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L. Craig Knudson and Lewis Craig Knudson v. Utah State Department of Social Services and Goldie Knudson : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

L. CRAIG KNUDSON, a/k/a LEWIS CRAIG KNUDSON, Plaintiff and Appellant, vs. UTAH STATE DEPARTMENT OF SOCIAL SERVICES and GOLDIE KNUDSON, Defendants and Respondents.	Case No. 18162

BRIEF OF APPELLANT

Appeal from the Decision of
the Third Judicial District Court of Salt Lake County,
State of Utah
Honorable G. Hal Taylor, District Judge

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STATEMENT OF THE NATURE OF THE CASE

This case is an appeal from a decision of the Third Judicial District Court that affirmed an administrative action which had ostensibly adjudicated Appellant's so-called "support debt" and attendant obligation to reimburse the Utah State Department of Social Services for payments made by the Department to Appellant's former wife (Co-Respondent) as support for the parties' child.

DESIGNATION OF PARTIES

Since the Appellant in the present proceeding was designated as "Defendant" in the administrative proceedings and since the Respondents herein were designated "Plaintiffs" in that hearing, this Brief will endeavor to avoid confusion by designating the parties as follows: Appellant shall be referred to as "Craig", "Craig Knudson" or "Appellant." Respondent, Utah State Department of Social Services, shall be referred to as the "Department", "Department of Social Services" or "Respondent." Respondent,

Goldie Knudson, shall be referred to as "Goldie", "Goldie Knudson" or "Co-Respondent."

STATEMENT OF THE FACTS

Craig and Goldie Knudson were married in Ogden, Utah on June 24, 1972 (R.38, 69). After their marriage, Craig worked as a salesman for various companies, largely handling promotions, liquidations and distress sales. Goldie was occasionally employed to work for these assorted companies on a temporary basis with Craig (R.45). Craig earned most of the family's regular income. Goldie's employment was episodic in nature and the earnings derived therefrom varied greatly (R.45).

The couple purchased a Fleetwood mobile home in November or December of 1975 (R.44, 67, 70), paying approximately $2,000 as a down payment (R.44). Title to the mobile home was taken in Craig's name alone (R.53). The balance of the purchase price was financed by the W.E.A. Credit Union (R.67, 70). After moving into the mobile home, Goldie ceased to work altogether (R.45), and Craig made all of the installment payments thereon (R.46 to 49).

A son was born to the Knudsons on July 8, 1977 (R.38). Shortly thereafter, Craig obtained regular full-time employment as a salesman at LaBelle's Catalog Showroom store in Ogden, Utah (R.43). In January of 1978 Craig was given a promotion by LaBelle's and advanced to the position of sales manager for the audio department at LaBelle's new store to be opened in Provo, Utah (R.43). The Knudsons prepared to move to Provo

in order that Craig might assume his new job in March of 1978 (R.43, 44). In this connection, Goldie advertised the mobile home in Ogden for rent in the Ogden Standard Examiner (R.44, 52, 78). The mobile home was rented for $225.00 per month (R.44, 52, 59), and Goldie accepted a security deposit from the prospective tenants (R.44, 59). With the assistance of a U-Haul trailer provided by LaBelle's, the Knudsons moved to Provo in late February or early March of 1978 (R.44).

Craig obtained a suitable residence for his family in Provo (R.44), and assumed his duties as audio manager at the new store. In order to prepare for the "grand opening," Craig was required to work evenings, as well as days. Goldie became dissatisfied that Craig was not spending enough time with her (R.44). Consequently, one evening in March or early April of 1978, when Craig had returned from the store for a meal, Goldie demanded that Craig spend more time with her and, in particular, remain home that evening (R.44). Craig told her that he was required to return to work, whereupon she threatened to leave (R.44). In fact, Goldie left Craig that night and, with their son, took up residence once again in the mobile home in Ogden (R.44, 46). The tenants had not then entered into occupancy of the trailer; they were subsequently denied occupancy by Goldie, who continues to reside in the trailer.

Shortly after she left Craig, Goldie began demanding that Craig pay her $200 per month as child support (R.45, 46). Craig and Goldie had a number of conversations concerning her

demands for child support during April and May of 1978 (R.45, 46). They reached an oral agreement that Craig would permit Goldie to occupy the mobile home in Ogden rent-free in lieu of cash support payments to her (R.46). As part of this arrangement, Craig was to continue to make the installment payments to the credit union, to pay the lot rent for the trailer space and otherwise to defer the expenses connected with the mobile home (R.46). At this time, Goldie had not filed for divorce or otherwise sought support and maintenance from Craig in any judicial proceeding. Craig hoped to effect a reconciliation.

Sometime during the Summer of 1978, Goldie informed Craig that she was seeking public assistance and that the welfare department would seek reimbursement from him (R.45). Subsequently, Craig did receive a letter and two telephone calls from the Department of Social Services with respect to such reimbursement (R.46). The first telephone call was received by Craig at the LaBelle's store in Provo (R.46) sometime during October of 1978. The caller was a gentleman who identified himself as an agent of the Department of Social Services, and inquired whether or not Craig was making support payments to his wife (R.46). Craig explained the substance of his agreement with Goldie and pointed out the fact that he was making the installment payment on the trailer which she occupied, the lot payment on the trailer space, the taxes on the trailer and the like (R.46). Shortly thereafter, Craig received another inquiry by telephone from a Departmental agent. This time the caller was a woman (R.46). Craig explained to her the same things which he had previously

described to the gentleman (R.47). Upon the basis of these conversations, Craig understood that these payments-in-kind were satisfactory to the Department. He was not aware of any claim by either Goldie or the Department to the contrary until this proceeding was commenced almost eighteen months later (R.46, 47, 59, 60).

