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Kay J. Larsen v. Judy Larsen (Thomas) : Brief of Judy Larsen (Thomas)

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

KAY J. LARSEN, :
Plaintiff & Respondent, :
vs. : Case No. 18198
JUDY LARSEN (THOMAS), :
Defendant & Appellant. :

BRIEF OF JUDY LARSEN (THOMAS)

ORIGINAL ACTION TO REVIEW THE
PROCEEDINGS AND ORDERS OF
JUDGE ERNEST F. BALDWIN, JR.
OF THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY

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IN THE SUPREME COURT
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BRIEF OF JUDY LARSEN (THOMAS)

NATURE OF CASE

This is a review of a Judgment entered by the Third Judicial District Court following an Order to Show Cause, In Re Contempt, for arrearages of child support due.

DISPOSITION BY THE DISTRICT COURT

The District Court entered a judgment in favor of Defendant-Appellant and against Plaintiff-Respondent for a sum equal to the child support accrued during the last eight years less the payments made during the same period, plus interest, costs and attorney's fees, and stayed execution on the judgment so long as \$50.00 per month was paid thereon.

RELIEF SOUGHT BY JUDY LARSEN (THOMAS)

Defendant-Appellant seeks a review by this Court of the law applied by the District Court for the computation of the amount of the arrearage of child support due under the Divorce Decree. Defendant-Appellant seeks to have this Court modify the amount of the judgment to correctly reflect an allocation, as of the date of the payment, of each of the payments made by Plaintiff-Respondent, to the oldest unpaid obligation, not barred by the statute of limitations.

STATEMENT OF FACTS

The parties were divorced in a decree of the District Court of Salt Lake County on the 7th day of March, 1967, wherein Defendant-Appellant was awarded the custody of the parties' two minor children and Plaintiff-Respondent was ordered to pay the sum of \$75.00 per month per child as child support and \$101.00 per month as alimony. The original Divorce Decree was modified by stipulation of the parties shortly thereafter, wherein, Plaintiff-Respondent was to pay Defendant-Appellant the sum of \$50.00 per month per child and \$150.00 per month as alimony. It was ordered that all payments were to be made through the Clerk of the Court of Salt Lake County. Alimony terminated on the 18th day of July, 1971, upon Defendant-Appellant's remarriage. Between 1967 and 1981, certain payments were made by Plaintiff-Respondent as recorded in the records of the Court Clerk's Office. On the 26th day of May, 1981, Defendant-Appellant brought an Order to Show

Cause, In Re Contempt seeking a judgment for the arrearages accrued upon the child support order.

At the Order to Show Cause hearing the parties stipulated that the records of the County Clerk's Office correctly reflected all payments made by Plaintiff-Respondent under the Divorce Decree, and Plaintiff-Respondent stipulated that he had not allocated any of the payments to any particular portion of the arrearage.

Defendant-Appellant provided the trial court with a MEMORANDUM OF POINTS AND AUTHORITIES, including a full accounting of the accrual of each of the child support and alimony installments and indicating every payment made by Plaintiff-Respondent with an allocation to the oldest part of the debt due, not barred by the statute of limitation.

The trial court entered judgment on the arrearage giving Defendant-Respondent credit for all payments made in the last eight years against the support obligation accrued for the same period.

ARGUMENT

POINT I

CHILD SUPPORT AND ALIMONY INSTALLMENTS ARE JUDGMENTS AT THE TIME OF ACCRUAL OF EACH PAYMENT AND THE STATUTE OF LIMITATIONS STARTS TO RUN FOR EACH PAYMENT AT THE TIME OF THE ACCRUAL OF THAT PAYMENT.

Under a long line of Utah cases each child support or alimony installment required by a divorce decree has been recognized as a final judgment at the time that it becomes due.

In Seeley vs. Park, 532 P.2d 684 (Utah, 1975), the latest in this line of cases, this Court stated:

Installments under a decree of divorce for alimony or support of minor children become final judgments as soon as they are due and cannot thereafter be modified.

