

1982

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

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Larsen v. Thomas*, No. 18198 (Utah Supreme Court, 1982).

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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 RESPONDENT KAY J. LARSEN

ORIGINAL ACTION TO REVIEW THE
PROCEEDINGS AND ORDERS OF
JUDGE EARNEST 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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Defendant & Appellant. :

BRIEF OF RESPONDENT KAY J. LARSEN

NATURE OF THE CASE

This is a review of judgement entered by the Third District Court in and for the County of Salt Lake, Honorable Ernest F. Baldwin presiding, pursuant to Appellant's Order to Show Cause in re Contempt and child support arrearage.

DISPOSITION IN THE LOWER COURT

The District Court entered judgement for Plaintiff & Respondent for \$3,600.00 child support arrearage, attorney's fees of \$175.00 and costs of \$17.50. A three day jail sentence was stayed as long as Plaintiff/Respondent made regular payments as due and \$50.00 per month on the arrearage. Later, after hearing petition to modify the decree, the court awarded an increase of \$25.00 per month per child to be paid until each of

two children graduated from High School or if they did not graduate, then until age 18. The modification is not an issue.

RELIEF SOUGHT BY RESPONDENT

Respondent seeks dismissal of Appellant's appeal.

STATEMENT OF THE FACTS

Respondent agrees with the facts as stated by Respondent except where the Appellant states that "Plaintiff/Respondent stipulated that he had not allocated any of the payments to any particular portion of the arrearage." The Plaintiff/Respondent did not appear in court and his counsel made no such stipulation; any representation to that effect is a completely unsupported fabrication and constitutes an unethical attempt to create support for issues that were not raised at hearing on the Appellant's Order to Show Cause.

The Appellant's references to her memorandum and "full accounting" are not agreed with: the "full accounting" is merely a tabular re-cap of the payments made as reflected by the Alimony Clerk's record of payments received from the Respondent since the divorce of the parties.

ARGUMENT

POINT I

THE APPELLANT'S NOTICE OF APPEAL WAS NOT TIMELY FILED AND NO BOND FOR COSTS ON APPEAL HAS BEEN FILED; THEREFORE, THIS COURT HAS NO JURISDICTION TO HEAR THE APPEAL AND APPELLANT HAS NOT PERFECTED HER APPEAL. THE APPEAL SHOULD BE DISMISSED.

An appeal must be taken within one month of the final

order appealed from or the Supreme Court can have no jurisdiction to hear the matter. Rule 73(a), Utah Rules of Civil Procedure. Anderson v. Anderson, 3 U.(2d) 277, 282 P.2d 845. Ratliff, Estate of v. Conrad, 19 U.(2d) 346, 431 P. 2d 571. Anderson v. Halthusen Mercantile Co., 30 U. 31, 83 P. 560.

Hearing was had on Appellant's Order to Show Cause July 9, 1981 (R.p.71). Parties counsel stipulated that the payments made to Appellant by Respondent were correctly reflected on photo copies of the Alimony Clerk's records. (R.p. 85-87). Appellant, on July 15, 1981 submitted a "Motion for Rehearing, (R.p.79) and submitted therewith a memorandum. (R.p.74-78). Appellant's motion was heard August 19, 1981, Respondent was granted seven days to file a responsive memorandum. (R.p.89-92). Thereafter, Appellant's petition to modify decree of divorce (R.p.66) was heard on October 7, 1981 (R.p.88). At this hearing the court was asked for its ruling on the support arrearage and contempt matter, at which time the court stated it would stand by the ruling it made on July 9, 1981, counsel for appellant was directed to prepare the Order. On October 12, 1981, Appellant's counsel sent a copy of a proposed judgement, with an attached letter, to Respondent's counsel, stating if no objection was voiced within 7 days, the order would then be submitted to the judge for signature. (See Exhibit "A", Affidavit of Respondent's counsel and attachments). Two days thereafter, on October 14, 1981, Respondent's counsel sent a letter to counsel for Appellant setting forth objections to the language of the order. (Attachment 2). No response to that letter was received, so on November 6, 1981, another

letter, (attachment No. 3 to Exhibit "A"), was sent to Appellant's counsel along with a copy of a proposed judgement. The letter stated that if there was no objection thereto made within seven days the judgement would be submitted to the judge for signature. No objection was raised and on November 17, 1981, the judgement was submitted to Judge Baldwin for signature and it was entered by the court on November 18, 1981. (R.p.93-94). There was no appeal taken from this judgement within one month from its entry. Appellant filed her notice of appeal January 4, 1982.