A month or more after these telephone conversations, Goldie filed a divorce action against Craig on or about December 5, 1978, in the Second Judicial District Court for Weber County (Knudson v. Knudson, Civil No. 71529). Notwithstanding the provisions of Sections 78-45-7(3), 78-45-9, and 78-45b-3, the Department of Social Services did not enter an appearance or otherwise participate in the divorce action (R.66 to 74).

Early in the course of the divorce action, Goldie sought temporary alimony and child support from Craig by a Motion for Order to Show Cause, filed on or about February 26, 1979. In connection therewith, Goldie filed an Affidavit (R.76 to 77) in which she recited the "amounts . . . reasonably necessary to maintain (her) and her child." As necessary expenditures for support, Goldie's Affidavit begins by listing $173 per month as the payment obligation on the mobile home, $8 per month as insurance thereon, $60 per month as lot rent for the space occupied by the trailer, and $15 per month as taxes assessed against the trailer (R.75). The cumulative amount of these expenses is $256 per month. At the time, Craig was, in fact, paying all of these expenses (R.47 to 49, 79 to 83). Goldie

also sought an additional $445 per month in her Affidavit (R.76).

So far as the record discloses, no order of temporary alimony or support was ever entered in the divorce action (R.39), apparently because Craig was paying the expenses associated with the housing of Goldie and the child. The divorce proceeding came on for an evidentiary hearing on August 23, 1979, but a Decree was not entered and Findings of Fact and Conclusions of Law were not made until November 21, 1979 (R.66 to 74).

The Decree (R.66 to 68) makes no mention of temporary alimony or support whatsoever. Goldie was awarded only $1 per year as prospective alimony and maintenance (R.67, Para. 5). Goldie was also awarded child support in the amount of $150 per month (R.67, Para. 4). However, Goldie was also ordered to assume and pay the installment obligation on the mobile home from and after September 1, 1979 (R.67, 68, Paras. 6 and 11). The Court awarded each party one-half of the equity in the mobile home as of Septebmer 1, 1979 (R.67). Since the entry of the Decree, Craig has complied with all provisions thereof.

The administrative proceeding to collect support payments was commenced on or about January 16, 1980, to recover for payments made by the Department to Goldie during the pendency of the divorce action, but prior to the hearing thereon and prior to the entry of the Decree therein. The divorce action was filed on or about December 5, 1978, and the hearing thereon occurred on August 23, 1979. Thus, the Department seeks reimbursement for support payments in the amount of $176 per month

from December of 1978 through July of 1979. During this period, the Department provided benefits, for which it now seeks reimbursement from Craig, in the cumulative amount of $1,408.00. During the same period, Craig provided benefits to Goldie at the rate of $256 per month, for a cumulative total, over the same period, of approximately $2,048.00. But since Craig provided these benefits to Goldie in-kind, rather than in-cash, the Department takes the position that Craig provided no support to Goldie and, hence, should reimburse the State for its payments on precisely the same basis as if Craig has provided no benefits whatsoever to his family.

The administrative proceeding came on for hearing before the Honorable Carolyn N. Eklund, Administrative Law Judge, on February 26, 1980. The only witness to testify was Appellant, Craig Knudson. Although Goldie was present at the hearing and occasionally interjected unsolicited comments, she was not called as a witness by the Department. Indeed, the Department adduced no evidence whatsoever, aside from its records concerning the amount of money the Department had paid to Goldie over the period in question (R.39, 62 to 65). The Department did not interpose any evidentiary objections to the testimony adduced by Appellant at the administrative hearing. Consequently, the facts as stated herein stand uncontroverted and undisputed.

SUMMARY OF THE FACTS

The foregoing uncontroverted testimony clearly demonstrates the following essential propositions:

1. Goldie refused to reside with her husband at his place of employment and abandoned him to return to his mobile home in Ogden.

2. Thereafter, Goldie demanded that Craig pay her $200 per month as support for her and for their son. After some discussions, Goldie agreed to accept rent-free occupation of the trailer, together with certain associated benefits, in lieu of such cash payments.

3. The reasonable rental value of the trailer occupied by Goldie and the child under this arrangement, as demonstrated by the actual rental thereof prior to the parties' move to Provo, exceeded $225 per month.

4. The cost to Craig of providing such rent-free housing for Goldie and the child amounted to approximately $256 per month.

5. The Department of Social Services received actual notice of the facts (i) that Craig was providing housing to Goldie and the child on a gratis basis, (ii) that the provision of such housing required a monthly expenditure somewhat in excess of the support requested by Goldie for herself and for the child, (iii) that Goldie had agreed to accept such rent-free housing in lieu of cash payments of support, and (iv) that Craig was relying upon a reasonable belief as to the efficacy of such an arrangement.

6. The Department never entered an appearance in the divorce action and never advised Craig that the continued provision of rent-free housing was unsatisfactory or less satisfactory than payments in cash.

7. Goldie continued to accept rent-free housing from Craig under the parties' previous arrangement even after the commencement of the divorce action and after the receipt of welfare benefits from the Department. Although Goldie moved for an order granting her temporary alimony and child support, no such order was ever entered in the divorce action, once it became clear that Craig was already providing benefits to Goldie in an amount equal to or in excess of the amount of any temporary support to which she might conceivably be entitled under the circumstances.

8. Under the Decree of Divorce, Craig was relieved of any obligation to continue the provision of rent-free housing in the trailer for Goldie, an expense amounting to approximately $256 per month, and ordered instead to make cash payments of child support to her in the amount of $150 per month and alimony in the amount of $1 per year. The actual effect of the Decree was a net reduction in the cost to Craig of the benefits provided to Goldie and the child of $105 per month.

