

1992

June Larson v. Orlo Larson : Reply Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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JUNE LARSON,)
)
Plaintiff and Appellee.) Case No. 920864-CA
)
vs.) APPELLANT'S REPLY BRIEF
) (Appeal)
)
ORLO LARSON,)
)
Defendant and Appellant.)

=====

APPEAL FROM THE FOURTH DISTRICT COURT - JUDGE LYNN DAVIS

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Priority Pursuant to Utah R. App. P. 29 (b) **FILED**
Category 16 (All Other Appeals) Utah Court of Appeals

JUL 19 1993


Mary T. Noonan
Clerk of the Court

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Pages</u>
<u>Adelman v. Adelman</u> , 815 P.2d 741 (Utah App. 1991)	6
<u>Bingham v. Bingham</u> , 629 P.2d 1297 (Okla. App. 1981)	7-9
<u>Fauver v. Hansen</u> , 803 P.2d 1275 (Utah App. 1990)	8-9
<u>Fuller v. Fuller</u> , 360 N.E. 2d 357 (Ohio App. 1976)	4
<u>Grover v. Grover</u> , 839 P.2d 871 (Utah App. 1992)	5-6
<u>In Re Lee's Estate</u> , 206 P. 548 (Utah 1922)	8
<u>Neil v. Utah Wholesale Grocery Co.</u> , 210 P 201 (Utah 1922)	8
<u>Smith v. Smith</u> , 651 P.2d 1209 (Az. App. 1982)	7
 <u>RULES OF PROCEDURE</u>	
Rule 6-404 of the Utah Rules of Judicial Administration	5
Rule 60(b) of the Utah Rules of Civil Procedure	8
 <u>STATUTES</u>	
Utah Code Annotated §78-45-4	4
Utah Code Annotated § 78-45-7.6 (3)	4

TABLE OF CONTENTS

<u>SUBJECT</u>	<u>PAGES</u>
JURISDICTION & NATURE OF PROCEEDINGS BELOW	3
ISSUES PRESENTED FOR REVIEW	3
STANDARD OF REVIEW	3
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3-4
STATEMENT OF FACTS	4
RESPONSE TO APPELLEE'S POINT I	4
RESPONSE TO APPELLEE'S POINT II	5
RESPONSE TO CASES CITED BY APPELLEE	6-9
OTHER ARGUMENT OF APPELLEE	9
CONCLUSIONS	9

JURISDICTION & NATURE OF PROCEEDINGS BELOW

Appellant does not take any exception to this portion of Appellee's brief and relies on his previous brief.

ISSUES PRESENTED FOR REVIEW

Although each party has framed the issues a little differently, both Appellant's opening brief and Appellee's brief set forth the essential issues of this appeal.

STANDARD OF REVIEW

Appellant relies on the standard of review set forth in his opening brief.

STATUTES INVOLVED

Copies of the relevant statutes have been provided to the court in the addendum to Appellant's opening brief. Those which have not been previously cited are reproduced within this brief.

STATEMENT OF THE CASE

Appellant relies on the Statement of the Case as set forth in his opening brief, but desires to point out that neither party has been totally correct in the statement that "The court commissioner refused to enforce the provision and struck the Order to Show Cause". (Appellee's Brief, page 3 and Appellant's Brief, page 4)

The Court Commissioner entered an order which partially relieved Appellee from her obligations under the Decree of Modification, Struck a portion of the Decree of Modification

entered more than five (5) years early and granted other relief to Appellee. (Record 504-506 & Appendix to Appellant's Brief, page 30)

STATEMENT OF FACTS

Appellant relies on his statements of the case and facts in his original brief and objects to that portion of Appellee's brief which attaches a letter from the Social Security Administration. (Appellee's Brief, page 4 and Appendix A) If the Court overrules this objection, Appellant desires to provide documents showing Appellee's substantial income.

RESPONSE TO APPELLEE'S POINT I

Appellee argues that the stipulation of the parties and subsequent orders of the trial court cannot be enforced because Social Security Benefits can only be used for the benefit of the recipient children. (Appellee's Brief at 8) While this appears to be a correct statement of the law, Appellee ignores Utah Code Annotated §78-45-4 which states:

"Every woman shall support her child; and she shall support her husband when he is in need."

Appellee is obligated to support her children and the Child Support Guidelines found in Utah Code Annotated §78-45-7.6 provides a scheme by which each parent supports their children in proportion to their respective incomes. It states in pertinent part:

"The parents' child support obligation shall be divided between them in proportion to their adjusted gross income."

Appellee works and makes substantially more income than Appellant due to his retirement. Under the scheme worked out between the parties, the Appellant was and is paying Appellee's share of the children's support as well as his own.

RESPONSE TO APPELLEE'S POINT II

Appellee argues that Appellant has sought to modify the decree of divorce in violation of "Rule 6-404 of the Utah Code of Judicial Procedure" which does not permit modification by order to show cause. (Appellee's Brief, page 16) The rules are actually entitled Rules of Judicial Administration. Appellee, however, fails to cite the entire rule for the Court. Subsection 3 states:

"(3) No petition for modification shall be placed on a law and motion or order to show cause calendar without the consent of the commissioner or the district judge." Emphasis added.

