

1982

Jo Ellen Ray et al v. Edward Thomas : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JO ELLEN RAY, fna JO ELLEN)
THOMAS, and STATE OF UTAH, by)
and through Utah State)
Department of Social Services,)

Plaintiffs-Respondents,)

vs.)

EDWARD THOMAS,)

Defendant-Appellant.)

Case No. 18316

BRIEF OF RESPONDENTS

Appeal from an Order and Judgment of the
Second Judicial District Court for Weber
County, State of Utah, Honorable Calvin
Gould presiding.

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TABLE OF CONTENTS

	PAGE
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT1
RELIEF SOUGHT ON APPEAL2
STATEMENT OF FACTS2
ARGUMENT4
POINT I: ORAL TESTIMONY OF THE SUPPORT OBLIGOR IS NOT SUFFICIENT TO ESTABLISH PAYMENT OF A SUPPORT OBLIGATION4
POINT II: PUBLIC POLICY DICTATES THAT PAYMENT OF A SUPPORT OBLIGATION BE VERIFIED11
CONCLUSION14

AUTHORITIES CITED

- Bell v. Jones, 100 Utah 87, 110 P.2d 327 (1941)
- Jensen V. Logan City, 96 Utah 522, 88 P.2d 459 (1939)
- Marks v. Marks, 98 Utah 400, 100 P.2d 207 (1940)
- Moore V. Prudential Insurance Co. of America, 26 Utah 2d 430,
491 P.2d 227 (1971)
- Openshaw v. Openshaw, 80 Utah 9, 12 P.2d 364 (1932)
- Openshaw V. Openshaw, 86 Utah 229, 42 P.2d 191 (1935)
- Openshaw v. Openshaw, 105 Utah 574, 144 P.2d 528 (1943)
- Ross v. Ross, 592 P.2d 600 (Utah 1979)

STATUTES CITED

§ 78-24-1, Utah Code Annotated 1953, as amended

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JO ELLEN RAY, fna JO ELLEN)	
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)	
Plaintiffs-Respondents,)	Case No. 18316
)	
vs.)	
)	
EDWARD THOMAS,)	
)	
Defendant-Appellant.)	

STATEMENT OF THE NATURE OF THE CASE

This is an action for reimbursement for child support accrued under a Decree of Divorce. Reimbursement is sought from the support obligor (appellant) by the State of Utah for periods of time that the support obligee received public assistance from the State of Utah and assigned to the State of Utah the child support due under the Decree of Divorce.

DISPOSITION IN THE LOWER COURT

The State of Utah intervened in the divorce proceeding and filed an Order to Show Cause seeking reimbursement for certain periods. An evidentiary hearing was conducted by the Honorable Calvin Gould, District Judge. After considering the evidence adduced, Judge Gould awarded the State of Utah judgment in the sum of \$3,975.00 as reimbursement for child support accrued during the periods public assistance was expended for the benefit of Edward Thomas' dependant minor children.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the Lower Court's Order and Judgment.

STATEMENT OF FACTS

An Agreed Statement of Record on Appeal has been filed in this case pursuant to Rule 73(o), Utah Rules of Civil Procedure. Additionally, copies of Judge Gould's Memorandum Decision and the Order and Judgment entered by the Lower Court are part of record on appeal. The Agreed Statement of Record on Appeal are hereinafter referred to by the paragraph numbers of that Statement.

The Decree of Divorce entered February 8, 1974, provided that the appellant pay \$50.00 per month per child for the support of his two dependant minor children (§1 and 2). Prior to June, 1976, the State of Utah had expended public assistance for the benefit of the children and sought reimbursement for child support accrued at a hearing on Order to Show Cause June 22, 1976 (§3). At the hearing, the appellant contested the amount sought by the State of Utah, representing that payments had been made directly to his ex-wife (§4). The Court ordered at that time, upon the specific request of the State of Utah to avoid confusion in the future, that the appellant pay all further child support through the Clerk of the Court (§5). The appellant ignored that order; he only

made one payment to the Clerk in 1976 (August) and did not pay through the Clerk again until December, 1980 (§6). The Court's order that payment be made through the Clerk was not modified or changed. The only explanation that the appellant made for not having the Clerk's record to verify his alleged payments was his claim that his ex-wife had asked that payments be made directly to her (§13).

