

1982

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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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.

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Case No. 18162

REPLY 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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## TABLE OF CONTENTS

	<u>Page</u>
<u>STATEMENT OF THE NATURE OF THE CASE</u> . . . . .	1
<u>DESIGNATION OF PARTIES</u> . . . . .	1
<u>STATEMENT OF THE FACTS</u> . . . . .	2
<u>DISPOSITION IN THE LOWER COURT</u> . . . . .	2
<u>RELIEF SOUGHT ON APPEAL</u> . . . . .	3
<u>ARGUMENT</u> . . . . .	3
I. THE DEPARTMENT IS BARRED FROM RE- COVERING REIMBURSEMENT FROM APPELLANT BY THE DOCTRINE OF RES JUDICATA . . . . .	3
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 . . . . .	18
III. THE UNDISPUTED FACTS OF THIS CASE PRECLUDE THE DEPARTMENT FROM RECOVERING REIMBURSEMENT FROM APPELLANT . . . . .	22
<u>CONCLUSION</u> . . . . .	25

## INDEX OF AUTHORITIES

### CASES CITED

#### United States Supreme Court

<u>Allen v. McCurry</u> , 449 U.S. 90, 94 (1980) . . . . .	7
<u>Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation</u> , 402 U.S. 313 (1971) . . . . .	12
<u>Santosky v. Kramer</u> , 71 L.Ed.2d 599 (1982) . . . . .	17
<u>Sea-Land Services, Inc. v. Gaudet</u> , 414 U.S. 595 (1974) . . . . .	13

#### Tenth Circuit

<u>Hoepfner Construction Company, Inc. v. United States</u> , 287 F.2d 108 (10th Cir. 1960) . . . . .	14
---	----

Colorado

<u>Harambee Enterprises, Inc. v. State Board of Agriculture</u> , 511 P.2d 503 (Colo. App. 1973) . . .	14
<u>In re Peterson</u> , 572 P.2d 849 (Colo. Ct. App. 1977) . . . . .	24

Minnesota

<u>Dereschuk v. Knudson</u> , 280 N.W.2d 42 (Minn. 1979).	15
---	----

Missouri

<u>C &amp; M Developers, Inc. v. Berbiglia</u> , 585 S.W.2d 176 (Mo. Ct. App 1979) . . . . .	15
<u>Cantor v. Union Mutual Life Insurance Company</u> , 547 S.W.2d 220 (Mo. Ct. App. 1977) . . . . .	15
<u>Warren v. Kirwan</u> , 598 S.W.2d 598 (Mo. Ct. App. 1980) . . . . .	14

Utah

<u>Bradshaw v. Kershaw</u> , 627 P.2d 528 (Utah 1981) . .	8
<u>International Resources v. Dunfield</u> , 599 P.2d 515, 517 (Utah 1979) . . . . .	8, 13, 14
<u>Krofcheck v. Downey State Bank</u> , 580 P.2d 243, 244 (Utah 1978) . . . . .	7, 8, 10
<u>Lynch v. MacDonald</u> , 397 P.2d 464 (Utah 1962) . .	14
<u>Mecham v. Mecham</u> , 570 P.2d 123 (Utah, 1977) . . .	7, 8, 9, 10, 11, 13
<u>Mendenhall v. Kingston</u> , 610 P.2d 1287 (Utah 1980)	8
<u>Nelson v. Smith</u> , 154 P.2d 634 (Utah 1944) . . . .	16
<u>Oppenshaw v. Oppenshaw</u> , 42 P.2d 191 (Utah 1935) .	24
<u>Ruffinengo v. Miller</u> , 579 P.2d 342 (Utah 1978). .	12
<u>Roberts v. Roberts</u> , 529 P.2d 597, 599 (Utah 1979) . . . . .	4, 20, 22
<u>Ross v. Ross</u> , 592 P.2d 600 (Utah 1979) . . . . .	23, 24

Page

<u>Searle Brothers v. Searle</u> , 588 P.2d 689, 690-691 (Utah 1978) . . . . .	8, 11, 13
<u>State Division of Family Services v. Clark</u> , 554 P.2d 1310 (Utah 1976) . . . . .	18
<u>Wilde v. Mid-Century Insurance Company</u> , 635 P.2d 417 (Utah 1981) . . . . .	11