Appellant does not agree that he was trying to modify the decree on the order to show cause calendar, but for the sake of argument, even if he was, both the commissioner and the assigned judge placed these matters on their respective calendars without objection from Appellee. The commissioner signed an order to show cause and the assigned judge noticed Appellant's motion to enforce the decree and for other relief for oral argument.

Appellee also cites Grover v. Grover, 839 P.2d 871 (Utah App. 1992) in support of this argument. Grover involved a mother who attempted to enforce a provision in a decree which automatically

increased child support at certain times. Some states have used this mechanism to avoid the need for parties to return to court for modifications. The Grover Court simply held that such an automatic escalation clause in a decree violates Utah statutes requiring a showing of changed circumstances to modify child support absent agreement of the parties.

Appellee also cites Adelman v. Adelman, 815 P.2d 741 (Utah App. 1991) which involved relief granted to a party on an order to show cause calendar. The trial court awarded retirement benefits, enforced part of the decree and modified part of the decree on the order to show cause calendar. Although the Court of Appeals did find that the trial Court was without jurisdiction to amend the decree without a finding of change circumstances, the Court did affirm the trial court in its determination to enforce the existing orders of the court.

RESPONSE TO CASES CITED BY APPELLEE

Appellee cites several cases from other jurisdictions to support her position that Appellant should still be required to pay her lien after he complied with their stipulation and she did not.

This Court should note that each case cited by Appellee was an appeal taken immediately after the court ruled. None of the cases involved a situation where a decree was entered and more than five years later one party refused to comply. All are distinguishable.

In Smith v. Smith, 651 P.2d 1209 (Az. App. 1982), the mother appealed a decision of the trial court related to orthodontic expenses for the parties' children. The Arizona Court of Appeals framed the issue as follows:

"The issue raised is whether the father, the appellee, is liable for orthodontic expenses incurred by the mother, the appellant, on behalf of the parties' minor child."

The appeal was from an order on order to show cause. The Court held that the mother had not proven that the orthodontic expenses were necessary for the health and welfare of the children. The court reasoned that the fact that the children received social security for the father's disability did not preclude the court from ordering the father to pay medical expenses in addition.

Fuller v. Fuller, 360 N.E. 2d 357 (Ohio App. 1976), was a contempt case where the Court held that the social security benefits of the father for the children could not be used to pay arrearage of support incurred when the father was not disabled in order to purge his contempt. The father had failed to pay support during an extended time when he was either employed or on workman's compensation. He excuse was denial of visitation.

Bingham v. Bingham, 629 P.2d 1297 (Okla. App. 1981) was an appeal where the parties had agreed that the adopted father would not be required to pay child support if he would not visit with the child. Later the mother filed a petition to modify the decree and

the Court ordered the adoptive father to start paying child support prospectively. No arrearage was accessed. The father appealed and the Court simply held that there was a substantial change and that the agreement should be set aside based on the change. The Court did justice by not accessing child support arrearage.

Appellee cites several Utah Cases. In Re Lee's Estate, 206 P. 548 (Utah 1922) is an old case that dealt with the Homestead Exemption Statute and has nothing to do with the issues before this court.

Neil v. Utah Wholesale Grocery Co., 210 P. 201 (Utah 1922), was a contract case. The Court held that the intent of the legislature determined if a contract violates a statute. The Utah Child Support Guidelines support the argument that the scheme agreed upon between these parties is enforceable and not a violation of public policy in light of the failure of Appellee to act under Rule 60(b) of the Utah Rules of Civil Procedure. The scheme of the parties clearly relieves Appellee of her obligation to support the children and places the entire obligation on Appellant.

Fauver v. Hansen, 803 P.2d 1275 (Utah App. 1990), involved a petition by a child to enforce her right to support over an agreement between her parents that the father's parental rights would be terminated. There was no father responsible for the

child's support if the agreement was enforced. The Court held that such an agreement was against the specific public policy to have the obligation of support to a child clearly delineated at all times. Like Bingham, supra, the father had agreed not to visit with the child in exchange for an agreement not to pay child support.

OTHER ARGUMENTS OF APPELLEE

The Appellee makes other arguments and addresses cases which have previously been argued by Appellant. A response would add nothing to this appeal except repetition.

CONCLUSIONS

The purpose of this reply brief is to provide the court with information as to the cases cited by Appellee, to point out the arguments not addressed by Appellee and to clarify other points.

For the reasons set forth herein and in Appellant's opening brief, Appellant urges this court to enforce the 1985 and 1987 stipulations and orders of the trial court and award him his attorney's fees and cost. Alternatively, Appellant urges this court to enter an order deeming the \$10,000.00 property award to Appellee satisfied and to award him his attorney's fees.

Respectfully Submitted



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Attorney for Appellant/Defendant

CERTIFICATE OF MAILING

This is to certify that on this 13th day of July, 1993, two
(2) true and correct copies of the foregoing was mailed, postage
prepaid to the following:

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