4. Mr. Adams became aware that the stipulation should have been reduced to an Order after discussing the matter with the Department (Transcript of Trial Sept. 14, 1989, P40 L7 - P41 L15).

5. Mrs. Adams informed Welfare of the parties' agreement and furnished them a copy of the agreement before being allowed on assistance (Transcript of Trial, Sept. 14, 1989, P31 L10 - P32 L3).

6. The Department knew about the parties' agreement prior to sending out their Advance Notice Income Withholding (Transcript of Trial, Sept. 14, 1989, P31 L10 - P32 L3; P39 L11 - 124).

7. That the Department informed Mr. Adams that he had to comply with their findings of an arrearage for delinquent child support or his credit would be damaged and his wages garnished (Transcript of Trial, Sept. 14, 1989, P41 L8, L16).

8. Mr. Adams believed that his credit would be damaged and his wages would be garnished by the Department (Transcript of Trial, Sept. 14, 1989, P41 L8, L16; P13 L13-L14).

9. That Mr. Adams retained legal services because he did not believe that it was right for the Department to take such unfair action against him (Transcript of Trial, Sept. 14, 1989, P41 L16 -

P42 L11).

10. The Department was served with Notice and the Order to Show Cause hearing. That Mr. Carl G. Perry represented the Department at the hearing regarding Mr. Adam's Order to Show Cause which was heard before Maurice Richards, Domestic Commissioner (Domestic Hearing Transcript, June 29, 1989, P3 L4-10 R. 39-40).

11. At the hearing, the Department waived any objection to the Court's recommendations and agreed to the recommendations of the Domestic Commissioner (Domestic Hearing Transcript P13 R. 40).

12. That the Department filed an objection to the Recommended Order that was prepared, although it had indicated to Mr. Adams' attorney and the Domestic Commissioner that it agreed with the Court's recommendation (Domestic Hearing Transcript, P13 L7-13 R. 41).

13. That the Department's objection was heard before the Honorable Douglas L. Cornaby on the 8th day of August, 1989. After listening to the attorneys' arguments and representations the parties agreed to treat that hearing as a pre-trial conference and set the matter for trial (Transcript of Proceedings August 8, 1989 P20 L5).

14. The sole issue which would be heard at trial would be whether the Department should pay attorney's fees to Mr. Adams (Transcript of the Proceedings August 8, 1989 P21 L22-P22 L2). At the hearing, the State waived any objections to the Domestic Commissioner's recommendations and failed to reserve any issue for trial except attorney fees (Transcript of Proceedings August 8, 1989

P13 L2, P21 L22-25; See also Transcript of Trial, Sept. 14, 1989 P3 L25; P6 L7; P47 L15; P50 L8-11; P71 L3-16).

15. The Court found that Respondent was forced to bring this action because of the State acting in bad faith with "an endless supply of money unreasonably pressuring people without reason" (Transcript of Trial, Sept. 14, 1989 P67 L7-19).

16. That Respondent was entitled to an award of attorney's fees in this case in the amount of \$457.00 and costs incurred (R. 85).

SUMMARY OF ARGUMENT

In a domestic matter the trial court may award attorney's fees under Section 30-3-3 UCA to any party based upon the court's determination of the case. In the instant case, Respondent was awarded \$476.00 and costs pursuant to the trial court's finding that Appellant acted "unreasonably" and in "bad faith" after the court had carefully considered the evidence and facts to justify an award of attorney's fees.

The Appellant waived or failed to preserve any other issues other than attorney's fees at the pre-trial hearing and could not raise said issues again at trial. Since all other issues other than attorney's fees were waived at pre-trial and were improperly raised at trial, it is improper for the Court of Appeals to hear those issues on appeal when they were not tried in the trial court. Therefore, all of Appellant's arguments numbered one through six should not be considered on appeal but dismissed as having been waived, abandoned or not properly preserved for appeal.

Further, that Respondent should be awarded his attorney's fees under Section 30-3-3 UCA because of the Department's unreasonableness in this matter, the frivolous nature of the appeal and in considering the economic pressures the Department has attempted by reason of the appeal to force Respondent to abandon his position in this matter.

ARGUMENT

POINT ONE

THE TRIAL COURT HAS THE POWER TO AWARD ATTORNEY'S FEES TO ENABLE A PARTY TO DEFEND AN ACTION.