Utah Constitution

<u>Article I Section 11</u> . . . . .	16
---------------------------------------	----

Statutes

U.C.A. §§78-45-1 to 78-45-13 (1953) . . . . .	10, 18
U.C.A. §78-45b-1.1 (1953) . . . . .	10
U.C.A. §78-45b-3(5) (1953) . . . . .	6
U.C.A. §78-45b-3(6) (1953) . . . . .	6, 19
U.C.A. §78-45-7(2) (1953) . . . . .	19, 20
U.C.A. §78-45-9(2) (1953) . . . . .	6
Utah Rules of Civil Procedure, Rule 17(a) . . . . .	9, 10, 16

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Case No. 18162

UTAH STATE DEPARTMENT OF  
SOCIAL SERVICES and  
GOLDIE KNUDSON,

Defendants and  
Respondents.

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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 convusion 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

The Brief of Respondents disagrees (Resp. B. 2 to 4) with several of the facts enumerated in the Brief of Appellant. However, in their Brief on Judicial Review of Administrative Order (R.143) Respondents stated that they concurred with Appellant's statement of the facts in Appellant's Brief on Judicial Review of Administrative Action (R.3 to 9) with the exception that Respondents challenged the fact that the Department of Social Services had received actual notice regarding the monetary arrangements between Craig and Goldie Knudson and denied that the Department had acquiesced to any such agreement. It was on these facts that the Court below rendered its decision. A perusal of the statement of the facts in the Brief of Appellant (App. B. 2 to 9) will demonstrate that the facts recited therein, including the summary of those facts, are virtually identical to those contained in Appellant's Brief on Judicial Review of Administrative Order. It is these facts which are to be reviewed by this Court.

#### 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.

As was diligently demonstrated in the Brief of Appellant, the instant case is governed by this Court's ruling in Mecham v. Mecham, 570 P.2d 123 (Utah 1977).

The Court in Mecham held:

"As to reimbursement for the support furnished to Maxine Mecham, the Department's rights are derivative and no greater than Maxine's rights. In her complaint, Maxine pleaded for temporary alimony. In the decree, she was denied past and present alimony; defendant's duty of support was determined, and the matter is res judicata. The Department cannot file a complaint one year after a court has determined the amount of support (in this case nothing), and demand reimbursement under Chapter 45.

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).

Subsequently, this Court reaffirmed Mecham's cogency under facts similar to those 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).

In the instant case, as in Mecham, the Department of Social Services is seeking to obtain reimbursement for funds given to the Department's co-respondent -- in Mecham, Maxine Mecham; and in the instant case, Goldie Knudson -- as "support" for each co-respondent's child during the pendency of such co-respondent's divorce proceeding. In Mecham (Mecham vs. Mecham, Case No. 14910, Resp. B. 6 and Appendix A to this Reply Brief) as well as in the instant case (R.62) an assignment of the co-respondent's right to

child support was executed in favor of the Department of Social Services by each co-respondent. In Mecham the wife filed a complaint for divorce; in that complaint she sought temporary alimony and child support; after first scheduling the divorce case for an adversary hearing, the parties presented a stipulation to the court with the result that the divorce was handled on a default basis; the record of the divorce proceeding does not indicate that Maxine Mecham pursued her demand for temporary alimony or support; and, with respect to child support, the divorce decree merely ordered the husband to pay Maxine Mecham \$75.00 per month as child support. Mecham vs. Mecham, supra at 124, R.16, 19, 23, Exhibit "A" to Resp. B. In the instant case the wife filed a complaint for divorce; she thereafter filed a motion for her husband to show cause why he should not be required to pay her temporary alimony and child support during the pendency of the divorce proceedings (Appendix B to App. B.); this order was accompanied by a supporting affidavit of Goldie Knudson; the record does not indicate that she pursued her demand for temporary alimony or support; although the divorce was originally scheduled for an adversary hearing, the parties in court agreed to an oral stipulation with the result that the divorce proceeded on a default basis; and the divorce decree merely awarded Goldie child support in the amount of \$150.00 per month, making no mention of temporary alimony or support (R.66, 67, 68, 76, 77). In neither Mecham nor the instant case did the Department of Social Services intervene in the divorce proceedings (R.66 to 74,



Mecham vs. Mecham, Case No. 14910, App. B. 3). Mecham and the instant case are, thus, factually indistinguishable.

