

1992

Julie Bradford v. Jay Bradford : Brief of Appellant

Utah Court of Appeals

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DOCKET NO.

920095
IN THE COURT OF APPEALS OF THE STATE OF UTAH

JULIE BRADFORD)

Plaintiff and Appellant)

VS.)

JAY BRADFORD)

Defendant and Respondent.)

Case No. 920095-CA

Priority No. 4

BRIEF OF APPELLANT

AN APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT
OF THE STATE OF UTAH, COUNTY OF BOX ELDER,
THE HONORABLE ROBERT W. DAINES, PRESIDING

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FILED

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COURT OF APPEALS

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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction over appeals in domestic cases by way of Utah Code Annot. section 78-2a-3(h) (1991).

STATEMENT OF ISSUES

1. Whether the trial Court erred in granting credits toward Defendant's Child Support Obligation for payments made by his father on debts of the parties?

Standard of Review

The standard of review to be applied in this issue is the correctness standard, because even if there is no document labeled "Conclusions of Law," paragraph 2 of the document labelled "Findings of Fact," is clearly a conclusion of law mislabeled. General Glass Corp. v. Mast Constr. Co., 754 P.2d 438 (Utah Ct. App. 1988).

2. Whether the trial court erred in allowing in-kind credits toward child support obligations without a written and signed agreement to that effect?

Standard of Review

The same standard of correctness must be applied to this issue also, as the conclusion is one based on a matter of law

rather than a fact. General Glass Corp. v. West Constr. Co., 754 P.2d 438 (Utah Ct. App. 1988).

3. Whether the trial court erred in not applying the Statute of Frauds to the alleged agreement between the parties that Defendant's father would make the payments in the place of Defendant?

Standard of review

Again the standard of correctness should be applied rather than that of clear error because the question is one of law rather than one of fact. Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co., 744 P.2d 1376 (Utah 1987).

DETERMINATIVE STATUTES AND RULES

Utah Code Annot. sections 25-5-4(1), and 25-5-4(2) (1989):

The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:

(1) every agreement that by its terms is not to be performed within one year from the making of the agreement;

(2) every promise to answer for the debt, default, or miscarriage of another;

Utah Code Annot. section 25-5-5 (1953):

To charge a person upon a representation as to the credit of a third person, such representation, or some memorandum thereof, must be in writing subscribed by the party to be charged therewith.

STATEMENT OF THE CASE

Nature of the Case

This is an Appeal from a civil Judgment and Order signed by the Honorable R.W. Daines, acting District Judge in the First Judicial District Court in Box Elder County, State of Utah.

Course of the Proceedings and Disposition at the trial Court

This is a case where Plaintiff filed an Order to Show Cause, seeking to hold the Defendant in Contempt of Court for his failure to make Child Support payments and the reduction of the back child support into a judgment. Judgment was entered in favor of Defendant, Jay Bradford, on the 21st day of January, 1992. The Plaintiff filed her Notice of Appeal on February 5, 1992.

STATEMENT OF RELEVANT FACTS

1. Plaintiff is a resident of Box Elder County, State of Utah. Defendant is a resident of the State of Montana. [See Transcript of hearing held in Box Elder County Court House, October 28, 1991, before Judge R.W. Daines, (hereinafter referred to as Tr.) page 3 and 68].

2. Plaintiff obtained a divorce from the Defendant in May of 1988, in Box Elder County, State of Utah, and

Plaintiff was awarded custody of the two minor children (Tr. at 16).

3. Defendant was ordered to pay child support in the sum of \$150.00 per month per child(Tr. at 72).

4. Defendant became delinquent in child support payments as of October 28, 1991, in the sum of \$9,149.00 (Tr. at 19).

5. Plaintiff filed an Order to Show Cause in October, 1991, seeking contempt and a reduction of the delinquent child support to a judgment against Defendant, which matter came for hearing on October 28, 1991 before Judge Daines (Tr. at 1).

6. Defendant counterclaimed an offset from payments made by his father toward the parties' bills and obligations (See Tr. at 71 and 75-77).

7. The Transamerica, First Security Bank and R.C. Willey debts were to be paid from a \$5,000.00 note owed to the parties on their Plain City home. The note became delinquent and Plaintiff sued on the note, and recovered \$2,500.00 (Tr. at 23)

8. Plaintiff paid the following debts of the parties:

Transamerica	\$ 178.24
First Security Bank	\$ 320.39
R.C. Willey	\$1,076.12

(Tr. at 24)

9. Plaintiff also paid the following amounts on bills

and obligations that the Defendant had been ordered to pay:

Zions Bank	\$800.00
Dr. Wilding\$213.45
Prescriptions\$294.00

(Tr. at 19, 20, 23 and 34)

10. The balance of the bills of the marriage, in the sum of \$5,551.33, were paid by the paternal grandfather (Tr. at 24, 57, 59, 71, 76).