DISPOSITION IN THE ADMINISTRATIVE PROCEEDING

On or about March 5, 1980, a Memorandum of Findings and Order was entered jointly by Carolyn N. Eklund, the Administrative Law Judge, before whom the case was tried, and by John P. Abbott, Director of the Office of Recovery Services, who had not been present at the proceedings and had not heard the evidence. The Memorandum and Order concludes:

(1) That Appellant, Craig Knudson, is entitled to a

credit for the lot rental payments which he made to secure a space upon which to locate the trailer; but

(2) That Appellant is entitled to a credit neither (i) for the reasonable rental value of the trailer itself (this is a necessary inference but is not an explicit conclusion), nor (ii) for the cost incurred by him in making the same available for exclusive use by Goldie and their child. In this connection, the Memorandum and Order somehow concludes that Appellant would be "unjustly enriched" by such a credit, because the Decree of Divorce awarded Craig one-half of the equity in the trailer -- a trailer for which Craig had paid all or substantially all of the original consideration and all of the installment payments for the nearly four years since its purchase.

The findings of fact included within the agency Memorandum and Order are generally accurate, but they reflect only a slight fraction of the undisputed facts adduced at the hearing. Said findings are inadequate either to support the agency decision or to support any alternative decision. However, the testimony adduced at trial was credible, consistent and uncontroverted. Additional findings based thereon should have been made, and additional facts should have been adduced by the Department.

DISPOSITION IN THE LOWER COURT

The Third Judicial District Court of Salt Lake County, the Honorable G. Hal Taylor presiding, upheld the Order of the Administrative Law Judge without comment concerning his ratio decedendi (R.173). No argument had been heard (R.169, 173).

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the Order of the Third Judicial District Court and of that portion of the administrative Memorandum and Order which denies recognition to the reasonable rental value of the housing and other benefits provided by Appellant for his family during the period in question and which thereby adjudicates Appellant's putative "support debt" in derogation of the facts and circumstances of the case. Appellant seeks a decision and Order from the Court determining that he has no obligation to make reimbursement to the Department in this proceeding. Appellant further seeks an award of his attorneys' fees.

ARGUMENT

I.

THE DEPARTMENT IS BARRED FROM RECOVERING REIMBURSEMENT FROM APPELLANT BY THE DOCTRINE OF RES JUDICATA.

Utah law is clear that estoppel by judgment, or res judicata, applies (i) not only to claims which were actually litigated but to claims which might have been litigated in the prior proceeding, and (ii) not only to parties represented in the prior proceeding but also to persons or entities "in privity with or claiming through" a party appearing in the prior proceeding. In the recent case of Krofcheck vs. Downey State Bank, 580 P.2d 240 (Utah, 1978) this Court reiterated these principles in holding that the bar of res judicata or estoppel by judgment applies when:

(1) the present case involves the same party or "one in

privity with or claiming through a party appearing in the prior action;"

(2) there has been a final judgment in the prior action; and

(3) the issue in question was raised or "could have been raised" in the prior proceeding.

Each of the Krofcheck criterion has been met in the instant case. First, the Department freely admits in the course of its argument (R.144) that it is in privity with a party to the prior proceeding which is relevant here, i.e., the divorce action between Craig and Goldie. Indeed, it claims to have been the "real party in interest" in that prior action (R.144), and the Department claims to have been in privity with Goldie by virtue of a written assignment of the very claims which were litigated by Goldie in the prior action (R.144). Moreover, the Department has no independent right of recovery against Craig, except by claiming through Goldie. This Court in Mecham vs. Mecham, 570 P.2d 123, (Utah, 1977) clearly so held:

> "As to reimbursement for support furnished [by the Department] to Maxine Mecham, the department's rights are derivative from and no greater than Maxine's rights." 570 P.2d at 125.

This principle was acknowledged and reaffirmed in the recent decision of the Court in Roberts vs. Roberts, 592 P.2d 597 (Utah, 1979). Hence, the Department was in privity with Goldie in the prior action for two separate reasons: First, the Department was in privity with Goldie as a matter of fact by virtue of a written contract, wherein Goldie assigned to the

Department the benefit of the very rights which she sued to enforce in the prior action. Second, the Department was in privity with Goldie as a matter of law, because the Department's rights are entirely derivative from Goldie's rights. That is to say, the Department can only recover against Craig by "claiming through Goldie." Consequently, the Department's argument that it was a real party in interest to the prior action by virtue of a written assignment from Goldie hardly serves as a defense against the application of res judicata to this case. Quite the contrary, such an argument admits and thereby proves that the Department stood in privity with a party in the prior action. As such, the Department's admission demonstrates beyond any question that the first standard of the Krofcheck test has been met.

The second standard of the Krofcheck test has also been met: there can be no question that a final judgment in the prior divorce case has been entered.

Similarly, the third standard of the Krofcheck test has been satisfied. The question of liability for child support payments not only "could have been litigated" but was actually litigated in the prior proceeding. In this connection, it should be observed that the bar of res judicata applies so long as the claim was raised or might have been raised, regardless of whether it was actually decided in the prior proceeding. See: Krofcheck, supra: and Belliston vs. Texaco, Inc., 521 P.2d 379 (Utah, 1974) wherein this Court held:

> " . . . this court [has] stated that the doctrine of res judicata applies not only to points and issues

> which were actually raised and decided in a prior action, but also to those that could have been adjudicated . . ." (521 P.2d at 380).

The question of temporary alimony and child support was actually raised in the prior proceeding. Since Craig was providing adequate support for his family, Goldie chose not to press her claim for temporary child support to judgment. However, a motion for temporary child support and alimony, together with a supporting affidavit and order to show cause are of record in the prior divorce proceeding; and the affidavit is of record in the administrative proceeding from which this appeal is taken (R.75 to 77).