This Court's theory and declaration that divorce decrees such as those in Mecham and the instant case should be res judicata against the Department of Social Services in any proceeding subsequent to the divorce for the purpose of obtaining reimbursement of sums expended by the Department for the support of the parties' child during the pendency of the divorce proceedings has been, again as carefully discussed in the Brief of Appellant, bolstered by the statute requiring any support obligee who files an action to recover support to give notice to the Department of Social Services of such action, Utah Code Ann. §78-45-9(2) (1953); the statute declaring that any court order embodying a money judgment for support to be paid to a support obligee by any person shall be deemed to be in favor of the Department of Social Services to the extent of the Department's subrogation rights, Utah Code Ann. §78-45b-3(5) (1953); and the statute providing that the Department shall have the right to petition a court for modification of any court order on the same basis as a party to that action would have been able to do, Utah Code Ann. §78-45b-3(6) (1953).

However, rather than pursuing Goldie for the breach of her duty to notify the Department of Social Services of her divorce action or attempting in a timely fashion -- a possibility which no longer exists -- to have the Knudsons' divorce decree modified, the Department has relentlessly stalked Craig. Continuing this

eternal quest, they now suggest, implicitly, that this Court overrule its decision in Mecham or, explicitly, that this Court find some distinction between Mecham and the virtually identical instant case.

Yet, the reasoning underlying the decision in Mecham is sound. The holding in that case is merely a practical application of the test established by this Court in Krofcheck vs. Downey State Bank, 580 P.2d 243, 244 (Utah 1978), for the imposition of the doctrine of res judicata:

(1) the two cases must be between the same parties or their privies;

(2) there must have been a final judgment on the merits of the prior case; and

(3) the prior adjudication must have involved the same issue or an issue that could or should have been raised therein. Respondents, appropriately, have agreed that the foregoing is the proper test to determine when the doctrine of res judicata should be applied (Resp. B. 5).

An opinion by the United States Supreme Court, furthermore, demonstrates the correctness of the test which this Court has established. In Allen vs. McCurry, 449 U.S. 90, 94 (1980) (emphasis added), the Supreme Court declared, "under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." This Court implicitly approved the

test it had established for determining when to apply the doctrine of res judicata and defined "privity" in Searle Brothers vs. Searle, 588 P.2d 689, 690-691 (Utah 1978):

"The legal definition of a person in privity with another, is a person so identified in interest with another that he represents the same legal right. This includes a mutual or successive relationship to rights in property."

In several subsequent cases this Court has reaffirmed the concept that res judicata applies not only to issues which were actually litigated in the prior proceeding but, also, to those that could or should have been: International Resources vs. Dunfield, 599 P.2d 515, 517 (Utah 1979), Mendenhall vs. Kingston, 610 P.2d 1287, 1289 (Utah 1980), Bradshaw vs. Kershaw, 627 P.2d 528, 531 (Utah, 1981).

Respondents agree that the divorce decree in the instant case constituted a final judgment on the merits of that case (Resp. B. 5); Respondents, however, deny that the other two parts of the test established in Krofcheck have been met. But the interest held by the Department of Social Services in the instant case falls precisely within the definition of "privity" enunciated by this Court in Searle: the Department succeeded to an interest, i.e., a claim for child support, formerly held by Goldie Knudson. Again as this Court noted in Mecham vs. Mecham, 570 P.2d 123, 125 (Utah 1977),

"As to reimbursement for the support furnished to Maxine Mecham, the Department's rights are derivative and no greater than Maxine's rights . . . . The rights of the Department are derived through Maxine . . . ."

In both Mecham and the instant case the wife had assigned her claim



for child support to the Department of Social Services. The Department, therefore, was in privity with the wife in each case not only because of applicable support law, Utah Code Ann. §§78-45-9, 78-45b-3 (1953), but also because of a written assignment of rights to the Department (R.62, Appendix A to App. Reply B., Mecham vs. Mecham, Case No. 14910, Resp. B. 6, R.33). Despite the Department's attempt at legalistic alchemy, any rights it has -- whether statutory or contractual -- are derived through Goldie Knudson; if she has no right to support payments for her child, the Department has none. Yet, even if the preceding analysis did not establish that the Department was in privity with a party to the divorce proceeding in the instant case, the Department would still be in privity; for both Goldie and the Department, in requesting that Craig be forced to make payments for child support, are acting as fiduciaries or guardians for the child of Craig and Goldie Knudson. It is the right of this child to support that was established by the divorce decree; it is the right of this child that the Department subsequently sought to enforce against Craig by an administrative proceeding. Utah Rule of Civil Procedure 17(a) (emphasis added) declares:

"Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, . . . or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought . . .

When an infant or an insane or incompetent person is a party, he must appear either by his general guardian, or by a guardian ad litem appointed in the particular

case by the court in which the action is pending."  
Utah Rule of Civil Procedure 17(b).

Section 78-45b-1.1 of the Public Support of Children Act says, in part, "it is declared to be the public policy of this state . . . that children shall be maintained from the resources of responsible parents . . . ." Both the foregoing quotation and the very title of the Uniform Civil Liability for Support Act, Utah Code Ann. §§78-45-1 to 78-45-13 (1953), indicate that the purpose of any action undertaken by the State of Utah to enforce an obligation owed to a support obligee, in this case the child of Craig and Goldie Knudson, is to protect the rights of that obligee, not the rights of the Department of Social Services.

Respondents further argue (Resp. B. 5) that the remaining portion of the test enunciated in Krofcheck, i.e., that the prior adjudication must have involved the same issue or an issue that could or should have been raised therein, has not been satisfied in the instant case. Yet, as noted above, both Maxine Mecham and Goldie Knudson requested child support during the pendency of their divorce proceedings. Maxine Mecham made her request in her complaint; Goldie Knudson, in an order to show cause (Appendix B to App. Reply B.). Additionally, Goldie Knudson filed an affidavit (R.75 to 77) to prove that she was entitled to child support during the pendency of her divorce proceedings. Again as noted above, the divorce decrees in both Mecham and the instant case merely provided a sum certain for child support, without explicitly referring to past support during the pendency of the

divorce proceedings. Only such an explicit declaration, either in Mecham or the instant case, could have made it more clear that the issue of child support during the pendency of the divorce proceedings not only could have been, but was actually, litigated. Respondents were well aware of these facts; indeed, the very administrative order which is at issue in the instant case was purportedly based, in part, on that same affidavit (R.86).

Even though it is clear from the fact that Craig Knudson was a party to the divorce proceedings in this case and that the Department of Social Services is in privity with Goldie Knudson or the child of Craig and Goldie Knudson, who was or were parties to the divorce proceeding, that the applicable doctrine to the instant case is res judicata, respondents challenge application of the doctrine of collateral estoppel -- a doctrine which applies when only the side against which a prior judicial ruling is sought to be applied was a party to the preceding judicial process.

Of course, had Craig not been a party to the divorce proceedings in this case, he would be forced to rely upon the doctrine of collateral estoppel. This Court has established the test which must be met for the imposition of collateral estoppel in Searle Brothers vs. Searle, 588 P.2d 689, 691 (Utah 1978), and Wilde vs. Mid-Century Insurance Company, 635 P.2d 417, 419 (Utah 1981):

- (1) Was the issue decided in the prior adjudication

identical with the one presented in the action in question?

(2) Was there a final judgment on the merits?

(3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

(4) Was the issue in the first case competently, fully and fairly litigated?

Although the discussion of res judicata, above, is sufficient to demonstrate that were it necessary, Craig could satisfy all these tests for the application of collateral estoppel, Respondents assert that the case of Ruffinengo vs. Miller, 579 P.2d 342 (Utah 1978), shows that the Department of Social Services cannot be bound by the doctrine of collateral estoppel. In Ruffinengo at 343 the Court stated, "As to the matter of collateral estoppel, it is to be noted that Reffinengo was not a party nor in privity with a party in the prior suit . . . ." (emphasis added). Ruffinengo, however, merely had rights that were identical to a party in the prior suit; no showing had been made that his rights succeeded from a party to that prior suit, as required by the definition of "privity" given in Searle, supra, and as did the Department's rights from Goldie.

This Court in Ruffinengo cited an opinion of the United States Supreme Court, Blonder-Tongue Laboratories, Inc. vs. University of Illinois Foundation, 402 U.S. 313, 329 (1971):

"Some litigants -- those who never appeared in a prior action -- may not be collaterally estopped without litigating the issue."

