1982

Gary D. Pilcher v. State of Utah : Brief of Appellant

Utah Supreme Court

Grant M. Prisbrey; Attorney for Appellant;
Ted Cannon; Attorney for Respondent;

UTAH SUPREME COURT

GARY D. PILCHER,

Appellant,

vs.

STATE OF UTAH, Department of Social Services,

Respondent.

BRIEF OF APPELLANT

No. 18222

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81 C.J.S. Social Security, Section 122 6

STATEMENT OF NATURE OF CASE

This case involves questions of law concerning a proceeding against appellant under Chapter 45 b of Title 78 of the Utah Code.

DISPOSITION OF CASE BELOW

The District Court of Salt Lake County modified but left standing a portion of a judgment of the State Department of Social Services against the appellant.

RELIEF SOUGHT ON APPEAL

Appellant seeks to reverse the judgment of the District Court of Salt Lake County and a ruling that appellant has no obligation for support payments under Chapter 45 b of Title 78 of the Utah Code.

MATERIAL FACTS OF CASE

On January 3, 1978 a Notic e of Support Debt was served on Gary D. Pilcher. Record 33. A motion to dismiss was filed (Record 37) and the matter was dismissed. Record 39. Thereupon a felony non-support complaint was filed against Mr. Pilcher. That case was dismissed without the matter even going to preliminary hearing upon the production of a document signed by the former wife of Mr. Pilcher to the effect that he had provided more than half of the support of the children in question during the years covered by the felony complaint. (Not in this record).

On October 20, 1978, Mr. Pilcher was served with a new Notice of Support Debt by the Department of Social Services. Record 41. Pilcher filed an answer and motion to dismiss. On February 22, 1979, a hearing was held before an administrative law judge. Record 56. The County

Attorney was allowed to amend the Notice of Support Debt. Record 88. Trial of the issues was held March 21, 1978. Record 103. By order dated March 26, 1979, the administrative law judge entered an order and judgment against Pilcer in the amount of $9,760.00. Record 192.

Mr. Pilcher filed a Petition for Judicial Review in the District Court of Salt Lake County. Record 2. On December 4, 1981, the District Court of Salt Lake County heard oral argument on the petition. The District Court denied all contentions of Mr. Pilcher except that the District Court ruled that Pilcher was only liable in the amount of $5,815.00. Record 225.

POINT I. THE AMENDED NOTICE OF SUPPORT DEBT WAS INVALID BECAUSE IT ADDED A NEW CAUSE OF ACTION ENTIRELY DIFFERENT FROM THE CAUSE STATED IN THE ORIGINAL NOTICE OF SUPPORT DEBT.

Utah decisional law permits amendment of civil pleadings but the amendment cannot add a different or new cause of action. See Hancock v. Luke, 46 Utah 26, 148 P 452. Se e also Combined Metals v. Bastian et al, 71 Utah 535, 267 P 1020, (1928).

In the Notice of Support Debt (Record 41) the claim of the State Department of Social Services was that Pilcher had an obligation of child support based on a Texas Court order dated June 13, 1968. The Texas Court Order was a URESA order requiring Pilcher to pay $30 per month per child and was not based on any right of the State of Texas to recover money for support provided by the State of Texas. The State of Texas never provided child support but only provided its courts and legal services to attempt to achieve payments by Mr. Pilcher under URESA. The Amended Notice of Support Debtretained an allegation of reliance on the Texas debt but also added that Pilcher was

liable under an earlier Utah Divorce Decree dated October 22, 1965.

The effect of the amendment was to add a new cause of action from that of the Notice of Support Debt in violation of the principles stated in the cases above cited.

The administrative law judge should not have allowed the amendment which had the effect of adding a new or different cause of action but should have dismissed the matter forthwith.

POINT II. THE DISMISSAL OF THE FIRST NOTICE OF SUPPORT DEBT AND THE DISMISSAL OF THE CRIMINAL COMPLAINT SHOULD BE DEEMED WITHIN THE TWO DISMISSAL RULE.

Appellant contends that the felony non-support action was in reality a civil action in the guise of a criminal action and that it was brought, not to impose a criminal sanction on the appellant but to coerce him to pay some money to the State of Utah because of welfare support theretofore provided for the minor children of appellant. Upon hearing that Mr. Pilcher had in fact paid support in years covered by the criminal case, the action was dismissed.

In view of this the closing words of Rule 41 (a) (1) of the Utah Rules of Civil Procedure are persuasive to this writer:

> ....a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any Court of the United States or of any state an action based on or including the same claim.