Applying the principles of Krofcheck and Belliston to a case almost indistinguishable from the instant one, this Court held that the principle of res judicata precluded the Department of Social Services from seeking, after entry of a divorce decree which failed to mention the temporary alimony and child support that had been sought in that divorce proceeding, reimbursement for support payments made during the pendency of the prior divorce action. In this connection, the Court held as follows:

> ". . . the same principle applies to child support which accumulated prior to the date of the [divorce] decree . . . Maxine had pleaded in her complaint for temporary child support; there was no provision in the decree for any sum expended for support of the child [during the pendency of the divorce action] . . . Maxine also had a duty to support the child, Section 78-45-4. Under the decree she was ordered to assume and pay any and all debts she had incurred since the filing of the complaint and to hold her husband harmless. Maxine did not seek in the decree any sum for reimbursement for the money she had expended for support of the child, although she had put that matter

at issue in her pleadings. The rights of the Department are derived through Maxine -- the matter is res judicata." Mecham vs. Mecham, 570 P.2d 123, 125 (Utah, 1977) (emphasis added).

In the face of these compelling authorities, the Department has contended that the Mecham decision was overruled by Roberts vs. Roberts (R.144). That is simply not true. This Court in Roberts reached a different result because the facts were different. Nothing in Roberts indicates that Mecham is overruled on its own facts. Indeed, the court in Roberts reaffirmed Mecham's cogency under facts similar to those in evidence in the instant case by holding:

"Mecham does not prevent the State from ever obtaining reimbursement for sums expended by the state prior to a court decree. Rather, it merely holds that the State's right to reimbursement is derivative from the person entitled to support and is limited to the amount of support fixed by the court. Because the district court assessed no child support payments against the defendant until after the effective date of the decree, the State was not entitled to reimbursement for those sums expended upon the child before the decree." Roberts vs. Roberts, 529 P.2d 597, 599 (Utah, 1979).

That is, indeed, the holding in Mecham. And, more importantly, that remains clearly the law applicable to the facts of this case. The Court reached a different result in Roberts solely because the Department had timely intervened and asserted its claim in the Roberts' divorce action. Consequently, no claim of res judicata was possible under Roberts' facts. It would be clearly erroneous, however, to conclude, as the Department argues, that because the doctrine of res judicata was inapplicable under Roberts' facts, the Roberts decision must somehow overrule Utah law on res judicata questions!

Moreover, the Court in Roberts mentioned the 1977 amendments to the Uniform Civil Liability for Support Act, Utah

Code Ann. §§78-45-1 to 78-45-13 (1953), which may have been made, in part, as a legislative response to the Mecham decision. In particular, the legislature added subsection (2) to §78-45-9 (Sess. L, 1977, Ch. 145, Sect. 11). This provision provides as follows:

> "(2) No obligee shall commence any action to recover support due or owing that obligee whether under this act or any other applicable statute without first filing an affidavit with the court stating whether that obligee has received public assistance from any source, and if the obligee has received public assistance, that the obligee has notified the department of Social Services in writing of the pending action."

This provision was obviously inserted to protect the State against the res judicata effects of decisions entered in divorce proceedings. It should be observed, however, that the statute clearly acknowledges that res judicata effects will attend any final judgment entered in such divorce proceedings. Otherwise, there would be no need for such a statute.

Conceivably, the legislature could have provided for a jurisdictional disability to proceed with divorce actions until and unless the Department had been duly informed. Alternately, the legislature could have provided that divorce decrees would not become final vis-a-vis the Department, until and unless the Department was made a party thereto. This, however, the legislature refused to do. Rather, the legislature sought to address this problem, not by changing the law with respect to res judicata and the finality of judicial decrees, but rather by requiring welfare recipients to notify the Department of the pendency of such judicial proceedings in order that the

Department might enter a timely appearance therein and thereby act to protect its claims and interests against the bar of res judicata which would otherwise apply.

Certainly, there is nothing in either this statute or in the decisions of this Court which would even remotely suggest that the principles of res judicata have been somehow superseded or suspended as applied to the Department. Indeed, the raison de etre of the post-Mecham statutory amendments was the accepted and understood application of the general principles of res judicata to cases of this nature. The Department's argument that these authorities have somehow lifted the bar of res judicata as applied to the Department is simply and obviously a non sequitur.

Moreover, additional support for the theory that the Department is barred by the decree entered in the prior divorce action is provided by Utah Code Ann. §78-45b-3(5) (1953) -- a portion of the Public Support of Children Act:

> "(5) Any Court order embodying a money judgment for support to be paid to an obligee by any person shall be deemed [to be] in favor of the department [of Social Services] to the extent of the amount of the department's subrogation rights. This transfer of interest shall be applicable to court orders including, but not limited to, temporary spouse support orders, family maintenance orders, or alimony orders for the benefit of a dependent child but allocated to the benefit of that child on the basis of providing necessities to the person in whose custody that dependent child resides." (emphasis added)

The clear implication of this statute is that the Department's rights are delimited by the court order entered in a prior divorce proceeding. The Department, by virtue of its "subrogation

rights" gets the benefit of the judgment in a prior divorce proceeding. However, the Department should also bear the burden of that adjudication as well. The estoppel arising from the entry of such a judgment must, in equity, be mutual. Certainly, there is nothing in the Public Support of Children Act which would even remotely suggest that the Department may claim the benefit of an estoppel arising from such a judicial decree but still avoid the "inconvenience" of being bound by its less favorable terms. To get the benefit, the Department must bear the burden.

This already clear implication is bolstered by the next provision of the same statute, which declares:

> "(6) The Department shall have the right to petition the court for <u>modification</u> of any court order <u>on the same basis as a party to that action would have been able to do so</u>." §78-45b-3(6) (emphasis added).

The application of generally accepted and universally known principles or res judicata to the facts of this case is neither unexpected nor unfair, even assuming, <u>arguendo</u>, that the Department had a viable claim against the Appellant. The preclusion of that claim by the bar of res judicata is not the Appellant's fault. After all, the Appellant was merely a hapless defendant in the divorce proceeding. The Appellant was not in privity with and had no direct responsibilities or obligations to the Department. Quite the contrary, the Department's difficulties in this case were of its own making. They were the direct and proximate result of its own negligence in failing to supervise and police the actions of its welfare recipients.