The trial court in a domestic relations matter has the power to award attorney fees to any party pursuant to Section 30-3-3 UCA 1953 (as amended) "The Court may order either party to pay ... to enable such a party to prosecute or defend the action."

In Kerr v. Kerr, Utah 610 P2d 1380 (1980) the Supreme Court has held that in a domestic proceeding the Court is empowered to award such sums as will permit opposing parties to bring or defend an action and the decision to make such an award, together with the amount thereof, rest permanently with the sound discretion of the trial court. In Kerr the Supreme Court went on to outline some considerations for the trial court to consider in making such an award, such as need, reasonableness and the relative ability to the respective parties to shoulder the expenses of litigation (see also Maughan v. Maughan, Ut App 770 P2d 156 (1989) which reaffirms trial court's power to award attorney fees and the power to award attorney's fees incurred with defending an appeal).

In the instant case, the State of Utah was joined as a party Plaintiff (Domestic Commission Hearing June 29, 1989 P111 L18-20). The State failed to object to the procedure, made their court appearances, never filed any motions raising the jurisdiction issue and submitted itself to the jurisdiction of the Court "waiving any defense which it might have accepted" (Transcript of Trial P50 L11; P51 L11).

The Department was an assignee of Mr. Adams' former wife since its standing to be a party of interest rests under the theory that the custodial parent assigns her right to the State in exchange for welfare benefits. Therefore, the State assumes the custodial parent's position in such a proceeding and in the instant case.

Therefore, since the Department had assumed the role of the former Mrs. Adams by reason of the assignment of her rights to child support, it allowed the trial court to have jurisdiction over it and would allow the trial court to order the Department to pay Respondent's attorney's fee under Section 30-3-3 UCA as in other domestic matters.

The Court, after hearing various evidence such as what alternatives the Department could have taken, (Transcript of Trial P15 L15; P16 L2); the procedures which the Department could have followed (P15 L11-24, P20 L10-P20 L16); what notice the Department had received (P21 L15-17; P25 L11, P26 L19-23, P36 L13); the belief of the Respondent (P41 L8-10, P36 L19-23, P41 L3-10) the action the Department continued to take in this matter after it had agreed in the two previous hearings that Respondent owed nothing (P28 L13 -

P30 L1) the relative economic strength of the various parties (Transcript of Trial P67 L9-11); the reasonableness of the Departments actions (p70 L2-17, P72 L3-22) and concluded that the Department's actions were "unreasonable" and in "bad faith" and that they should pay some of Respondent's attorney's fees in the amount of \$476.00 and costs (R. 84-85).

It should also be noted that the Appellant's continuance to raise the same issues over and over again after waiving them previously and agreeing with the Respondent's position in the two previous hearings (Domestic Commissioner Hearing P12 L16- P13 L12; Hearing August 8, 1989 R. 71 L22- R. 72 L2; Transcript of Trial P4 L13 - P5 L15, P6 L9-18, P7 L14 - P7 L5, P50 L8-11). The trial court based upon the evidence and the findings and conclusions of law did not err in awarding Respondent attorney's fees in the amount of \$476.00 and costs.

POINT TWO

THE COURT COULD HAVE ALSO AWARDED ATTORNEY'S FEES UNDER THE FACT AND CIRCUMSTANCES IN THE INSTANT CASE PURSUANT TO SECTION 78-27-56 UCA.

Section 78-27-56 allows the prevailing party to be awarded attorney's fees when the Court finds the action or defense is "without merit" and it was "not brought or asserted in good faith". Under the circumstances of the instant case, the Court found that the State's action in this case were "unreasonable" and "asserted in bad faith" (R. 85). The trial transcript supports the award of attorney's fees. The Court at the time of trial advised the State's Attorney that the only issue to be resolved was an award of

attorney's fees; that all of the other issues were resolved in the previous hearing. The State, however continued to argue the issues which it had waived at the time of Pre-trial hearing and had not preserved for trial. Also the Court at the time of Pre-trial advised the State that if the evidence supported the fact that the State had notice of the parties' agreement prior to sending out their Notice to Respondent it would award attorney's fees to Respondent for the extra hearings (R. 14 L5-17, R. 19 L6-19).

The Court found that the State had been given notice (R. 83 L6). Further it found that the State had continued to ignore the Trial Court's order and continued to threaten garnishment of Respondent's income, even after the State had agreed that no money was owed by Respondent (R. 84 L10-12).

The State continued to press its case, even after it had stipulated to the outcome in two previous proceedings (R. 85-86).