For various periods June, 1976, through December, 1981, the State of Utah expended public assistance for the benefit of the minor children of appellant. Said assistance was provided for 40 months, / June, 1976 through December, 1981; during the remaining 27 months, the appellant's ex-wife did not receive public assistance and was entitled to collect the support due individually (§7). At the evidentiary hearing held on the State of Utah's Order to Show Cause on December 28, 1981, the issue was child support paid by appellant during the 40 months for which public assistance had been expended on behalf of the children. The appellant testified that he had made the required payment for every month in question (§11), but did not have documentation for any of the claimed payments, except for those payments made to the Clerk in August, 1976, and subsequent to December, 1980 (§ 14,10). Jo Ellen Ray testified that the appellant had not paid her for every month in question; she did recall receiving some payments from the appellant, but did not recall the amounts or whether the payments were made

during one of the 40 months she was a public assistance recipient or during one of the 27 months she was not a public assistance recipient (§ 15, 16, 17). The total child support accrued during the periods public assistance was expended, [including that under the modified order (§ 8)], less total payments verified (§ 10), equalled \$3,975.00 (§ 11).

Judgment was awarded the State of Utah in the sum of \$3,975.00 and no credits were allowed to the appellant for payments which he orally testified were made but for which he did not have verification.

ARGUMENT

POINT I: ORAL TESTIMONY OF THE SUPPORT OBLIGOR IS NOT SUFFICIENT TO ESTABLISH PAYMENT OF A SUPPORT OBLIGATION.

Appellant argues that the trial court (a) ignored appellant's oral testimony; (b) gave appellant's oral testimony no weight whatsoever; and (c) in essence held appellant to be an incompetent witness. Respondents disagree. In his Memorandum Decision, Judge Gould stated:

The Court is under more severe restrictions in fact-finding in a case of this nature than in an ordinary civil case. Ordinarily, the oral testimony of a single witness (if believed) is sufficient for the proof of a fact. Such, however, is not the rule in the case at bar. Under rules which must be applied in accordance with decisions of the Utah Supreme Court, defendant's efforts to prove payments by oral testimony must fail. The proof of payment having failed, it follows that plaintiffs are entitled to judgment for \$3,975.00

While respondents agree with appellant that there is not a case directly on point, respondents submit that the implicit rule of law, understood by both support obligors and the Bar and employed by the Utah Supreme Court in its decisions, is that oral testimony by a support obligor is not sufficient to establish payment of a support obligation. Judge Gould correctly follows such decisions in making the above-quoted order. Contrary to appellant's position that cases decided by the Utah Supreme Court provide "little, if any, guidance", several prior cases decided by the Utah Supreme Court clearly state the rule and standard used by Judge Gould.

In 1931, Margaret Openshaw obtained a decree of divorce dissolving her marriage to Clarence R. Openshaw. Four different appeals arising from the decree were taken to the Utah Supreme Court, in addition to several other related appeals. In the first appeal, Openshaw v. Openshaw, 80 Utah 9, 12 P.2d 364 (1932), the use of the term "alimony" in the decree is clarified to include support for Margaret and the children. Hence, in referring to "alimony" in its decisions, the Court was referring to both spousal and child support and not setting one against the other as suggested on page 5 of Appellant's Brief. The Openshaw cases clearly deal with child support; however, respondents submit that the issue raised by this appeal applies to both spousal support and child support and no distinction need, nor should, be made.

The question of Clarence R. Openshaw's compliance with the order of support was raised in the second appeal. In Openshaw v. Openshaw, 86 Utah 229, 42 P.2d 191 (1935), Mrs. Openshaw admitted that she received payments totalling \$2,374.00 and Mr. Openshaw received credit accordingly. However, Mr. Openshaw asserted other payments made by him. The specifics regarding these other payments is not stated in the opinion, but at 42 P.2d, page 193, the Court stated:

As to the other payments alleged to have been made by him, though they were admitted as having been received, they were so uncertain in amount that to fix their total would be speculative. The burden being upon the defendant to establish the amount paid, he must assume the risk of any failure by reason of indefiniteness. The payments to the children themselves do not appear to have been made as payments upon alimony, but were rather the result of his fatherly interest in the welfare of those children.