Goldie, not Craig, had a duty to advise the Department of the pendency of the divorce action. The Department, not Craig, had the responsibility to monitor Goldie's compliance with this requirement. Indeed, Craig had no reliable way of knowing whether or not the Department had, in fact, any viable interest in the divorce action. Most assuredly, he was not a knowing participant in any scheme or artifice to defraud the Department. It made no difference to him whether the Department participated in the divorce action or not. In short, there is no conceivable rationale upon which the burden of the Department's own negligence or Goldie's either negligent or knowing omissions should be placed on Craig's shoulders.

The Department may have a claim against Goldie. But it has no claim against Craig.- The Department knew or reasonably should have known that its rights would be precluded by any action brought by Goldie. That was the direct, clear and unavoidable meaning of the statutes under which the Department was operating. To the extent that Goldie deceived the Department or, alternately, to the extent that the Department negligently failed to intervene in the divorce proceeding notwithstanding such notice, the Department has no claim against Craig and no basis upon which to argue for broad and sweeping changes in the hitherto well-accepted principles of res judicata otherwise applicable to this case.

II.

VIOLATIONS OF APPELLANT'S STATUTORY AND DUE PROCESS RIGHTS BY THE DEPARTMENT SHOULD, AT LEAST, CAUSE THIS CASE TO BE REMANDED FOR A FULL AND FAIR HEARING

The Department, however, seems to suggest that it has some sort of separate, non-derivative right to reimbursement from Appellant which exists apart from and was not precluded by the adjudication of, Goldie's rights. In this connection, the Department argues:

> ". . . in addition, subsequent legislation was passed that specifically provided for payments which Meacham [sic] precluded. These provisions are set forth in Utah Code Annotated [sic] 78-45-7(3)" (R.144).

But this theory is bereft of any support whatsoever, either in the law of this State or in the record of this proceeding.

The statute cited by the Department to support their theory in fact provides as follows:

> "78-45-7 Determination of Amount of Support.
> (1) Prospective Support shall be equal to the amount granted by prior court order unless there has been a material change of circumstance on the part of the obligor or the obligee.
> (2) When no prior court order exists, or a material change in circumstances has occurred, the court in determining the amount of prospective support shall consider all relevant factors, including but not limited to:
> (a) The standard of living and situation of the parties;
> (b) The relative wealth and income of the parties;
> (c) The ability of the obligor to earn;
> (d) The ability of the obligee to earn;
> (e) The need of the obligee;
> (f) The age of the parties;
> (g) The responsibility of the obligor for support of others.
> (3) When no prior court order exists, the court shall determine and assess all arrearages based upon, but not limited to:

(a) The amount of public assistance received by the obligee, if any;
(b) The funds that have been reasonably and necessarily expended in the support of spouse and children (emphasis added).

This statute is part of the Uniform Civil Liability for Support Act, Utah Code Ann. §§78-45-1 to 78-45-13 (1953). As such, it deals exclusively with judicial determinations of the amount of support to be provided to an "obligee." On its face, the statute has no application to the facts of the instant case because there was a prior court order entered by a court of competent jurisdiction. The issue of "arrearages" or temporary support and alimony was raised in the prior judicial proceedings. The court order entered therein adjudicated this matter for the reasons amply indicated above.

Moreover, even assuming, arguendo, that the provisions of Section 78-45-7 apply to administrative agency proceedings, rather than to judicial proceedings, and that the doctrine of res judicata is inapplicable, the Department still has not complied with the terms of this statute. In determining the amount of prospective support and of any "arrearages" owing under a support obligation, the statute, when read as a whole, clearly requires the court to consider "all relevant factors including but not limited to" the standard of living of the parties; the situation of the parties; the relative wealth and income of the parties; the ability of the obligor to earn; the ability of the obligee to earn; the need of the obligee; the age of the

parties; the responsibility of the obligor for the support of others; and, to determine "arrearages", "when no prior court order exists," the amount of public assistance received by the obligee, if any.

In its administrative hearing, the Department provided no evidence whatsoever bearing upon the standard of living and situation of the parties, the relative wealth and income of the parties, the ability of the obligor to earn a living, the ability of the obligee to earn a living, the need of the obligee, the age of the parties, or the possible responsibility of the obligor for the support of others. Indeed, the Department rested its case after showing only the amount of the support payments made to Goldie during the period in question. No effort was made to assess all or even to consider most of the other factors required for a proper determination of the "support obligation" of Appellant under the statute. Clearly, the Department had the burden of proof on this issue. The minimal facts that were presented relative to these considerations were produced by Appellant. This modicum of evidence consisted of Appellant's testimony that during the period for which the Department seeks reimbursement, Appellant was employed by LaBelle's as an audio manager (R.43); that from 1973 through 1975, inclusive, Goldie earned approximately $6,000 per year (R.45); that from 1975 through 1978 Goldie had no earnings (R.45); that after leaving Appellant, Goldie requested that Appellant pay $200 each month as child support (R.45); that Appellant had then declared he could not afford to pay such support (R.46); and that Goldie

worked during 1979 as a CETA summer work program bookkeeper (R.51). Appellant also introduced a certified copy of the divorce decree (R.66 - 68), the findings of fact and conclusions of law in the divorce proceeding (R.69 - 74), and the affidavit Goldie had used in an attempt to get support during the pendency of the divorce proceeding (R.75 - 77).

There is no provision in any Utah statute which makes the provision of public assistance the sole and exclusive determinant of an obligor's duty to make reimbursement to the Department. The Supreme Court in Mecham observed:

> " . . . the duty of support of the obligor is to the obligee. The State Department of Social Services has only the right to enforce the amount of support which is due the obligee from the obligor. The department may not unilaterally determine that amount and then enforce a right to reimbursement by an action . . ." 570 P.2d at 125 (emphasis added).