The record is clear that the State agreed with the Domestic Commissioner's recommendations but objected to all issues, when the only issue was attorney's fees. The record is clear that the State agreed with the position of the Trial Courts and waived any objection to it, preserving the sole issue of attorney's fees for Trial. Although the Trial Court failed to express a finding of "without merit" the Court expressed this position on several occasions throughout the proceedings (R. 84, 85).

The Court did not err in an award of Attorney's fees in this matter. An award of attorney fees was proper even under Section 78-27-56.

POINT THREE

ISSUES AND ARGUMENTS WAIVED, NOT OBJECTED TO OR ELIMINATED AT A PRE-TRIAL CONFERENCE CAN NOT BE RESURRECTED AT THE TIME OF TRIAL.

Rule 16, U.R.C.P. allows the Trial Court to conduct pre-trial conferences upon its own discretion. At the conferences the Court may consider:

"(b)(1) The formation and simplification of the issues, including the elimination of frivolous claims, and defenses."

Utah courts have long held that issues and legal theories not preserved at pre-trial conferences are deemed waived or abandoned at the time of trial Parker v. General Motors Corp., 503 P2d 148, 28 UT 2d 385, DiEnes v. Safeco Life Ins. Co., 442 P2d 468, 21 UT 2d 147; Citizens (as Co of N.Y.) v. Hackett, 410 P2d 767, 17 UT 2d 304; Kaiser Aluminum & Chemical Sales, Inc. v. Lords, 460 P2d 321, 23 UT 2d 152; Youngren v. John W. Lloyd Construction Co., 450 P2d 985, 22 UT 2d 207; Rumay v. Salt Lake City, 400 P2d 205, 16 UT 2d 310.

In the instant case, the objection hearing of August 8, 1989 was deemed to be a Pre-trial by agreement of the parties (R. 70 L5-7). The Trial Court narrowed the issue which would be tried to that of whether Respondent was to be awarded attorney's fees (R. 71 L21; R. 72 L3). Appellant failed to preserve any other issue for Trial. In fact, Appellant agreed with the Trial Court's conclusion and disposition of all other issues (R. 71 L21 - R. 72 L3). By not objecting to the Court's determination of the issues at Pre-trial the Appellant waived its right to raise these issues again at Trial.

The Appellant never filed any pleadings in this case, either in response to Respondent's Order to Show Cause Affidavits or raised any issues or grounds for its filing of its objection to the Recommended Order of the Domestic Commissioner or filed any motions prior to Trial to frame any issues (Record).

The Trial Court even recalled that the sole issue preserved for Trial was attorney's fees and who should pay them (Transcript of Trial P3 L25 - P6 L7). The Court allowed, over the objection of Respondent, the Department to re-argue these issues because it did not have before it a record of the prior proceedings, and allowed the State's Counsel to present other arguments which had been waived at Pre-trial as a courtesy to Appellant's Counsel (Transcript of Trial P7 L11 - P8 L5) but essentially ruled that the State's arguments were not timely brought and rejected them (Transcript of Trial P50 L8-14), finding in favor of Respondent.

Appellant, by not objecting to the Court's determination of the issues and agreeing with the Trial Court, waived its right to preserve these issues for trial and waived its right to have the Court consider them at the time of Trial, even though the Court, as a courtesy to Appellant allowed arguments in that regard to be made. The sole issue at the time of trial was attorney's fees and nothing more.

POINT FOUR

ISSUES OR LEGAL THEORIES NOT PRESENTED AT TRIAL OR WAIVED PRIOR TO TRIAL CAN NOT BE RAISED FOR THE FIRST TIME ON APPEAL.

It has been long established that defenses, issues and

claims not raised by the parties in the trial court can not be considered for the first time on appeal Edgar v. Wagner, 572 P2d 405 (1977); Mascaw v. Davis, 741 P2d 938 (1987); Lane v. Messen, 731 P2d 488 (1984); James v. Preston, Ut App 746 P2d 799 (1987). In the instant case, Appellant would desire that this Court do precisely that and try the case at the appellate level. As presented in the previous argument, the Appellant abandoned any right to have the Court re-hear the case by it failing to preserve the issues it is now presently placing before this Court to decide by reason of the State's appeal in this matter.

I would submit that the only issue which is appealable before the Court is whether the trial court erred in awarding attorney fees to Respondent. Any other issue should be dismissed outright because that issue was waived at Pre-trial, and not tried at the time of Trial which has been already discussed in the previous points.

