

1982

# Kenneth A. Swiecicki v. Board of Review of the Industrial Commission of Utah et al : Reply Brief of Plaintiff-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 :  
Dept. of Social Services, :  
 :  
Plaintiff-Respondent, :  
 :  
EDWARD THOMAS, : Case No.  
 :  
Defendant-Appellant. :  
 :

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BRIEF OF APPELLANT

NATURE OF THE CASE

This is an Appeal from a Judgment of the Second Judicial District Court for Weber County, Honorable Calvin J. Gould, presiding.

DISPOSITION IN THE LOWER COURT

The District Court granted Judgment in favor of the State of Utah, Department of Social Services, in the amount of Three Thousand Nine Hundred Seventy Five Dollars (\$3975.00) representing reimbursement for Welfare payments made for the benefit of Appellant's dependent minor children in the custody of his ex-wife.

RELIEF SOUGHT ON APPEAL

Appellant requests this Court to overrule or reverse the decision of the District Court and remand the case for further proceedings.

STATEMENT OF FACTS

This case is before this Court pursuant to Rule

73(o) on an "Agreed Statement of Record on Appeal". The facts provided here will be referenced to the paragraphs of that Statement.

Appellant was required, by a Decree of Divorce entered February 8, 1974, to pay child support in the amount of Fifty Dollars (\$50.00) per month for each of the the two children. (Paragraphs 1 and 2.) On June 22, 1976, at a Show Cause hearing instituted by the State of Utah concerning arrearages, the prior Decree was modified to require the child support payments to be made through the Clerk of the Court. (Paragraphs 3-5.)

After making one such payment to the Clerk of the Court, Appellant testified below that he made each and every subsequent payment directly to his ex-wife at her specific request. (Paragraphs 12-13.)

Appellant's ex-wife, while admitting to receiving certain payments personally, was unaware as to the amount or frequency of the payments, and whether or not they coincided with the periods during which she was receiving Public Assistance. (Paragraphs 16 and 17.) The ex-wife further denied that all payments had been properly made. (Paragraph 17.)

Intermittently from June, 1976, through December, 1981, Appellant's ex-wife was receiving Welfare benefits for the minor children, the total of which, less the proper deductions, was Three Thousand Nine Hundred Seventy Five Dollars (\$3975.00) at the time of the hearing below, (Paragraphs 7, 10, and 11.)

Ruling that oral testimony was insufficient to establish payment which was required to be made through the Clerk of the Court, the District Court granted Judgment in the full amount of Three Thousand Nine Hundred Seventy Five Dollars (\$3975.00). (Paragraph 18.) This Appeal resulted from that Judgment.

QUESTION PRESENTED

Whether oral testimony of the support obligor, if believed, is sufficient to establish payment under a support order requiring payment through the Clerk of the Court.

ARGUMENT

ORAL TESTIMONY IS SUFFICIENT TO  
ESTABLISH PAYMENT.

It should be first be noted that the Trial Court did not rule as to whether the payments had actually been made. That is, whether Appellant or his ex-wife were telling the truth about the payments. The Court instead ruled that Appellant's oral testimony was entitled to no weight whatsoever. It is that ruling, and not the issue of payment itself which is the subject of this Appeal.

Appellant's research has failed to find any case in this State which would even remotely be classified as on-point. Indeed, a search of other States and authorities also failed to disclose a case on-point. Accordingly, the balance of this Brief will be long on argument and short on authority.

Utah has adopted by Statute the rule that all

persons are competent to be witnesses so long as they are capable of perceiving events and relating these perceptions. § 78-24-1, Utah Code Annotated. All other factors, such as their interest in the litigation and their past background, are merely factors going to the weight and credibility of the testimony.

A logical concomitant of being a competent witness is having your testimony at least be considered for determining whether it is believable or not. To prima facie ignore a person's oral testimony is tantamount to holding that person incompetent to be a witness. This, the Statutes forbid.

There is no Statute or Rule in this State which requires written, corroboration of any asserted facts. Further, Trial Judges of this State uniformly give jury instructions to the effect that the testimony of one witness, if believed, is sufficient to establish the proof of any fact as against the contradictory testimony of other, and more numerous, witnesses. See California Jury Instructions - Civil "BAJI" 2.01.

The District Court below requested memoranda from the parties on this specific issue. The State of Utah, Respondent here, presented and discussed four prior cases of this Court. Though Appellant believes these cases provide little, if any, guidance they will be discussed below.

In Openshaw v. Openshaw, 86 Utah 229, 42 P. 2d 191 (1935), the Court considered various allegations of the Defendant that he had made required alimony payments. This Court



held that he would not be given credit because the amount of the payments was uncertain and more in the nature of child support rather than alimony. Such is not the case here. Appellant's testimony below was certain and definite that he made all required child support payments in cash.

Eight years later this Court considered the Openshaw divorce for the fourth time. Openshaw v. Openshaw, 105 Utah 574, 144 P. 2d 528 (1943). The Defendant was again seeking credit for alimony payments and had gone so far as to fraudulently endorse and alter various checks and endorsements in an attempt to establish payment. Despite this fraud on court, this Court agreed that he should be given credit for all the payments he testified to except those backed up with fraudulent instruments. In the instant case, there is no allegation of fraud against Appellant. Appellant simply states that at his ex-wife's request, all payments were made in cash.

In Marks v. Marks, 98 Utah 400, 100 P. 2d 207 (1940), this Court reversed the Trial Court holding that the burden of proof was on the party alleging payment. The Court, however, did allow the ex-husband credit for cash payments which were admitted by his former wife. In the instant case, Appellant's ex-wife similarly admits to receiving some cash payments but is uncertain of the amount and their coincidence with Welfare.

Three years ago, this Court considered Ross v. Ross, 592 P. 2d 600 (Utah 1979). Ross, in the context of the instant case merely holds that expenditures of a nature and type not in



conformity with the terms of the Divorce Decree are not to be credited against the obligations of the Decree. Such is not the case presently before the Court. Appellant's testimony was that he complied with the nature and type of the expenditures directed by the Decree merely avoiding the intermedial offices of the Clerk of the Court.

Appellant can find little guidance from the above-cases concerning the facts here. The logical argument that competency to testify implies the right to have the testimony's credibility weighed thus remains unshaken. Accordingly, § 78-24-1 establishing general competency appears to control and require reversal.

#### CONCLUSION

No Statute, Rule or case requires written corroboration of support payments even though such payments should have been made through the Clerk of the Court. Moreover, competency to testify necessarily carries with it the right to at least be considered for belief. Accordingly, this Court should reverse the Trial Court's ruling and remand this case for consideration as to the testimonial veracity of the conflicting witnesses.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of June, 1982.



BRUCE R. BAIRD, Counsel for

Appellant EDWARD THOMAS