Somewhere the repetition of actions against the same individual for the same claim ought to stop, preferably at some reasonable point.

POINT III. THE HEARING BY THE ADMINISTRATIVE LAW JUDGE WAS VOID FOR NON-COMPLIANCE WITH THE STATUTORY 30 DAY RULE.

Section 78-45b-6 of the Code requires a hearing within 30 days after request of the party receiving the notice of support debt. In Mr. Pilcher's answer to the Notice of Support Debt dated November 15, 1979, (Record 47) a hearing was requested. No hearing was held until February 22, 1979, (Record 54), 99 days after the request.

The hearings thereafter should be held to be a judicial nullity.

POINT IV. THE TEXAS ORDER DOES NOT PROVIDE A LAWFUL BASIS FOR A PROCEEDING BEFORE THE DEPARTMENT OF SOCIAL SERVICES.

Chapter 45B of Title 78 of the Utah Code was enacted by the Utah Legislature pursuant to provisions of federal law which were designed to obtain certain results in the form of collections from parents of dependent children. The Utah law must be construed in accordance with the provisions of the federal law which led to the enactment of the Utah Statute. To the extent that the proceeding purported to be based on the order from a Texas Court , the proceeding by the Department of Social Services was not in accordance with the federal law.

42 U. S. C. Section 602 (a) (22) (B) reads:

> in securing compliance or good faith partial compliance by a parent residing in such state (whether or not permanently) with an order issued by a Court of competent jurisdiction against such parent for the support and maintenance of a child or children or such parent with respect to whom aid is being provided under the plan of such other state.

In view of the fact that the State of Texas never provided any such support, the attempt to make the Texas order a basis for Utah jurisdiction over Mr. Pilcher was not in accord with the Utah Statute and the federal law on which it was based.

POINT V. THE UTAH ACT IN QUESTION WAS PROSPECTIVE IN NATURE AND CONFERRED NO RIGHT ON THE STATE OF UTAH TO SEEK REDRESS FOR CHILD SUPPORT PROVIDED PRIOR TO ITS ENACTMENT.

Chapter 45b of Title 75 of the Utah Code was passed by the Utah legislature in its regular 1975 session. There is no indication in the Act that there was to be an effective date for the act other than the usual 60 day time provided by the Utah Constitution. The legislation would therefore have become effective in mid May of 1975. There was no indication in any way, shape of form that this legislation was intended to have any retrospective or retroactive effect. It can only be concluded from a reading of the statute that it was intended to have prospective effect. Any rights of any parties affected by the act should be based on events occurring subsequent to its effective date. All monies attempted to be collected in this case were for child support provided before December 31, 1973.

A good statement concerning retrospective versus prospective consturction of statutes is found in 73 AM Jr 2d STATUTES, Section 350.

> The question whether a statute operates retrospectively,or prospectively only, is one of legislative intent. In determining such intent, courts observe a strict rule of construction against a retrospective operation, and indulge in the presumption that the legislature intended statutes or amendments thereof, enacted by it, to operate prospectively only, and not retroactively. However, a contrary determination will be made where the intention of the legislature to make the statute retroactive is stated in express terms, or is clearly, explicityly, positively, unequically, unmistakably, and unambiguously shown by necessary implication or terms which permit no other meaning to be annexed to them, and which preclude all question in regard thereto, and leave no reasonable doubt thereof.

Using this standard, the use of this statute against Mr. Pilcher was not intended by the legislature.

In one case the Supreme Court of Wisconsin went so far as to rule that the Wisconsin statute enacted to achieve the same result as the Utah statute under consideration was unconstitutional to the extent that it had a retroactive effect. See In re Estate of Mildred Marie Peterson, Deceased. Milwaukee County versus David L. Walther, 225 North Western 2d 644, 66 Wis. 2d 535 (1975). See also 81 C.J.S. Social Security Section 122.

CONCLUSION

The Supreme Court should reverse the judgment entered in the District Court of Salt Lake County and rule that Chapter 45b of Title 78 of the Utah Code has no application to any obligation against the appellant.

Dated this 1st day of April, 1982.

GRANT M. PRISBREY
Attorney For Appellant

Proof of Service

I hereby certify that I hand delivered two copies of the foregoing brief of Appellant to the office of the Salt Lake County Attorney, 431 South 300 East, Salt Lake City, Utah on the 1st day of April, 1982.

Grant M. Prisbrey