I would suggest to this Court that arguments and issues raised in this appeal by Appellant in his brief numbered one through six were never tried by the trial court, that these arguments had been decided and resolved at pre-trial, that these same issues or arguments were abandoned or waived by the State at pre-trial and it would be improper for the Court of Appeals to consider them where they were not presented or preserved for trial and should not be considered appealable issues for this Court to consider.

POINT FIVE

THAT RESPONDENT IS ENTITLED TO BE AWARDED COSTS AND

ATTORNEY'S FEES INCURRED IN RESPONDING TO THIS APPEAL.

Rule 33(a) and 40, Rules of the Utah Court of Appeals and this Court's previous decision in cases such as O'Brien v. Rush, Ut App 744 P2d 306 (1987); Topik v. Thunber, 739 P2d 1101 (1987) would allow this Court to award attorney's fees and costs for "frivolous" appeals. Additionally this Court has awarded attorney's fees and costs incurred on defending appeals under Section 30-3-3 UCA as in such cases as Fife v. Fife, Ct App 777 P2d 512 (1989); Kerr v. Kerr, 610 P2d 1380 (1980); Maughan v. Maughan, Ut App 770 P2d 156 (1989). It would be appropriate that this Court award Respondent his attorney's fees and costs incurred in defending on this appeal on either theory.

The trier of fact suggested in his decision of the case as to why Respondent should be entitled to attorney's fees in this matter, the same reason which Respondent urges this Court to adopt as follows:

There is no question that I'm irritated when I see a bureaucracy that has an endless supply of money unreasonably pressuring people without reason. And that's what I see in this case. I see bad faith from beginning to end on behalf of the State. The Court employed the parties at the last hearing to settle this because it was ridiculous to come back to this Court for a hearing just to determine who would pay attorney's fees.

There is no question that ... the Defendant in this action, Mr. Adams, has been forced to bring this action (Transcript of Trial P67 L9-19).

That this appeal is another attempt at pressuring the Respondent to concede to the State's position. It is clear the trial court can and does have the power to award attorney's fees

pursuant to Section 30-3-3 and 78-27-56 UCA. This Appeal by the Department is an unconscionable attempt by appeal to delay the imposition of the award of attorney's fees and cost and to pressure economically Respondent to roll over and play dead under the guise of an appeal of issues which were waived at pre-trial which have been continually resurrected at every hearing held previously and then abandoned by the State.

The Courts must address the issue and preserve the balance between the power and resources of the Department verses the limited resources of the individual as this case represents. An award of Respondent's attorney's fees and costs incurred is a necessity to preserve such a balance. The trial court again stated:

The State has agreed to the Court today that they have not -- that they're just a party to this action because they are kind of forced into it and they would not have pressured.

But the testimony clearly is that Mr. Coombs, clear up through even after this last hearing date on August 6th would still have gone ahead with taking a garnishment for these monies. So obviously they were using that pressure of the government without reason, without thinking.

Counsel says it's bad faith and the State's Counsel says there's nothing bad faith about it. It's bad faith from the beginning to [the] end. This whole action is bad faith of having to defend it by the Defendant."

Respondent would hope that this Court would agree with the Trial Court and award to him his costs and attorney's fees incurred on appeal and sustain the trial court in this matter.

CONCLUSION

The only proper applicable issue for this Court to consider

is the issue of attorney's fees. The Appellant at the time of Pre-trial abandoned, waived or stipulated away any other issue and only preserved the issue for trial of that of attorney's fees.

The Trial Court may award attorney's fees under Section 30-3-3 UCA in a domestic matter at its discretion. It also may award attorney's fees under Section 78-27-56 UCA. The award of attorney's fees to Respondent was reasonable under the facts and circumstances of this case.

That Respondent should be awarded his attorney's fees and costs incurred in defending this appeal because the Appeal is in bad faith and Respondent is entitled to be awarded his expenses under Section 30-3-3 UCA.

Respectfully submitted this _____ day of May, 1990.

SCOTT W. HOLT, Attorney for
Defendant-Appellant

CERTIFICATE OF MAILING

I, SCOTT W. HOLT, hereby certify that I have mailed four (4) true and accurate copies of the foregoing Brief of Defendant-Appellant to the following persons at the following addresses, by depositing same in the U.S. Mail, postage prepaid, on the ____ day of May, 1990:

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