In a subsequent opinion the Supreme Court clarified this statement:

"[W]hile the general rule is that nonparties to the first action are not bound by a judgment or resulting determination of issues, see Blonder-Tongue vs. University Foundation, 402 U.S. 313, 320-327 (1971), several exceptions exist. The pertinent exception here is that nonparties may be collaterally estopped from relitigating issues necessarily decided in a suit brought by a party who acts as a fiduciary representative for the beneficial interest of the nonparties." Sea-Land Services, Inc. vs. Gaudet, 414 U.S. 573, 593 (1974).

The Supreme Court, thus, using the language of "exceptions" indicates that the same type of analysis that we used in determining whether one is in "privity," as defined by Searle, is to be undertaken in order to determine whether an individual or organization that was not an actual party to a preceding judicial decision can be bound by that decision. It is particularly instructive to note that the Supreme Court determined that collateral estoppel should be applied to one who acted "as a fiduciary representative for the beneficial interest of the nonparties," (emphasis added), as in the instant case did Goldie for her child and, derivatively, for the Department of Social Services.

Taking another tack, Respondents again assert their erroneous proposition that Mecham did not involve a situation where the wife who sought child support in the divorce proceedings had previously executed an assignment to the Department of Social Services. Respondents then claim that this Court ruled in International Resources vs. Dunfield, 599 P.2d 515 (Utah 1979), "that the doctrine of res judicata does not bar an assignor from



maintaining an action against a debtor, even though the assignee had brought a prior action." In fact, this Court declared on page 517 of International Resources that there had been no demonstration in that case that any assignment did exist. In Lynch vs. MacDonald, 367 P.2d 464, 468 (Utah 1962) (emphasis added), this Court said, "the general rule is that an assignee is the real party in interest." But this does not mean that the assignor is not a real party in interest. A number of cases indicate various situations in which an assignor of an interest is permitted to bring suit.

The court in Harambee Enterprises, Inc. vs. State Board of Agriculture, 511 P.2d 503, 504 (Colo. Ct. App. 1973), stated,

"If an assignor has not assigned his entire claim, he can still maintain an action in his own name."

In Warren vs. Kirwan, 598 S.W.2d 598, 600-601 (Mo. Ct. App. 1980), the court was considering an assignment which read, "the Insured hereby assigns . . . to the Insurer any and all claims or causes of action . . . to the extent of the payment above made . . . ."

The court construed this language, which is remarkably similar to the language in the assignment of Goldie Knudson on behalf of the Department of Social Services (R.62), to be a partial assignment and, therefore, to permit suit by the assignor. The United States Court of Appeals for the Tenth Circuit in Hoepfner Construction Company, Inc. vs. United States, 287 F.2d 108 (10th Cir. 1960), also ruled that an assignor who has not assigned his entire claim can maintain an action in his own name.



The Supreme Court of Minnesota in Dereschuk vs. Knudsen, 280 N.W.2d 42, 44 (Minn. 1979), citing cases from several other jurisdictions, held that the assignor in cases where the assignment is for collection only or is given as a mere collateral security is certainly a party in interest.

In Cantor vs. Union Mutual Life Insurance Company, 547 S.W.2d 220, 225-226 (Mo. Ct. App. 1977), another assignment was construed by the court. This assignment was of "all my right, title and interest in said Policy and in and to any and all benefits which may hereafter become payable . . . ." The court found this to be an assignment given as collateral security because additional language in the assignment stated that it was to be "collateral security for any and all of my present or future indebtedness to the Assignee." According to the court,

"[W]here an assignment is given as collateral security only, the assignor retains such an enforceable substantive right so as to maintain an action, even though the assignment appears to be absolute in form . . . . When the assignor maintains suit, the assignee is a 'necessary' party . . . and not an 'indispensable' one."

In C & M Developers, Inc. vs. Berbiglia, 585 S.W.2d 176, 181 (Mo. Ct. App. 1979), another district of the Missouri Court of Appeals agreed with the holding in Cantor.

Reviewing the assignment in the instant case (R.62), it is evident that this assignment fits all of the foregoing categories: it is a partial assignment because it assigns the right to collect for child support only to the extent that funds had been provided by the Department of Social Services to Goldie on behalf

of her child, it is an assignment for collection only because its purpose was to facilitate the Department's efforts to obtain reimbursement for "child support" from Craig, and it is an assignment furnished for collateral security by Goldie to guarantee to the Department that they would be able to obtain the funds they desired from Craig.

