

2001

Kevin Dwyer v. Emily Assenberg : Reply Brief

Utah Court of Appeals

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Utah Court of Appeals

Kevin Dwyer,	:	Reply Brief of Appellant
Appellant/Petitioner,	:	
	:	
v.	:	
	:	
	:	Appellate Case No. 20010634-CA
Emily Assenberg,	:	
Appellee/Respondent	:	

From the 7th District Court Utah Case # 004700079

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Paulette Stagg
Clerk of the Court

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Summary

The basis of this appeal is the trial court's wholesale disregard of Utah Code §78-45-7(3) (d), (h), and §78-45-7(4) in the determination of the child support award for the minor child Quince Tillien Dwyer Assenberg (Quince). At the behest of the appellee's (Ms. Assenberg's) counsel, these sections as well as Utah Code §78-45-7.5(5)(b), (c) and §78-45-7.5(7)(a),(b) were ignored by the trial court, as it acted in punitive and errant fashion, further stressing the limited resources of the appellant (Mr. Dwyer). While the emotional, conjecture laden and accusatory testimony of Ms. Assenberg was certainly able to confuse the trial court, the trial court erred by failing to acknowledge the factual and statutory points raised in by Mr. Dwyer and the testimony he introduced.

I. The trial court failed to apply statute and improperly determined the child support obligation.

While granted wide latitude in determining the facts, the trial court is expected to uphold certain standards. Essentially, the trial court is charged with developing an accurate picture of the facts surrounding the case by applying appropriate statute. With respect to the determination of income, and subsequently

support, the trial court erred by failing to apply consistent and appropriate statutes in determination of facts. The statutes Utah Code §78-45-7(3) (c), (d), (h), §78-45-7(4), §78-45-7.5(5) (b), (c) and §78-45-7.5(7) (a), (b) apply to this issue and the importance of this determination was emphasized in Shinkoskey v. Shinkoskey, 2001 UT App 44.

With respect to the income of the parties, for Mr. Dwyer, the trial court made a determination that the appellant's income should be based on its historical maximum. This determination was made despite testimony (R: 19; R: 15; R: 63-64) that informed the court of the appellant's wide variety of employment, seasonal variation in income, unemployment during at the time of conception, and birth of the minor child and unemployment at time of trial. Utah Code § 78-45-7.5(5) (b), (c) specifically direct the court to consider all of these factors. While only marginally relevant, but in response to Ms. Assenberg's statements about the current financial status of Mr. Dwyer, it should be noted that the Mr. Dwyer, despite consistent effort, has been able to achieve only temporary employment since relocating to Salt Lake City. The appellant's income for year 2001, including unemployment compensation, was \$18,400, yielding a monthly amount of \$1533, far from the imputation figure of \$2800/mo.

Conversely, the trial court imputed, to the Ms. Assenberg, a completely arbitrary figure of \$960/mo. (perhaps, minimum wage for a 40 hr. work week?)

despite testimony by the Ms. Assenberg which placed her income at \$2160/mo.

(R: 106). Utah Code §78-45-7(3) (d) specifically directs the court to consider the Ms. Assenberg's "ability...to earn" when making a determination on income imputation. It would seem that the Ms. Assenberg's assertions of her income, and thereby "ability to earn," would be a defining factor in any determination. An imputation for Ms. Assenberg at less than half of Ms. Assenberg's own and uncontested figures is clearly errant.

So, whereas the appellant's income is imputed at the historical maximum, and Ms. Assenberg's income is imputed at what appears to be its potential minimum, the court fails to be consistent with applicable statute, to act in the best interest of the child, and to render a determination representative of the facts.

Statute Utah Code §78-45-7 clearly states that a modification of child support award, "(iv) does not allow a decrease in support as a result of the obligor's voluntary reduction of income." Despite the Ms. Assenberg's allegations that Mr. Dwyer's unemployment was voluntary ("he goaded his employer into firing"(Brief of Appellee, pg. 14)), an extensive investigation by the Utah State Division of Unemployment Compensation found his unemployment to be involuntary and, as such, awarded him unemployment compensation (See trial court file for verification of unemployment compensation and (R: 57-61). There is no provision to award unemployment compensation for voluntary unemployment.