Certainly, this principle was not overruled by the statute in question (Section 78-45-7(3)), nor by the subsequent decision in Roberts. Rather, the Court in Roberts held:

> "However, the above amendment [Section 78-45-7(3)] would constitute a denial of due process to the obligor's spouse if the court assessed the obligor for all public assistance payments received by the obligee, without considering relevant factors such as the relative wealth and income of the parties; and the ability of the parties to earn income. Under [section] 78-45-7(2) seven such factors are required to be considered in determining the amount of prospective support. Under the Public Support of Children Act [78-45b-6(2)], which provides an administrative procedure for obtaining reimbursement for assistance payments made on behalf of minor children, similar factors must be considered in the hearing to determine the extent of the parent's liability for child support [footnote omitted]. The assessment of arrearages under [section] 78-45-7(3) must also be subject to consideration of the same factors." 592 P.2d at 599 (emphasis added).

It is, in fact, the Public Support of Children Act, Utah Code Ann. §§78-45b-1 to 78-45b-22 (1953), which governs the type of administrative hearing held in the instant case. Section 78-45b-4 provides the method for the Department to collect a support debt established by prior court order. Sections 78-45b-5 and 78-45b-6 provide for an administrative hearing to establish the required support in the absence of a prior court order. But in the instant case the divorce decree determined sub silentio that no support debt was owed by Appellant.

Even when such an administrative hearing is proper, Section 78-45b-6(2) requires a "full and fair" hearing that considers factors similar to those mandated by Section 78-45-7(2). It must be clear beyond cavil, then, that the provision of prior public assistance to an obligee is not the talisman of "reimbursement" liability as against the obligee's husband or father. Rather, before any obligation to make reimbursement to the Department may be constitutionally determined, all of the relevant factors "including but not limited to" those set forth in Section 78-45-7(2) must be carefully considered. Few, if any, of those factors were considered in this case. The Department made no effort whatsoever to adduce any testimony or other evidence bearing upon such factors. Notwithstanding the clear and unambiguous language in Roberts to the contrary, the Department blithely and blindly argues that subsection (3) of Section 78-45-7 is somehow a self-effectuating mandate for reimbursement completely independent of the provisions of subsection (2) of the same statute. The

incredible thing about this daring argument is that the Department has the remarkable temerity to cite Roberts in support of this contention!

It is equally intriguing that the Order of the Administrative Law Judge was assertedly based, at least partially, upon the prior decree of divorce that rendered such an administrative proceeding improper and upon the affidavit with which Goldie had unsuccessfully sought temporary support in the prior divorce proceeding (R.86).

In view of the existence of the prior divorce decree which demonstrated Appellant had no support debt, the Department, as noted above, could not have properly proceeded under Section 78-45-7, 78-45b-4, or 78-45b-5. The Department should have sought a modification of the divorce decree in accordance with Section 78-45b-3(6):

> "(6) The Department shall have the right to petition the court for modification of any court order on the same basis as a party to that action would have been able to do so." Section 78-45b-3(6) (emphasis added).

But it is clear that Goldie, as party to the prior divorce proceeding, cannot now seek a retroactive modification of the divorce decree entered therein. That decree has become final. The time periods provided in Rules 59 and 60 of the Utah Rules of Civil Procedure for the change or modification of said decree have long since expired. Certainly, Goldie could not now seek to re-open said decree and request a retrospective award of "temporary alimony and child support." If Goldie cannot properly seek such a retroactive modification of the prior decree, there is no reason in law or logic why the Department should be able

to do so. Indeed, this is precisely what the statute proscribes.

Even were Section 78-45b-5 not rendered inapplicable by its own terms and the prior divorce decree, the Department should not be permitted to do indirectly under Section 78-45b-5 that which it cannot do directly under Section 78-45b-3. Yet this is precisely what the Department purported to do in this case.

Consequently, the Department's mistaken argument that the primary issue before the Court on this appeal is whether or not the Department should be obligated to "consider" payments in-kind as support for a dependent child (R.144) simply begs the question. Before this issue may be properly addressed by the Court, the Department must first overcome two insurmountable obstacles:

(1) The Department must somehow avoid the res judicata effects of the prior judicial decree entered in the divorce action which, under both Utah case law and the relevant Utah statutes, is dispositive of the issue which the Department seeks to raise anew under the guise of "reimbursement."

(2) Having once avoided the application of res judicata, the Department must still establish that it has fully satisfied the requirements of Section 78-45-7(2) and Section 78-45b-6(2) which require it to plead and prove the material elements necessary to establish a proper support obligation, "including, but not limited to," the standard of living of the parties, the sitaution of the parties, the relative wealth and income of the parties, the ability of the obligor to earn income, the ability of the obligee to earn income, the need of the obligee for

financial support, the age of the parties, the responsibility of the obligor to support others, and similar factors which may be material to a proper and circumspect assessment of a support obligation. The Department has utterly failed to carry this burden of proof. The record is even devoid of any evidence arguably sufficient to permit findings on these issues.

III.

THE UNDISPUTED FACTS OF THIS CASE PRECLUDE THE DEPARTMENT FROM RECOVERING REIMBURSEMENT FROM APPELLANT

It is only after the Department has somehow satisfied the foregoing burdens that any question as to the efficacy of payments-in-kind to satisfy a support obligation can be properly raised.

The Department has argued that a "general rule" exists which declares "that the father is not entitled as a matter of law to credit for . . . voluntary expenditures when they are made in a manner other than that specified by the support order or divorce decree" (R.145). But the fact of paramount importance is that the instant case does not present a question of payments-in-kind tendered to satisfy a liquidated judicial decree ordering payments-in-cash, much less the even more remote question of the efficacy of payments-in-kind to satisfy already accrued payments under such a decree. Moreover, even if this case presented a situation within the purview of that so-called "general rule", this Court has repeatedly recognized "equitable exceptions" to the "general rule" which would be applicable.