Yet, even if the assignment in the instant case could not be classified into any of the categories which have just been considered, Goldie would have been entitled to maintain an action in her own name on behalf of her child in accordance with Utah Rule of Civil Procedure 17(b). As noted in detail above, the principal purpose of the assignment and of the relevant support laws of the State of Utah is to ensure that children will receive the necessities of life; and such children are, therefore, truly the real parties in interest in any action instituted for child support, whether it be by the custodial parent of that child or by the Department of Social Services. This Court long ago declared that it would look behind the pronouncements on the face of an assignment to determine its true purpose. In Nelson vs. Smith, 154 P.2d 634, 637-639 (Utah 1944), the Court observed that in view of Article I Section 11 of the Constitution of Utah, no person could be barred from prosecuting or defending before any state tribunal by himself or counsel, any civil cause to which he was a party. The court then also noted that an assignee has the right, in accordance with the Constitution of Utah, to appear

in court and prosecute or defend an interest which has been assigned to him. But, considering the true purpose of the assignment as opposed to its superficial declarations, the court announced that laymen would not be permitted to evade or circumvent the statute that required lawyers to be licensed by the State through the device of taking an assignment of the claim and proceeding in their own names.

A declaration that Goldie after executing the assignment to the Department of Social Services no longer had the right to utilize the legal process to protect the interest of her child would, furthermore, contravene the spirit of the opinion rendered by the United States Supreme Court in Santosky vs. Kramer, 71 L.Ed.2d 599, 603 (1982):

"Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence."

And should this Court hold that because of the assignment from Goldie to the Department of Social Services, the Department may proceed to enforce that assignment and collect reimbursement for "child support" from Craig in spite of the divorce decree, the Department of Social Services would have a veto over the judicial system of this State. When a divorce decree would not be favorable to the Department, the Department would proceed under its assignment from the custodial parent and ignore the judicial decree; when a divorce decree would appear pleasing to the Department, the Department would proceed under its

statutory right to enforce that decree.

## 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.

Perhaps, the most striking feature of the instant case is the fact that there has never been any adjudication declaring that Craig Knudson had failed in his duty to support his child. In fact, the divorce decree ruled, sub silentio, that Craig had satisfied all duties of support to his child during the pendency of the divorce proceedings.

In State Division of Family Services vs. Clark, 554 P.2d 1310, 1311-1312 (Utah 1976) (emphasis added), this Court declared:

"A necessary concomitant of the continuing and inalienable duty of parents to support their children is that if a child is left in need and a third party comes to the rescue and furnishes support, the latter is subrogated to the child's right and may obtain reimbursement therefor . . . . The purpose is to assist in assuring that help will not be withheld from children in necessitous circumstances. Nevertheless they should be furnished only those things which are reasonable and necessary, and this may sometimes vary according to the appropriate standard of living . . . .

On pages 20 through 27 of the Brief of Appellant in the instant case, a thorough discussion has been presented of the specific statutes in the Uniform Civil Liability for Support Act, Utah Code Ann. §§78-45-1 to 78-45-13 (1953), which designate the factors to be considered and the procedural methods to be utilized in determining the "reasonable and necessary" support



that a parent is required to furnish his child. Such statutory sections make provision for hearings when there is no prior judicial decree adjudicating the support obligation and, also, for proceedings when there is a prior judicial decree specifying the support that the parent or support obligor is required to furnish. These statutes indicate that the only course available to the Department of Social Services when it desires to alter a divorce decree which has explicitly or implicitly declared that the support obligor has satisfied all duties of support prior to the time such decree was entered is to seek a modification of that decree, "on the same basis as a party to that action would have been able to do . . . ." Utah Code Ann. §78-45b-3(6) (1953). But the time period within which Goldie and, therefore, the Department of Social Services could have properly sought a modification of the divorce decree in the instant case with respect to child support during the pendency of the divorce proceedings has long since expired.

Utah Code Ann. §78-45-7(2) (1953) (emphasis added) declares,

"(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."

This Court in Roberts vs. Roberts, 592 P.2d 597, 599 (Utah 1979) (emphasis added), raised the requirement that such factors be considered in determining the duty of a support obligor to Constitutional levels:

"[It] 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." (Emphasis added.)