11. The grandfather testified that at the time he made the payments on the parties bills, he was attempting to "help out" his former daughter-in-law and grandchildren (Tr. at 57-59).

12. The grandfather further testified that he did not expect to be reimbursed by the Plaintiff. He was making a "gift" to his daughter-in-law and grandchildren without expectation of reimbursement or that the Defendant would be given credit against his delinquent child support obligations (Tr. at 57-60).

13. Plaintiff claimed, at the contempt proceeding that the Defendant had not paid \$263.50 for the attorney fees on the divorce decree, \$1,775.00 paid by Plaintiff's parents on obligations, \$550.00 for a garbage trailer awarded to Plaintiff, and \$1,344.00 for one-half of day care (Tr. at 5, 12, 18, 29-30, 34, 36, 44).

14. The trial court allowed Defendant to offset against Child Support the gratuitous monies paid by the paternal

grandfather on the parties' bills and obligations (See Findings of Fact dated January 21, 1992, paragraph 6).

SUMMARY OF THE ARGUMENT

The trial court committed reversible error when it credited the payments made by Defendant's father toward the back child support owed by Defendant. It is well established law in Utah that the child support arrangements cannot be altered without the agreement of the custodial parent. It is also well established that the obligor on child support cannot be given credit for in-kind payments. If a parent buys shoes for example, for the children, he will not receive credit toward child support, unless the obligee agrees to give him that credit.

If the Office of Recovery Services were seeking reimbursement from the Defendant in this case, he would not have been given credit for the payments his father made on the debts of the parties, unless there were a written agreement, and even then it would have had to have been approved by the Court to be recognized as payment for the child support he is required to pay under the decree.

The statute of frauds clearly applies to the case at bar. The Defendant claims an agreement for his father to pay his obligations in child support, yet there was no mention to the plaintiff that such was the intent when she was apprised of the Defendant's father making payments on the parties'

debts. Such an agreement for the father to stand in the place of the Defendant in his obligations to the Plaintiff would have had to be in writing and signed by the Plaintiff as well as the Defendant and the father.

Since the Court gave the Defendant credit toward his obligations of child support for payments on debts owed by both parties made by his Dad, the Court in all fairness should have increased that amount or reduced the amount of the debts to be paid by the Plaintiff by the amounts her own parents had paid.

ARGUMENT

I

THE TRIAL COURT ERRED IN ALLOWING OFF-SETS TO CHILDSUPPORT OWED BY DEFENDANT FOR GRATUITOUS PAYMENTS MADE BY DEFENDANT'S FATHER. THE COURT ALSO ERRED IN ALLOWING IN-KIND CREDITS TOWARD CHILD SUPPORT OBLIGATIONS OF THE DEFENDANT WITHOUT AN EXPRESS AGREEMENT BETWEEN THE PARTIES.

It is an established rule that the obligor parent in a divorce situation cannot substitute benefits which he gives the children in any other form for the cash payments in set amounts mandated by the decree of divorce in any particular case. The Utah Supreme Court in Harris v. Harris, 14 Utah 2d 96, 377 P.2d 1007, 1009 (1963) reiterated that rule when the father attempted to justify his failure to pay the full amounts as required by his maintenance of medical insurance on the children and allowing the Plaintiff to deduct the children on her income tax as dependents. ". . . We must

agree with plaintiff that the decree did not authorize the defendant to substitute benefits to the children for the support payment ordered by the decree. and we believe that the trial court's conclusion that defendant should be held in contempt is supported by the law and evidence."

In Hills v. Hills, 638 P.2d 516, 517 (Utah 1981), the Supreme Court struck down an agreement of the parties and an order of the trial court which allowed future payments of child support to discontinue under the condition that the Defendant give up his parental rights and allow the Plaintiff's second husband to adopt the children. The second husband never did adopt the children, thus the Court never did hold a hearing as to the termination of the rights of the father and child support had to continue. The Court said ". . . The right to support from the parents belongs to the minor children and is not subject to being bartered away, extinguished, estopped or in any way defeated by the agreement or conduct of the parents."

In Larsen v. Larsen, 561 P.2d 1077, 1079 (Utah 1977), the Utah Supreme Court stated the rule that ". . . In this jurisdiction alimony and support payments become unalterable debts as they accrue; therefore, a periodic installment cannot be changed or modified after the installments have become due."

In Ross v. Ross, 592 P.2d 600, 603 (Utah 1979), the Utah Supreme Court again restated the rule against in-kind support

payments and this time emphasizes the necessity for the agreement of the custodial parent to such changes.