See, e.g., Openshaw vs. Openshaw, 42 P.2d 191 (Utah, 1935) (dictum) and Boggs vs. Anderson, 528 P.2d 141 (Utah, 1974) (dictum).

Considering the agreement between Appellant and Goldie that Goldie and her child could live in the trailer house, which was paid for by Appellant and the title for which was in the name of Appellant only (R.53), in lieu of Appellant's making cash payments for child support demanded by Goldie but not ordered by any court (R.46), the most compelling case is Ross vs. Ross, 592 P.2d 600, 603-604 (Utah, 1979) (footnotes omitted) (emphasis added):

> "Plaintiff is not entitled, however to credit for expenditures made on behalf of the children or defendant which do not specifically conform to the terms of the decree. To do so would permit plaintiff to vary the terms of the decree and to usurp from defendant the right to determine the manner in which the money should be spent. Only if the defendant has consented to the plaintiff's voluntary expenditures as an alternative manner of satisfying his alimony and child support obligation, can plaintiff receive credit for such expenditures."

Obviously, the Appellant would not object should the Court decide to apply such an "equitable exception" as a rubric for reaching a correct result here. Indeed, the compelling circumstances of the present case certainly call for the application of such an "equitable exception," assuming that the "general rule" applies at all. But speculation over the scope and application of such "equitable exceptions" is unnecessary under the circumstances of this case, because this case does not fall within the purview of the ostensible "general rule" in any event.

During the period in question, there was no court order

requiring Appellant to pay any specific amount of support in cash or otherwise. Moreover, there was then -- and is now -- no legal requirement that a man, during coverture, support his wife and child by payments in cash. Prior to the entry of a judicial decree requiring liquidated support payments in cash, the question of whether or not a husband and father is providing adequately is not and cannot be fairly and rationally analyzed in terms of "cash payments." Rather, the question of whether such an "obligor" is providing support must be determined by reference to whether or not he has provided his family with the reasonable necessities of life, including such items as housing, food, and clothing. Certainly, it cannot be meaningfully contended -- as the Department incredibly, if intrepidly, argues by implication -- that a father is not supporting his family when he is providing them with the necessities of life unless such payments are in cash. Had Craig paid Goldie $225.00 per month in cash -- an amount established in an arm's length transaction as the rental value of the trailer house (R.44, 59) -- so that Goldie could have rented the same housing which she and her child occupied gratis at Appellant's expense of $256 per month (R.53, 75), then, apparently, the Department would have no complaint. However, because Appellant provided this benefit "in-kind", the Department considers it to be "administratively inconvenient" to acknowledge its existence (R.27,145). Surely this is a distinction without a difference. Furthermore, either the benefits conferred ($225 per month) or the costs incurred ($256 per month) exceed the $176 per month

"support debt" alleged by the Department to exist.

Still, the Department essentially argues that it is "too confusing" and too much of a burden for the Department to consider anything other than cash payments:

> "The Department suggests that the general rule is sound because if you begin making exceptions there is [sic] no factual or legal criteria [sic] upon which to base such exceptions. At what point do benefits begin and end, how are the benefits determined, how much credit should be given, are just a few of the questions that come to mind if the petitioner's theories are followed. The benefit theory espoused could only lead to an administrative and legal nightmare. This is particularly true when the department is involved, rather than the parties to the marriage" (R.145).

Once again, the Department appears to be arguing that its rights are somehow different from and superior to those of "the parties to the marriage." Since Utah law is clear that the Department's rights are entirely derived from Goldie's rights, this position is nonsense. However, the Department continues to argue:

> "As a practical matter the problems become insurmountable. What is the simple solution? Prohibit the "in lieu of" payments. This solution is certainly not an illogical and incomprehensible theory as suggested by petitioner, but represents a workable and sound basis for the resolution of the factual and legal problems which are inherent in the petitioner's proposed theories" (R.146).

The Administrative Law Judge specifically denied Appellant any credit for the benefits he conferred or the costs he incurred in making the trailer house available to Goldie and her child because the divorce decree awarded Appellant one-half of the equity in the trailer house for which he alone had paid and the title to which

was solely in his name (R.86). Under the view most favorable to Appellant, he lost $225 rental income per month; spent $60 per month to rent a space for the trailer house; and made $196 in payments for the trailer and its protection, only half of the benefit of which did he receive. Thus, he "spent" $225 plus $60 plus $98, or a total of $383, per month as "child support." Under the view most favorable to Respondents, which requires assuming that the lot rental of $60 was included in the trailer rental of $225 and that the divorce decree gave Goldie an equity in the trailer retroactive to the pendency of the divorce proceedings, the time for which the Department seeks reimbursement, Appellant "spent" 1/2($225 - $60) plus $60 plus $98, or a total of $240.50, per month as "child support." Such calculations do not seem overly burdensome; but even they are unnecessary because, as noted above, either the rental value of the trailer alone ($225 per month) or Appellant's out-of-pocket cost ($256 per month) for providing such housing exceeds the $176 per month demanded by the Department and the $150 per month established by the divorce decree as child support for the period after the time for which the Department seeks reimbursement. (It should again be remembered that despite Goldie's motion for temporary support during the pendency of the divorce action, the divorce decree awarded no such temporary support.)