Thus, even were Respondent's dubious assertion that because the instant case involves an assignment, Respondent could proceed to determine the support obligation by any method (Resp. B. 13), true, the Department would still be required to consider, among other factors, those prescribed in Utah Code Ann. §78-45-7(2) (1953).

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).

In her order the Administrative Law Judge merely considered the fact that the Department of Social Services had provided

support to Craig and Goldie Knudson's child during the pendency of the divorce proceedings, the divorce decree, the affidavit submitted by Goldie during the divorce proceedings, and the rental payments made by Craig for the lot upon which the mobile home that Goldie and the Knudson's child used as a residence during the pendency of the divorce proceedings was situated (R.84 to 87). It is, to say the least, intriguing that Respondents suggest that they satisfied the demands of Roberts (Resp. B. 13 to 15) by utilizing the affidavit and divorce decree which they argue would not meet the test for collateral estoppel, were collateral estoppel rather than res judicata the appropriate doctrine to apply to the facts of the instant case.

### III.

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

Even were the doctrine of res judicata not applicable to the instant case and had Respondents considered the required factors in determining the support obligation, Respondents should have given Craig credit for the necessities which he provided to Goldie and the Knudson's child during the pendency of the divorce proceedings. Appellants have already elaborately detailed the legal, Constitutional and factual reasons why such credit should have been extended (App. B. 27 to 35). Thus, only a few points need be mentioned here.

Before a marriage is terminated, the

breadwinners in the family provide necessities for their children; they do not necessarily supply the other spouse solely with cash payments so that the other spouse may purchase necessities for their children. And the support statutes considered above speak in terms of supplying the support obligee with the necessities of life -- not with cash. This is why respondents could not find any cases requiring that support payments prior to the entry of a divorce decree be made in cash (Resp. B. 16).

Moreover, during the emotional turmoil of divorce proceedings, the noncustodial spouse may very well furnish necessities rather than cash to the other spouse on behalf of their child because the noncustodial spouse, at such a time, may entertain doubts concerning the responsibility of the custodial spouse.

As demonstrated by this Court's opinion in Ross vs. Ross, 592 P.2d 600, 603 (Utah 1979), a principal reason why payments-in-kind are not permitted to satisfy a judicial decree when they are made after such decree has been entered is that permitting such an extra-judicial "modification" of the decree would necessarily lessen respect for the judicial system -- a result which could not transpire before any decree had been entered. Furthermore, respondent's theory that credit is not given for payments-in-kind made after the entry of a judicial decree because "the intent of child support is to allow the custodial parents latitude in deciding the needs of the child and not permit the noncustodial parent to dictate where the

monies are to be expended" (Resp. B. 16) need be of no concern in the instant case because Goldie, the custodial parent, chose to return to the housing which Craig supplied (R.44, 46) and for which Craig requests credit.

And even if the instant case involved payments-in-kind subsequent to the entry of a judicial decree requiring payments in cash, this Court has recognized that there should be "equitable exceptions" to the rule that all such post-decree payments must be in cash. Openshaw vs. Openshaw, 42 P.2d 191, 193 (Utah 1935) (dictum). Then in the post-decree case of Ross vs. Ross, supra at 603-604, this Court announced,

"Only if the defendant has consented to the plaintiff's voluntary expenditures as an alternative manner of satisfying his alimony and child support obligations, can plaintiff receive credit for such expenditures."

The instant case did, indeed, involve such an agreement (R.46).

In a highly relevant case closely related to the instant situation a Colorado court has ruled that child support accruing during a period when a divorced husband and wife were in good faith attempting a reconciliation should be abated. In re Peterson, 572 P.2d 849 (Colo. Ct. App. 1977).

Appellants have demonstrated in detail that under any financially reasonable system of accounting the benefits provided by Craig to Goldie and the Knudson's child during the pendency of the divorce proceedings and for which Craig has received no credit substantially exceed the amount the Department claims it deserves as reimbursement for "child support."

The Department of Social Services would have long ago given Craig credit for such benefits were it more concerned with rendering due process to the citizens of this state than with its own ego-centric desire for administrative convenience.