" . . . Plaintiff is not entitled, however to credit for expenditures made on behalf of the children or defendant which do not specifically conform to the terms of the decree.¹⁰ To do so would permit plaintiff to vary the terms of the decree and usurp from defendant the right to determine the manner in which the money should be spent.¹¹ Only if the the defendant has consented to the plaintiff's voluntary expenditures as an alternative manner of satisfying his alimony and child support obligation, can plaintiff receive credit for such expenditures.¹²"

Similar is the holding of the Utah Supreme Court in Stanton v. Stanton, 30 Utah 2d 315, 517 P.2d 1011, 1013-14 (1974).

" . . . The general rule is that the decree fixes the obligations of the parties; and that they cannot modify it or change their obligations by their conduct.⁹ Otherwise sometimes interfamilial tensions and machinations could make a shambles of determining and enforcing the rights and duties of the parties.

In the absence of any modification of the decree, the support money accrued in accordance with its terms; and it was not the prerogative of the defendant to unilaterally decide that he would not pay the support money and offset it by favors conferred upon the children."

Most recent in the long line of cases reiterating the rule of no in-kind credits without agreement of the parties is the foot note number 4 in a case in which the Utah Court of Appeals overturns the actions of the Office of Recovery Services in not allowing credit where the Defendant allowed

his ex-wife and children live in a house he owned in exchange for credit toward his child support obligation and the wife was on public assistance. Utah Dept. of Social Services v. Adams. 806 P.2d 1195. 1196 (Utah App. 1991).

" . . . We hasten to add that the instant case is atypical and in no way do we lend general support to efforts to satisfy support obligations "in-kind." The agreement here concerned property that was easily valued and the children clearly received a significant surplus. Mrs. Adams had bargained for and acquiesced in the agreement and the court and the Department had been notified of the arrangement. Nothing in this opinion should deter the Department from taking the position it took here, albeit unjustifiably, in the more common situation where a support obligor unilaterally drops off second-hand clothes, canned fruit, or a pair of skis and then purports to deduct his or her view of the value thereof from support payments. Indeed, it may safely be said that the Department's fundamental position is sound--it just missed, by a mile, the case in which to seek validation of that position."

From the foregoing discussion of relevant caselaw, it is obvious that in the instant case, the trial court erred egregiously in allowing the Defendant credit toward his back child support obligation for payments toward debts made by the Defendant's father (Findings of Fact #'s 5 and 6). There must be a written or at least an oral agreement for the obligor parent to substitute any such payments for his obligation under the decree to pay child support as ordered. If such an alteration is to be made he must confer with the Custodial parent and receive her acknowledgement of such a deal.

In the instant case there were no written or oral agreements allowing any change in the way payments were to be made (Tr. at 25). The Plaintiff did not know of any such arrangement and definitely did not agree to Mr. Bradford receiving credit toward his back child support for the payments his father made gratuitously on behalf of the whole family (Tr. at 25). It was not until the Plaintiff sought to enforce her right to back child support that the idea of a credit even was thought of, and then by Defendant's Counsel as a defense to the action for contempt and judgment (Tr. at 15).

The right to child support is one belonging to the children and should have been protected by the court in this situation, especially had the court found that there had indeed been an agreement for the child support credit to be made. It would obviously be to the children's detriment to allow their father to avoid paying his child support and also to default on payments on family debts as occurred in this case. The grandfather did not want to see his grandchildren left out in the cold and made the offer to pay off the debts without being asked and without any thought of asking the Plaintiff to pay the Defendant (Tr. at 57-60). In giving the credit for the grandfather's payments in this case, the trial court has actually forced the Plaintiff to repay that gift or loan to the Defendant by forcing her to forego back child support which is hers according to the divorce decree in

addition to the contribution that the Defendant was to make on the debts of the parties.

II.

THE TRIAL COURT ERRED IN NOT APPLYING THE STATUTE OF FRAUDS TO THE THIRD PARTY AGREEMENT WHEREBY THE DEFENDANT'S FATHER MADE PAYMENTS ON BEHALF OF THE DEFENDANT.

It is clear that the agreement, if indeed there were one by which the Defendant could obtain the substitution of his father for himself in his debt for child support and default on other obligations, would need to be in writing to binding on the Plaintiff in a case such as this one. Further, according to the Utah Court of Appeals, the agreement to allow credit for the payment of debts to be substituted for actual cash child support payments must be in writing and satisfy the statute of frauds.

In Brown v. Brown, 744 P.2d 333, 334, 335, 336 (Utah App. 1987), the Defendant tried to enforce a stipulation purportedly agreed to by the Plaintiff through Court action. The agreement provided that the alimony would be reduced and then terminate as also the child support would increase and then terminate within a set period of time. The Plaintiff's attorney had agreed to the stipulation, and the Plaintiff had never signed it. In fact she discontinued the service of her attorney. The Defendant never produced the writing he claimed had been agreed to by the Plaintiff and the Court

stated in pertinent part,

" . . . Silence cannot be construed to be assent in these circumstances. For a stipulation to be binding, agreement by the parties must be evidenced by a writing which would satisfy the statute of frauds, or the agreement must be stated in court on the record before a judge. The facts in this case do not show such evidence. Therefore, there was no stipulation reached between the parties and there is nothing for the Court to enforce."