This sets a standard for establishing support payments, to wit:

- (a) the amount of payment must be certain so that fixing the total paid is not speculation;
- (b) the support obligor bears the burden of proving the amount paid; and
- (c) the support obligor assumes the risk of any failure in payment by reason of indefiniteness.

Just as Mrs. Openshaw admitted to having received the other payments, Jo Ellen Ray agreed that she received some payments but was uncertain as to the amount or frequency of the payments

or the month of payment [Agreed Statement of Record on Appeal, ¶15, 16]. However, in weighing the testimony of the appellant and Jo Ellen Ray, the trial court determined that fixing payments would be speculative and that appellant failed to carry his burden of proof and was required to assume the risk for the indefiniteness in payment made. The trial court correctly applied the standard set forth in the Openshaw (second) case.

In the fourth appeal, Openshaw v. Openshaw, 105 Utah 574, 144 P.2d 528 (1943), it is clear that Mr. Openshaw understood the implicit rule of law that support payments must be verified and established by evidence other than the oral testimony of the support obligor. Mr. Openshaw had attempted to perpetrate fraud upon the court by submitting checks (verification) which had been altered as to the amounts, the payee and the dates. It is important to note that Mr. Openshaw went to the extent of committing fraud upon the court to prove payments by cancelled check rather than to rely upon naked oral testimony as to payment.

Placing the burden of proving payments upon the party asserting payment is a general rule applicable to all civil actions [for example, see: Bell v. Jones, 100 Utah 87, 110 P.2d 327 (1941)]. The rule was followed, and amplified, in the case Marks v. Marks, 98 Utah 400, 100 P.2d 207 (1940). In this case, the defendant had alleged, among other credits,

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payments for which he had not been credited by the plaintiff. In ruling on the issues before it, the Utah Supreme Court stated at 100 P.2d, page 210:

It is well settled that payment is an affirmative defense, and that the party claiming payment has the burden of proving it [citations omitted]. This rule should especially apply to cases of this kind, where the debtor can always, or is usually ordered to, make his payment into court, where a record is kept, thereby eliminating any chance of dispute.

The Court then quoted from the Openshaw case, 42 p.2d, at page 193, quoted above. Concerning the payments which the defendant claimed to have paid the plaintiff in small sums and cash, he introduced a check, a sender's receipt for a money order, and a receipt signed by the plaintiff. The Utah Supreme Court determined that the endorsement on the check was not the plaintiff's handwriting, and credit was not allowed. As to the sender's receipt, the Utah Supreme Court determined that it was a gift to the son rather than a payment of alimony and did not allow the credit. The receipt was allowed, as well as another small check admitted to having been received by the plaintiff. The Court did not allow him credit for any payments he could not verify by evidence other than oral testimony. It is implicit in the Supreme Court's discussion of these payments and the defendant's proffer of evidence other than oral testimony that the burden of proof placed upon a support obligor requires verification.

Verification can be made by (a) the support obligee's admission that the alleged payments were made; (b) a receipt

signed by the support obligee; (c) a sender's copy of a money order; (d) a cancelled check or other negotiable instrument; (e) court records; or (f) any other document showing receipt of monies by the support obligee.