The record is confusing because the judgement submitted to Respondent's counsel for approval, and not approved, now appears in the record, (R.p.95-96), showing it to have been signed on October 12, 1981 (the same day it was supposedly mailed to Respondent's counsel) and entered by the Clerk of the Court on December 1, 1981.

Respondent therefore submits that the judgement dated October 12, 1981 was erroneously or improperly submitted and signed and should be of no effect; prejudgement interest was not asked for, nor was it awarded by the trial court; the method of calculation is unknown, the interest rate used is wrong, and therefore the amount improper. These were the reasons Respondent objected to this judgement as originally prepared.

Therefore, the Appellant's Notice of Appeal was not timely filed, being filed more than one month after the 18th day of November 1981. (The existence of a judgement signed October 12, 1981 was not discovered by Respondent until the day before hearing of

Respondent's motion to dismiss Appellant's appeal.)

The Appellant's appeal should likewise be dismissed for failure of Appellant to perfect her appeal by filing of a bond for costs on appeal, the requirement for which was never waived.

POINT II

THE ISSUE OF ALLOCATION OF PAYMENTS WAS NOT RAISED PRIOR TO HEARING ON APPELLANT'S ORDER TO SHOW CAUSE AND THERE IS NO EVIDENCE IN THE RECORD THEREON.

The Appellant's two Orders to Show Cause (R.p. 65 & 66) do not allege any allocation of payments and are in fact not supported by either affidavit or verified petition appearing in the record. Therefore, the issue of allocation of payments was not raised, nor were the Appellant's pleadings ever amended to include such issue, nor did the trial court hear evidence thereon. The only evidence before the lower court were the photocopies of the Third District Court's Alimony Clerk's records of payments (R.p. 85-87), which only show the date and amount received by the clerk and the date and amount forwarded to Appellant.

The matter of allocation of a payment is a matter of intent of the payer or if not in any way determinable, of the payee. (See 60 Am Jur 2d §80 et seq.). However, there is, as earlier mentioned, no evidence at all before the court on the issue. The issue was not raised by Appellant before the trial court. However, it is obvious that if a non-custodial parent, owing a support obligation, has financial demands that exceed his income periodically and he is unable to pay all of his financial obligations and therefore fails to make one or more of these support payments; the next payment he in fact makes is intended by him to pay the sup-

port obligation due the month of his payment. Where an obliger has the right to allocate and if he knows of that right, he certainly will allocate the payment in a manner that will best serve the interests of himself and his immediate family.

The dicta cited in Seely v. Park, 532 P.2d 684 at 685 (Utah 1975) is not supported by reference to any evidence there before the court. The court said "...the presumption is that a payment made without specific allocation is to be applied against the oldest part of the debt." Whether specific allocation had been made or not is a question of fact and the court in Seeley says nothing of how or where that fact was decided. It appears there, as in the instant case, that it had not been decided.

In questions of allocation, consideration would also be given to the rights and interests of third parties. As stated in 60 Am Jur 2d §91:

... If the debtor fails to direct the application of his 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 a different appropriation, or unless the rights and equities of third persons are involved. (Emphasis added)

Here, the Respondent has two young children and a wife who is a full time mother and homemaker, (R.p.83) and therefore justice, equity and the third parties interests would not be served by saddling their provider with a judgement three times that awarded by the trial court.

The courts in certain cases cited by Appellant, Seely (supra.), Chudzinski vs. Chudzinski, 26 Ariz App 130, 546 P.2d 1139

(1976); Young v. Williams, 583 P.2d 205 (Alaska 1978) and others, are unfairly equating support cases to commercial and contract cases, by applying the theory of allocation to them. The courts go beyond that, and without making factual inquiry about the obligors intent as to allocation, indulge in a fictional assumption. The courts apply the allocation theory, one of the foundations of which is that the obligor has the right to allocate, in cases where there is no evidence at all about the obligors actual allocation or intent to allocate. In doing so, they fail to make inquiry about the obligor's allocation, but presume there was none.