See Openshaw vs. Openshaw, 105 Utah 574, 144 P.2d 528 (1943) and Beesley vs. Badger, 66 Utah 194, 240 P. 528 (1925).

The statute of limitations for an action on any judgment entered by a state court of the United States is found at Section 78-12-1 and Section 78-12-22, UTAH CODE ANNOTATED (1953), as amended, and is for the period of eight years from date of the judgment.

In the instant case there is a series of judgments, the first dated on the 7th day of March 1967, with a new judgment accruing monthly thereafter, until suit was commenced on this action on the 26th day of May, 1981. The statute of limitations for each of these judgments commenced to run on the date that it became due and continued running for a period of eight years. Any installment which remained unpaid for more than eight years from the date which it became due, was thereafter barred by the statute of limitations.

POINT II

ALL SUMS PAID, WITHOUT SPECIFIC ALLOCATION, UPON A CHILD SUPPORT OR ALIMONY OBLIGATION SHOULD BE APPLIED, AS OF THE TIME OF THE PAYMENT, TO THE OLDEST PART OF THE ARREARAGE NOT THEN EXTINGUISHED BY THE STATUTE OF LIMITATIONS.

The general rule of law is that payments made without specific allocation are applied to the oldest debt then due. This rule is set forth in 60 Am Jur 2d PAYMENT Section 91 as follows:

If debtor fails to direct the application of this payment, and the creditor does not exercise his right of application, the law will apply the payment to the oldest debt unless justice and equity demand different appropriation, or unless the rights and equities of third persons are involved.

This Court followed this rule of law in its decision of Seeley vs. Park, infra, when on page 685 the Court stated:

The presumption is that a payment without specific allocation is to be applied against the oldest part of the debt.

See also Chudzinski vs. Chudzinski, 26 Ariz. App. 130, 546 P.2d 1139 (1976).

Nothing in the statement of this rule would allow the application of a payment to obligations which, at the time of the payment, were then barred by the statute of limitations.

60 Am Jur 2d. PAYMENT Section 101 states:

Where a voluntary payment is made before the statute of limitations runs, but the payment is not applied by the parties, and subsequently the statute of limitations runs against part of the debt, the rule is that the payment shall be applied by the Court according to the principles of equity and justice and that, absent superior equities compelling a different application, justice and equity require the application to be made first to the part of the debt which is barred and then to the balance.

From this statement it is clear that the time to judge whether the application of the payment to a particular portion of the obligation is barred by the statute of limitations is at the time of payment. See Young vs. Williams 583 P.2d 201, 206 (Alaska, 1978).

This Court applied this rule correctly in the Seeley case. There the Appellant, in addition to successfully arguing for an eight-year statute of limitations, claimed he was entitled to credit for payments against the accruals during the eight years not excluded by the statute of limitations. The Appellant sought to have the Court reduce the accruals during the last eight years by the payments which he had made during the same period. However, the Court affirmed the judgment in a sum equal to the accruals during the eight years with no reduction for payments. It seems clear the court allocated the payments made during the eight years to accruals of the earlier period.

In the instant case, although the Plaintiff-Respondent stipulated to the trial court that no allocation had been made for any of his payments, he prevailed upon the theory which this Court refused in the Seeley case.

In the Young vs. Williams, 583 P.2d 201, 205-206 (Alaska, 1978), the Supreme Court of Alaska decided a case raising the same issues as the instant case. In that case the debtor-husband named Young advocated the same position as the Plaintiff-Respondent in the instant case. The Alaska Supreme Court stated:

The superior court held that child support payments were judgments at the time each payment accrued. Thus, the applicable statute of limitations on actions to recover arrearages in child support payments is that applicable for judgments, which is 10 years. In order to resolve the question whether support payments made during the period from 1966 to 1975 should be credited against support obligations for the same period, the

superior court took evidence as to support obligations and payments made for the period from 1961 to 1965. This was done because the superior court concluded that "(a)ll sums paid or credited shall be applied to the oldest arrearage" not extinguished by the statute of limitations. Since the total credit for all of Young's payments made in the period 1966 to 1975 was applied to obligations which accrued prior to 1966, Young received no credit against support obligations owing from 1966 to 1975.