Two other things are important to note from the Marks case. First, the trial court had originally placed the burden of non-payment on the plaintiff. This was overturned by the Supreme Court and at 100 P.2d, page 210, the Supreme Court indicated that if the evidence was evenly balanced, judgment should be awarded in favor of the plaintiff. Second, from the language quoted above, i.e., "This rule should especially apply to cases of this kind (emphasis added), where the debtor can always, and is usually ordered to, make payments into court, where a record is kept, thereby eliminating any chance for dispute", a distinction is made between support cases and other civil cases. At the June 22, 1976, hearing, the appellant was cited into court by the State of Utah. The appellant was present and it was clear that the child support was due to the State of Utah and the State of Utah wanted payment through the Clerk to avoid future confusion. The Clerk of the Court was not refusing to accept payments from the appellant. Jo Ellen Ray denied that she made a request for direct payments. This case demonstrates the importance of making payments through the Clerk of the Court. The order to

pay through the Clerk was not modified or altered. The appellant violated the Court's direct order and assumed the risk of having not made payments through the Clerk of the Court and, therefore, not being otherwise able to verify payments except for his own naked assertions; the appellant should not now be excused for violating the specific order concerning payments to the Clerk of the Court.

In the case Ross v. Ross, 592 P.2d 600 (Utah 1979), the support obligor made several different claims of payments. After discussing these specific claimed credits, the Supreme Court at page 604 commented on other credits claimed and restated the rule that the support obligor has the burden of proving payments and assumes the risk of indefiniteness:

Other amounts for which plaintiff claims credit were so uncertain as to amount or actual expenditure as to be highly speculative, and were paid out of either a joint checking account which he had with defendant or his own account into which defendant deposited her paychecks during that period of time when the parties attempted reconciliation. Plaintiff has not met his burden of proving that these expenditures were made by him. We therefore do not find that the evidence clearly preponderates against the Court's finding that plaintiff paid only \$7,024.00 in child support under the decree.

It is clear from the above decisions that oral testimony is not sufficient to meet the burden of proof required of the support obligor. The lower court did rule that alleged payments by appellant were not made. The trial court considered both the testimony of payment and the testimony of non-payment

and, in weighing the same, concluded that the evidence did not preponderate in favor of the appellant. Hence, the trial court ruled that the appellant had not met his burden of proof, and did not rule tantamount to saying the appellant was not a competent witness. Section 78-24-1, Utah Code Annotated, 1953 as amended, which is relied upon by appellant, provides that the credibility of the witness may be drawn in question by various factors, including his motives, and provides that the trier of fact is the exclusive judge of credibility. Judge Gould heard the testimony and weighed the statements of the witnesses. It resulted in a question of whom to believe and the court's decision, that the weight of evidence was against the appellant, should not be overruled on this appeal. Although not stated in Judge Gould's decision, the motive of the appellant to avoid repaying a substantial arrearage illustrates why the standard of proof set forth in the cited cases and the implicit rule of law is sound and should be affirmatively stated in upholding Judge Gould's decision on this appeal. The question of a witness' motive and its bearing on a support case is more specifically addressed under Point II.

POINT II: PUBLIC POLICY DICTATES
THAT PAYMENT OF A SUPPORT OBLIGATION
BE VERIFIED.

Two well recognized principles concerning oral testimony are, first, that the trier of fact is not required to believe self-serving testimony [see for example: Jensen v. Logan City, 96 Utah 522, 88 P.2d 459 (1939)], and, second, that if testimony

is given and no other evidence is offered to the contrary, the trier of fact is not required to find in accordance with the testimony [see for example: Moore V. Prudential Insurance Co. of America, 26 Utah 2d 430, 491 P.2d 227 (1971)]. These are not rules which are tantamount to saying that the witness is incompetent. These principles apply to all civil cases; however, in a support case even more restrictive principles should apply. To rule that in a support case the trier of fact is not required to give credit for payments established only by the testimony of the support obligor is consistent with, and mandated, by public policy.

The paramount consideration is that if a support obligor can merely come to a hearing and orally assert payments, without verification by clerk record, cancelled check, receipt, etc., no support obligor would ever again be delinquent! The support obligor could merely testify that he made all required payments in cash and obtain an order that he is current in his obligation. Such a possibility would spawn and encourage perjury. As a matter of public policy, even the temptation of perjury should be avoided. Although perjury is a problem for any witness, the inducement for perjury to avoid paying support for such a large population of similarly situated individuals is clearly contrary to public policy, especially where such perjury can be controlled, or even avoided, by requiring proper verification of payments. Further, the possibility that mere oral testimony could satisfy the burden of proving payment would make a mockery of the inalienable duties to provide support. It would in, most cases be the needy, minor

children who would suffer from the wholesale opportunity of support obligors to be declared current merely because they said so.