The Appellant would be strenuously taxed to find a more damning and compelling indictment of the unreasonable, unconstitutional and grossly unfair position of the Department than that contained with the above quotations. The multiplication of

"administrative difficulties" is certainly no argument for the abridgment of substantial and, under the Roberts decision, constitutional rights of the individual involved. The Department is all too quick to forget that it has the burden of proof, that it is bound as a governmental agency to observe the Constitution, and that its internal convenience is not the touchstone of the legal principles involved. Certainly, its proposed approach to making these factual determinations -- which apparently consists of largely, if not exclusively, ignoring "inconvenient" facts - casts considerable doubt upon the limits which the Department sets upon itself in its own, in-house administrative proceedings to "adjudicate" its rights against individual citizens. Such a Departmental philosophy is hardly surprising, however, when one considers the latitude available for Departmental review of the Administrative Law Judge's findings:

> "78-45b-6.1. Findings and order by department -- Judicial review -- (1) Upon receipt of the administrative hearing officer's report of findings on the issues designated for hearing, the department may accept the report of findings as the basis for a final order or upon filing a statement of the legal or substantial factual basis in the record therefor, it may:
>
> (a) Reject all or any portion of the findings and remand for further hearing and findings on specified issues;
>
> (b) Disregard any portion of the findings and proceed to enter a final order based upon the remainder of the findings;
>
> (c) Substitute alternative or additional findings of fact on the issues designated for hearing, if the substituted findings are supported by a preponderance of the evidence in the record. The department shall then cause its findings and order to be served upon the responsible parent."

Indeed, counsel for the Department might extend his fatuous

arguments to an almost limitless extent. It is hardly conceivable that the "convenience" of the Department will be subserved by a simple distinction between "in-kind" and "in-cash" payments. Certainly the Department's arguments would apply with equal vigor to payments made, quite literally, "in-cash" for which no receipt was given and no cancelled check may be produced. Similarly, the Department might make precisely the same sort of argument with respect to payments made "in-cash" which, in the Department's curious and incomprehensible lexicon, somehow "benefited" the payor. For example, if an obligor makes a cash payment to an obligee, which the obligee then uses to make a house payment, which in turn might possibly result in the protection of the obligor's equity therein, will the Department be satisfied to credit the entire payment simply because it was "in-cash"? According to its argument, the Department cannot be discommoded by having to determine the relative "benefits" involved. Clearly the Department's "administrative convenience" might be impaired by examining these questions, which do not differ in any material respect from those which it finds intolerably inconvenient in the present case.

In short, the Department does not propose a clear and comprehensible legal rule when it seeks to elevate its bureaucratic convenience into a self-effectuating fiat; it only creates an arbitrary and unfair rule which does justice to neither party.

Obviously, little is gained by imagining "administrative difficulties" and multiplying the hypothetical ramifications of

these difficulties into some sort of "parade of horribles." The basic and ineluctable issue here is not the Department's convenience, but rather the Appellant's rights. The Department would do well to remember that the due process clauses of the Utah and Federal Constitutions were inserted therein to guarantee that individual citizens would be treated justly and fairly when they dealt with governmental agencies. This may be, and usually is, "administratively inconvenient;" but it is still the law, and the supreme law at that.

The question here, as the Court observed in both Mecham and Roberts, is one of due process of law. The facts of this case graphically demonstrate the most execrable denial of due process to this Appellant. He has been forced to re-litigate issues which already had been determined in his favor by a court of competent jurisdiction. By so doing, he has been forced to pay for the Department's bureaucratic bungling and negligence in the administration of its own responsibilities. He has been coerced to appear before an administrative tribunal whose impartiality and constitutional efficacy are at best questionable. He has been victimized by a proceeding in which clear, comprehensible, and uncontradicted evidence has been disregarded out-of-hand. He has witnessed the Department utterly fail to meet the statutory standards and burden of proof applicable to the instant case. He has seen a decision made and signed by an administrative officer who was not even present at the so-called "full and fair hearing." He has received a decision which ignores the facts

that were submitted into evidence. In sum, he has received an administrative decision which is founded primarily upon the "general rule" that the Department always wins, and which "is sound because if you begin making exceptions there is [sic] no factual or legal criteria [sic] upon which to base such exceptions" (R.145). On this appeal, he has been told in precisely that language that the administrative hearing process could offer him no relief, since it would be "inconvenient" to consider the actual facts of his case. This kind of protracted and egregious denial of due process should be redressed by this Court on this appeal.

CONCLUSION

Both the relevant Utah statutory and case law establish that the decree of divorce was res judicata upon Goldie's and the Department's right to recover funds expended on behalf of Appellant and Goldie's son during the pendency of the divorce proceedings. That decree demonstrated Appellant had no support obligation for the period in question beyond the support he had already provided.

The Department, in seeking to obtain reimbursement from Appellant, utilized a path which was statutorily proscribed because of the existence of the prior divorce decree. Moreover, the Department even failed to consider the factors that due process as well as the applicable statutes and cases mandate when an administrative adjudication of a putative support debt is a proper course to pursue. And the Department has failed to

utilize in a timely fashion the appropriate means of redress-judicial modification of the divorce decree.

Finally, the undisputed facts of this case show beyond reasonable question that Appellant furnished support which more than satisfied even the Department's demand for $176 per month during the pendency of the divorce proceeding.

Therefore, the decisions of the Third Judicial District Court and the Administrative Law Judge should be reversed; this Court should declare that Appellant owes nothing to the Department for child support during the pendency of the divorce action. If this is not done, the Court should, at least, remand the case so that the statutorily required factual determinations can be made. And, in view of the egregiously bad faith exhibited by the Department in pursuing Appellant, with full knowledge of the prior divorce decree, contrary to the clear dictates of due process, relevant statutes, and controlling case law, this Court should, in all equity and good conscience, award Appellant his attorneys' fees.

RESPECTFULLY SUBMITTED this 25th day of February, 1982.

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CERTIFICATE OF SERVICE BY DELIVERY

I, the undersigned, do hereby certify that I have this day personally served a true and accurate copy of the foregoing BRIEF OF APPELLANT upon the counsel of record for the Defendants and Respondents by hand-delivering the same to his offices in Ogden, Utah as follows:

Robert D. Barclay
Municipal Building, First Floor
Ogden, Utah 84401

DATED this 25th day of February, 1982.

Thompson E. Fehr