It is unjust to allow application of "allocation" doctrine to situations in which the obligor is totally unaware of what his rights are under such doctrine. Such blanket application of the doctrine results in great unfairness. For a "worst case" example, assume that a divorced non-custodial parent under a support obligation experienced severe financial problems, paid nothing for the first eight years after his divorce, then after rehabilitating himself for the next eight years was able to pay each current payment as it became due. Under the allocation doctrine as Appellant would have it applied, the parent could have judgement taken against him for the full eight years of support payments if he had not allocated his payments to current support obligations.

Respondent acknowledges children's need for support, but the courts create great mischief when they attempt to insulate some parties over others from certain realities of life: such

as those times when there is legitimately not enough money to cover basic expenses. The courts should make inquiry in these situations and not unjustly penalize a non-custodial parent for matters beyond his control.

POINT III

THE APPELLANT IS NOT LAWFULLY ENTITLED TO THE FUNDS SHE SEEKS BY REASON OF HAVING ASSIGNED THEM TO THE STATE AND HAS THEREFORE PERPETRATED A FRAUD ON THE COURT FOR NOT SO DIVULGING. HER APPEAL SHOULD BE DISMISSED AND REMANDED TO THE TRIAL COURT FOR DETERMINATION OF ANY PROPER AMOUNT SHE MAY BE DUE.

Respondent learned after the Appellant had filed her notice of appeal that she had signed an assignment of support obligation to the State of Utah (R.p.111) and that she had received certain public assistance payments from the state. (as partially set forth on R.p. 110)

Respondent became aware of the foregoing when the State of Utah served him with the proceedings via the Clark County, Nevada Court, which pleadings are in the record, page 101-119.

From the URESA pleadings, it is evident that Appellant is not entitled to recover any sums due her for the months she received public assistance. Those amounts would be properly due the State of Utah. In fact, Appellant, having received both support payments from Respondent and public assistance from the State of Utah for the same month, would be guilty of fraud.

Therefore, the matter should be remanded to the trial court in order that the judgement may be properly adjusted. Note also that according to DeAnna Earl, investigator for the Office of Recovery Services, the amounts shown as paid to Appellant are not complete. Appellant received public assistance as early as 1967.

(Exhibit "B", letter from DeAnna Earl to Jo Kost dated April 14, 1982)


CONCLUSION

The Appellant's appeal, not being timely taken should be dismissed. The judgement signed October 12, 1981 was erroneously or improperly submitted to the court, Appellant's counsel had purportedly given Respondent's counsel seven days to comment or object to the proposed language of the judgement yet the trial court signed said judgement the day it was shown as being mailed to Respondent's counsel. This court should then set this judgement aside. The judgement signed November 17, 1981 was submitted to and signed by the court after Appellant failed to respond to Respondent's objections and comments and after notice of preparation of the corrected judgement, and after having had ample time to comment thereon before it was submitted to the Court. In any event, the notice of appeal was not filed within one month of the signing of the judgement of October 12, 1981 nor the docketing of the judgement signed November 17, 1981. Why the earlier judgement was not filed until December 1, 1981 is an unexplained fluke and should not serve to improperly extend the time for appeal.

For the reasons heretofore stated, the doctrine of allocation should not be applied where the issue was never raised in the pleadings at the Order to Show Cause hearing and where there was no evidence taken thereon.

Since it is clear that Appellant is not entitled to the full amount of the judgement heretofore entered and has attempted to perpetrate a fraud on the court for failure to divulge her assignment of support, her appeal should be dismissed and remanded to the trial court for such further proceedings as are appropriate. In fact, the provisions of § 55-15c-5(3) Utah Code Annotated, as amended 1953, so requires.

RESPECTFULLY submitted this 9 day of June, 1982.


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CERTIFICATE OF MAILING

I certify that I mailed a copy of the foregoing Respondent Brief, postage prepaid, to Phippil A. Harding, attorney for Appellant, 175 South West Temple, Suite 500, Salt Lake City, Utah 84101 this 10th day of June, 1982.