An additional consideration is the chaos and burden upon the courts. Since support cases are heard before judges as the trier of fact, an extreme burden would be placed upon the judiciary if oral testimony alone could establish payment of a support obligation. While our legal system is based upon the trier of fact deciding who is telling the truth, in support cases this would be to an inordinate extreme. In case after case after case the testimony of the support obligee would be pitted against the testimony of the support obligor -- in some cases payment may have actually been made, but credit not given, in others it may be given; yet in many other cases (too many) payment will not have actually been made, but credit given. The judiciary would be placed in the chaotic state of making coin-flips. There is no reason for such a nightmare when the reasonable and functional alternative is to require verification of payments.

These public policy considerations can be extended even further to the welfare setting where collusion could result, e.g.: the support obligee would receive welfare and then agree, be threatened, coerced or whatever to co-operate with the support obligor in getting ^{him} off-the-hook with the State of Utah; or, more importantly, the support obligor could have received payment, but deny the same to avoid his own welfare fraud. Also, the support obligor could merely assert payment in cash and further assert that the support obligor did not, or would not, give him a receipt because he did not want to be caught in welfare fraud; if the testimony

were accepted, the support obligor does not have to pay the accrual and the State of Utah could never prove the welfare fraud since the support obligee's testimony was that payment was not received - for a ruling of payment in one instance, is not a ruling of fraud in another instance. Hence, contrary to the interests of the taxpayers in the State of Utah, the State of Utah would be unable to collect from either party. A rule requiring proof of payment by other than oral testimony protects the support obligee, the benefactors of the support debt and any third party who comes to the aid of the support obligee and the dependant minor children.

To flatly state that oral testimony alone will not fulfill the burden of proving payment in a support case may appear harsh at first glance. However, support obligors can very easily protect themselves from double payments by paying by check, by money order, through the Court Clerk or insisting upon a receipt. Such is not in any way onerous; in fact, such has been the implicit rule of law followed by support obligors in the past.

CONCLUSION

The burden of proving payments is placed upon the person ordered to make payments. That person can assure proper credit for all payments by requiring a receipt, paying by check, or preferably paying to the Clerk of the Court. In the matter before the Court, Mr. Thomas was specifically ordered to pay through the Clerk of the Court and he violated

that order. He assumed the risk of any failure to prove payments by not making payments through the Clerk of the Court. Establishing his payments was speculation and a search in the parameters of indefiniteness. As a general principle, he, nor any other support obligor should not be allowed to merely take the witness stand and say, "I paid every month. I am 100% current. I paid in cash, and due to trust or an oversight, failed to get a receipt for my cash," when the same is denied by the equally competent testimony of the support obligee. While oral testimony may initially satisfy the burden of producing evidence, once that testimony is refuted by the support obligee, the burden shifts back to the support obligor to go forward with evidence beyond mere naked statement of cash payment. The support obligor is required to demonstrate definite payment by some means of verification. Since this shifting of the burden of proof is standard in all support cases, the steps of the support obligor's testimony of payment and ^{the} support obligee's testimony of nonpayment should not be necessary -- the rule should be made that oral testimony alone will not meet the burden of proving payments by a support obligor. Such a rule would not preclude the support obligor for soliciting the testimony of the support obligee in an effort to establish payment through the support obligee's testimony; but, upon the support obligee denying the claimed payments, would require the support obligor to come forward with verification of payment. The public policy considerations set forth above mandate

such a rule.

In the instant case, appellant failed to meet the burden of proof and because of the indefiniteness created thereby the decision of the lower court was correct and should be affirmed.

Respectfully submitted,



ROBERT D. BARCLAY
Deputy Weber County Attorney
Attorney for Plaintiffs-
Respondents

CERTIFICATE OF DELIVERY

This is to certify that a true and correct copy of the foregoing was delivered to the Office of counsel for Appellant, Bruce R. Baird, 310 S. Main St., 12th Floor, Salt Lake City, Utah, this 6th day of August, 1982.