### CONCLUSION

Craig is not trying to avoid his duty to support his child; he is simply attempting to have recognition given to a prior judicial determination of what that duty is, to have the proper factors considered in determining that duty, and to receive credit for the support he has provided his child.

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 attorney's fees.

RESPECTFULLY SUBMITTED this 23rd day of August, 1982.

JENSEN & LLOYD

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Thompson E. Fehr  
Attorney for Plaintiff-Appellant



Address of Attorney:

870 Commercial Security Bank Tower  
50 South Main Street  
Salt Lake City, Utah 84144-0457  
Telephone: (801) 322-2300

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 REPLY 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  
Deputy Weber County Attorney  
Municipal Building, First Floor  
Ogden, Utah 84401

DATED this \_\_\_\_\_ day of August, 1982.

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## ASSIGNMENT OF COLLECTION OF SUPPORT PAYMENTS

For public assistance received or to be received, I, Maxine L. Meckham  
Meckham hereby assign, transfer and set over to the Utah State  
Assistance Payments Administration of the Department of Social Services, all monies payable to me  
and/or my child from Richard Lynn Meckham  
(Name of Absent Parent with Duty of Support)  
during the time I am or we are receiving public assistance and also past support and alimony due  
me, not in excess of amount due while receiving public assistance, and authorize anyone whosoever  
to deliver any and all negotiable instruments and/or warrants to be issued under the above duty of  
support to the Bureau of Recovery Services, Utah State Assistance Payments Administration, which  
is authorized to endorse my name upon and receive any and all funds due or to become due  
provided that the balance due on said claim shall be reassigned to me whenever the assignee recovers  
in full the sum equivalent to the assistance I have received.

I further authorize said assignee to do every act and thing it deems necessary to collect the  
support and/or alimony payments, including taking any and all legal action it deems necessary or  
the compromising of my or our claims without further notice to me.

Dated this 28 Day of March, 19 75.

Signature: Maxine L. Meckham  
(Applicant or Recipient)

KELLY G. CARDON, ESQ.  
Attorney for Plaintiff  
2506 Madison Avenue  
Ogden, Utah 84401  
Telephone: 627-0400

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IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY,  
STATE OF UTAH

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GOLDIE KNUDSON,	:	
	:	
Plaintiff,	:	<u>MOTION FOR ORDER</u>
	:	
vs.	:	<u>TO SHOW CAUSE</u>
	:	
L. CRAIG KNUDSON,	:	
	:	Civil No. 71529
Defendant.	:	

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Plaintiff moves the Court for an Order directed to Defendant, requiring him to appear personally before the Court at a time and place certain and show cause, if any he may have, why he should not be required to pay to Plaintiff such sums as may be found reasonable for temporary alimony and child support money, and temporary attorney's fees during the pendency of these proceedings; why Plaintiff should not be awarded the temporary and exclusive use and possession of the mobile home jointly owned by the parties as a residence for herself and the minor child ROBERT CRAIG KNUDSON; and why temporary custody of said minor child should not be awarded to Plaintiff, subject to reasonable visitation by Defendant.

Plaintiff further requests that said Order to Show Cause require Defendant to produce at said hearing a statement of his total income for the year 1978 and the month of January, 1979, and a statement from his employer setting forth his current rate of pay and his salary, with deductions, during his most recent pay period.

This Motion is made and based upon the papers and pleadings filed herein and for the reasons more specifically set

**Kelly G. Cardon**  
ATTORNEY AT LAW  
2506 MADISON AVENUE  
OGDEN, UTAH 84401

forth in Plaintiff's sworn Affidavit annexed hereto and made a part hereof.

DATED AND SIGNED at Ogden, Weber County, Utah this \_\_\_\_\_ day of \_\_\_\_\_, 1979.

KELLY G. CARDON, ESQ.  
Attorney for Plaintiff

STATE OF UTAH } ss:  
COUNTY OF WEBER }

I HEREBY CERTIFY THAT THIS IS A TRUE COPY  
OF THE ORIGINAL ON FILE IN MY OFFICE.

DATED THIS 23. DAY OF August 1982

LEROY WILLIAMS, COUNTY CLERK &

EX OFFICIO CLERK OF 2nd DIST. COURT

BY L. Williams DEPUTY

Kelly G. Cardon  
ATTORNEY AT LAW  
2506 MADISON AVENUE  
OGDEN UTAH 84401