The Alaska court on page 206 continued:

Claiming that the period from 1961 to 1965 is now barred by the ten-year statute of limitations since this action was brought in 1975, Young contends that no consideration should be given to this earlier period. However, he advances no legal support for this argument and we can find none. The superior court properly considered what support obligation Young had during the 1961 to 1965 period and what payments he had made against it. Thus, by ascertaining what was still owing on this debt during the period 1965 to 1975 the court was able to compute the extent to which the payments Young made after 1965 were applicable to the pre-1965 debt and to the post-1965 debt. The application of a payment to the oldest outstanding debt is to be computed as of the date the payment was made and not as of when the suit was filed to enforce the underlying judgment. Thus, although the entire debt from 1961 through 1965 was barred by the statute of limitations when this action was brought in 1975, this was not the case when the various payments were made by Young prior to 1975. Those payments properly are to be credited against the debt.

The California appellate court in Parhm vs. Parhm, 2 Cal. App. 3rd 311, 82 Cal. Rptr. 570, 574 (1969) came to a similar resolution of these issues. The trial court in Parhm came to a position similar to that taken by the District Court in the instant case. The California court of appeals remanded the case because they were unable to properly determine the

extent to which the payments made during the period not barred were entitled to be credited against the obligation now being sued upon, lacking a complete accounting of the earlier period.

POINT III

ALL OF THE PAYMENTS MADE BY PLAINTIFF-RESPONDENT DURING THE LAST EIGHT YEARS SHOULD BE CREDITED TO OBLIGATIONS WHICH WERE NOT BARRED BY THE STATUTE OF LIMITATIONS WHEN THE PAYMENT WAS RECEIVED BUT HAVE SUBSEQUENTLY BECOME BARRED BY THE STATUTE OF LIMITATIONS.

In the instant case Appellant provided a MEMORANDUM OF POINTS AND AUTHORITIES to the trial court which included a full accounting of all payments made by Plaintiff-Respondent, showing that each of these payments was properly allocated to debts which were at the time of payment not barred by the statute of limitations, but which subsequently became barred. The accuracy of this accounting has never been questioned by Plaintiff-Respondent, and is sufficient to allow this Court to amend Defendant-Appellant's judgment to the sum of \$9,600.00 (96 x \$100.00).


CONCLUSION

The Court should follow the precedent contained in Seeley vs. Park, infra, and the better-reasoned cases which support the position that the allocation of payments to debts is to be made as of the date of receipt of the payment. This result is in accordance with general Debtor-Creditor law, Utah precedent and is consistent with the public policy to require both parents to contribute meaningfully to the support of their

children. The holding which the Plaintiff-Respondent urged upon the trial court has the effect of rewarding the delinquent payment of child support and would significantly reduce the relative burden which the delinquent parent would bear to the total cost of child rearing. The delinquent parent should not be standing in a better position vis-a-vis the custodial parent than the ordinary debtor to his creditor.

This Court should modify the judgment in favor of Defendant-Appellant to the sum of \$9,600.00 (96 x \$100.00) together with interest at the statutory rate, \$175.00 for Plaintiff's attorney's fees and \$17.50 costs of Court, which total judgment should bear interest at the statutory judgment interest rate, and the Court should lift the stay of execution on said judgment imposed by the trial court.

Respectfully submitted this 27th day of April, 1982.



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CERTIFICATE OF SERVICE

I hereby certify that I mailed, postage prepaid,
two (2) copies of the foregoing BRIEF OF JUDY LARSEN (THOMAS) to:

D. Kendall Perkins
Attorney for Plaintiff-Respondent
525 South Third East
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on the 27th day of April, 1982.



PHILLIP A. HARDING
Attorney for Defendant-Appellant