The court went on to say further, ". . . We will not go around the Statute of Frauds and Rule 4.5(b) to create a stipulation on the mere acceptance of \$200.00 per month by plaintiff" In the instant case the parties both state that there was no agreement between the parties for the grandfather to take the place of the Defendant in paying his child support, or for the payment of debts as a favor by the Grandfather of debts of the parties to cancel out the back child support debts of the Defendant (Tr. at 25, 71-2). There is only an agreement mentioned orally for the Defendant to repay the amounts paid by the grandfather by him (Tr. at 57-60, 71). There being no writing as required, and there being no contract allowing the interposition of Defendant's father in his place to pay his obligations, the statute of frauds bars any such implication of an agreement by the trial court and the de facto imputation of such an agreement by the court giving the Defendant credit for amounts paid by his father on his just debts toward child support.

Further a brief glance at the statute of frauds will

show that any such agreement for the interposition of the grandfather in the place of Defendant in paying his child support or the allowance of in-kind credits would fail its requirements. Utah Code Annot. sections 25-5-4(1) and 25-5-4(2) (1989), in pertinent part states:

The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:

(1) every agreement that by its terms is not to be performed within one year from the making of the agreement;

(2) every promise to answer for the debt, default, or miscarriage of another;

Any agreement which would require the passing of more than a year would violate the statute if not in writing. This was one of the reasons that the Court in Brown stated that the Statute of Frauds applies to child support and alimony agreements. Also as stated above the agreement for the father to answer for the debt of the son must be in writing and signed by the Plaintiff.

Further the statute in Utah Code Annot. section 25-5-5 (1953) requires a writing if another person is to be charged with the debt of another and would also bar an agreement such as that implicated by the Court in the instant situation.

To charge a person upon a representation as to the credit of a third person, such representation, or some memorandum thereof, must be in writing subscribed by the party to be charged therewith.

III

THE TRIAL COURT ERRED IN NOT CONSIDERING THE AMOUNT THAT DEFENDANT FAILED TO PAY TOWARD PLAINTIFF'S ATTORNEY FEES AS ORDERED IN THE ORIGINAL DIVORCE DECREE AND THE AMOUNTS PAID BY PLAINTIFF'S PARENTS AND THE VALUE OF THE LOSS OF THE GARBAGE TRAILER AWARDED TO PLAINTIFF UNDER THE ORIGINAL DECREE WHEN FIGURING OUT THE AMOUNT OF MONEY OWED TO PLAINTIFF BY DEFENDANT AND GIVING HIM THE CREDITS TOWARD BACK CHILD SUPPORT

The original decree in this case awarded the Plaintiff with the garbage trailer (Tr. at 31-32) which was later removed by the Defendant's father (Tr. at 32, 60). She paid to have improvements made to it and she placed a value on it of \$500.00+ (Tr. at 33). The Trial Court disregarded this evidence of expense in apportioning who owed what (Findings of Fact, # 3). This should have been added to the amount to be offset by the Defendant's supposed payments.

Defendant was ordered also in the divorce decree to pay a certain amount of attorney fees of the Plaintiff in getting the divorce (Tr. at 74). This he also failed to pay (Tr. at 74) and this amount was also left out of the figuring of the Court in determining the total figure of Credits and offsets (See transcript at 91-97, and Findings of Fact, no mention in either place of the attorney fees). The Court should be reversed on this point and the case remanded for refiguring of amounts offsetting each other on this point.

The Plaintiff's parents paid \$1775.00 toward bills that should have been paid by Defendant (Tr. at 28-30). This amount was also left out of the reckoning by Judge Daines and

should also be included in a redetermination by the Court as to offsets (See Transcript and Findings of Fact for fact that this also was not considered because of lack of its mention in either document).

CONCLUSION

In conclusion, the Plaintiff should prevail and asks that the Court reverse the trial court's award of credit for the gratuitous gifts of Defendant's father toward the Child Support obligation he owes Plaintiff and remand for the Trial Court to enter a judgment against the Defendant in the amount of back child support actually left unpaid after credit for whatever has actually been paid through the withhold orders of the Office of Recovery Services.

DATED THIS 6th day of July, 1992.


Respectfully Submitted,

DALE M. DORIUS
Attorney for Plaintiff/Appellant

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing Reply Brief of Appellant to be mailed on this 6th day of July, 1992 to:

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