In fact, Mr. Dwyer's unemployment came as result of a dispute regarding the responsibilities of owners (R: 61-62) and resulted in Mr. Dwyer being physically assaulted by his employer. A police report confirming the details of this event, corroborated by the Utah State Division of Unemployment Compensation, exists with the City of Moab, Utah police department.

Most importantly, the trial court further failed in its charge, in determining the facts and applying the law, by ignoring the *a priori* obligation of the appellant to his first born child Chahakilo Tori (Cha). Contrary to the assertions of the Ms. Assenberg's counsel Cha did not "periodically" reside with his father, Mr. Dwyer, but rather consistently and in the majority of time resided with Mr. Dwyer, at time of trial (R: 45;R: 50).

It is clearly in the best interest of the court to support arrangements, court sanctioned or independently negotiated, which provide for the support of dependant children. In the case of Cha, the fact that the mother and father (Mr. Dwyer) were able to negotiate a support and custody arrangement outside of the court should be acknowledged and supported, not denied as did the trial court (R: 149). The limited resources and positive interactions, of the parents of Cha, are to be conserved and lauded. By denying this important obligation, in factoring support for Quince, the trial court and the Ms. Assenberg, act to punish and further constrict the limited resources of the appellant.

On this point of obligation to support “other” children, the law is absolutely clear and unambiguous. Statute Utah Code §78-45-7 states that the trial court should consider relevant factors including, “(3) (h) the responsibilities of the obligor and the obligee for the support of others.” This section goes on to say, “(4) When no prior court order exists, the court shall determine and assess all arrearages based upon the Uniform Child Support Guidelines described in this chapter.” In this respect, distinctly and importantly, the trial court erred to fulfill the requirements of the statute. It should be noted that Mr. Dwyer directly and unambiguously requested consideration of this factor in determining the support obligation (R: 136). The fact that the custody circumstances, with respect to Cha, have changed has little bearing on the issues at hand as Mr. Dwyer has maintained financial support for Cha consistent with Uniform Child Support Guidelines.

II. The trial court erred in its calculations in order to determine a tax benefit arrangement consistent with Utah Code §78-45-7(1) (b) (iv), §78-45-7(3) (c), (d), (h) and §78-45-7(4) and the best interest of the child.

As described by the trial court judge(R: 156-157), the value of any tax deduction for the minor child is intimately related to notions of income. With the aforementioned inaccurate determination of income, the appropriate tax award of the minor child, as a deduction, is impossible to clearly ascertain. What is clear is

that the court, in a variety of considerations, directed to act in the best interest of the child (Utah Code §78-45-7.2(3) et. al) and as such this tax benefit is best assigned to the party to whom it is of greatest benefit, particularly where a buyout arrangement is proposed which places no penalty on the other party, as recognized in Motes v. Motes 1989 Utah App. In failing to consider Utah Code §78-45-7(1)(b)(iv), §78-45-7(3) (c),(d),(h) and §78-45-7(4) as mentioned above, the trial court erred to consider the best interest of the child by conserving limited parental resources, the year 2000, excepted. In excepting the year 2000, and allowing for a “buyout” of tax benefit, the trial court recognized the variability of this financial equation (R: 156-161). Further, in allowing this buyout for year 2000 only, the trial court showed the important relationship between the imputation of income and calculation of tax benefit, though it continued its display of bias toward the appellant and ignorance in Utah Code §78-45-7(3) (h) and §78-45-7(4) in attempting to calculate(R: 156-157), based on errant figures of the tax benefit to each party.

III. The trial court erred when it ordered Mr. Dwyer to pay a portion of Ms. Assenberg’s attorney fees.

Fundamentally, there would have been little cause for legal action if Ms. Assenberg’s counsel and the trial court would have proposed a settlement

consistent with statutes Utah Code §78-45-7(3) (h) and §78-45-7(4). Furthermore, Ms. Assenberg's failure, *for years*, to post Mr. Dwyer as the father of record, on the birth certificate, all the while collecting support for Quince, necessitated Mr. Dwyer's action to assert his paternity, rights and obligations with respect to Quince. Additionally, Ms. Assenberg's unfounded restriction and elimination of visitation of Quince, by Mr. Dwyer, and her impending move, some 250 miles away, only exacerbated the effect of excluding of Mr. Dwyer as father(R: 95-96). Mr. Dwyer only reluctantly undertook this method of recourse after all of the aforementioned conditions existed. With respect to the award of attorney's fees, it would be proper to consider that the issues before the Court of Appeals, specifically as codified in Utah Code §78-45-7(3)(h) and §78-45-7(4), are those at issue with respect to (1) the stipulation agreement proffered by Ms. Assenberg's counsel, (2) trial court ordered mediation and (3) the trial court. Additionally, Ms. Assenberg and counsel, through proposed stipulation, mediation and trial, have been the consistent advocates of resolution in forms which defy these statutes.

The documents filed with the trial court, and testimony at trial, indicate that Mr. Dwyer is of limited financial means and that he acted to conserve expenditures on legal fees for both parties by initiating mediation, both informal and Trial Court ordered (R: 121). Testimony and documents filed with the court confirmed his status, not as a wealthy home owner, but that of a poor renter, with no significant

assets (R: 19; R: 15; R: 63-64). Ms. Assenberg, conversely, and according to her own testimony, enjoys employment at \$18/hr. (R: 106) largely predicated on the regular and ongoing child care provided by Mr. Dwyer (R: 107-108).

As for the stipulation prepared by Ms. Assenberg's counsel, it was prepared pursuant to a request by Mr. Dwyer that a stipulation should be crafted consistent with Utah statute. The proposed stipulation specifically failed to conform to Utah Code §78-45-7(3) (c), (d), (h) and §78-45-7(4) and proposed an imputation of income, for Mr. Dwyer, *higher, even, than that of the trial court*. With respect to this imputation, Ms. Assenberg's proposed stipulation, further, specifically disregarded statute Utah Code §78-45-7.5(5) (a).

As the trial Court file shows, Ms. Assenberg was defiant in attempts to mediate the conflict, objecting, even, to trial court mandated mediation (R:152). Specifically, and most importantly, this predisposition to a non-negotiation stance has contributed to legal expenses incurred by Ms. Assenberg. And, as the trial court file shows, the pleadings were honest attempts by Mr. Dwyer to fully inform the court of the changing circumstances of the case including the Ms. Assenberg's relocation to Salt Lake City and Mr. Dwyer's unemployment.

Be it noted that at no time did Mr. Dwyer vacate his support obligations to Quince (R: 108-110), despite allegations that "he was "happy to have the unemployment because he was trying to get the most snowboarding days in one

season.””(Brief of Appellee, pg. 14), and, while, for no articulately reasoning, other than legal maneuvering by the Ms. Assenberg (R: 95-96), he was denied and restricted in his access to visitation of Quince (R: 121) and, while, further he failed to be recognized as the father of record on the birth certificate (R: 95-96). Though certainly this context caused Mr. Dwyer to point out to the Ms. Assenberg the likelihood of court settlement should the denial of visitation and proper recording of paternity persist, it was only with reluctance that Mr. Dwyer initiated legal proceedings.

IV. The court should order the parties to pay their own legal fees and the court costs associated with the appeal should be shared equally.

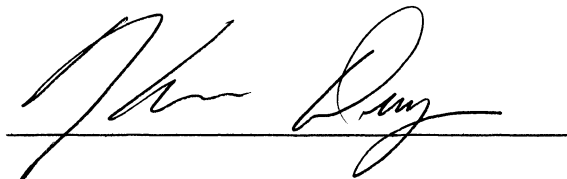
As the issues before the Court of Appeals are points of law, and Ms. Assenberg and counsel supported a disregard for law, specifically Utah Code §78-45-7(3) (c),(d),(h) and §78-45-7(4), by the trial court, the parties should be responsible for their own attorney’s fees and should share in the court costs of the appeal.

Conclusion

Based on the foregoing, the Court should:

- (1) Remand the case to the trial court for a correct determination of child support pursuant to Utah Code §78-45-7(3) (c), (d), (h), §78-45-7(4), §78-45-7.5(5) (b), (c) and §78-45-7.5(7) (a), (b).
- (2) Direct the trial court to consider the award of the child, for tax benefit purposes, in light of the new support and income calculations and that arrangement which best conserves the limited resources of the parents.
- (3) Order parties to pay their own attorney's fees.
- (4) Order the court costs associated with this appeal to be shared equally.

Submitted this 5th day of April, 2002.

A handwritten signature in black ink, appearing to read "Kevin Dwyer", is written over a horizontal line.

Kevin Dwyer, Appellant, Pro Se