

1991

# Kathryn L. Mattingly v. Thomas C. Mattingly : Brief of Respondent

Utah Supreme Court

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KATHRYN L. MATTINGLY and the  
STATE OF UTAH, by and through  
Utah State Department of  
Social Services,

Plaintiffs and  
Appellants,

vs.

THOMAS C. MATTINGLY,

Defendant and  
Respondent.

Case No. 14627

BRIEF OF RESPONDENT

Appeal from an Order of Dismissal of the  
Third Judicial District Court in and for  
Salt Lake County, the Honorable Bryant H.  
Croft, presiding.

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Case No. 14627

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The issues are procedural. The questions are whether a divorce decree is final as to child support orders in the sense that the action is no longer pending and whether it is appropriate to take a deposition in an attempt to recover child support arrearages without first filing a pleading.

DISPOSITION IN THE LOWER COURT

Judge Bryant H. Croft on June 4, 1976, decreed as follows:

1. The signing of a divorce decree closes the action and specific relief must be plead in order for there to be a justiciable issue upon which further discovery may be predicated.

2. The Utah Department of Social Services may be joined as a real party in interest in a divorce case where

it has provided support, received an assignment, made proper application and given proper notice. This ruling was later sustained by the Utah Supreme Court in the case of Social Services v. Margo Bartholomew, March 76.

3. No separate action need be filed by the Department of Social Services as its petition to intervene is based upon a support order in the divorce decree.

4. The attorney is deemed relieved of further representation upon the filing of the divorce decree, and service may not be had on defendant by mailing a copy of the notice of taking deposition to the attorney six years after the case was closed.

#### RELIEF SOUGHT ON APPEAL

Respondent seeks to have provisions #1 and #4 upheld and to have an order entered requiring the State Department of Social Services to file a pleading before it takes depositions in support arrearage cases.

#### STATEMENTS OF FACTS

Defendant Thomas Mattingly was formerly married to Kathryn Mattingly. Two children were born of the marriage. A final divorce decree was entered May 15, 1970, requiring defendant to pay child support of \$50 for each child per month.

The Utah State Department of Social Services, represented by the attorney general's office, about January 27, 1976, filed an ex parte motion and became a party to the



case, pursuant to statute. The motion was accompanied by an affidavit signed by the assistant attorney general, Stephen Schwendiman, who claimed no personal knowledge of statements in the affidavit.

A copy of the ex parte motion to join and the order of joinder, along with a notice of taking defendant's deposition, were mailed January 27, 1976, to Attorney Don Bybee, who had represented the defendant in the original proceeding, and to Attorney Ray Grossman, who had represented the plaintiff in the original proceedings.

On January 30, 1976, Mr. Grossman filed notice that he did not represent or know the whereabouts of either Kathryn L. Mattingly or Thomas C. Mattingly.

On February 3, 1976, Mr. Bybee filed objection to the interpleader and taking of deposition alleging:

1. The divorce action is closed.
2. The Utah Department of Social Services is not a real party in interest.
3. A separate action should be filed before a deposition can be taken.
4. One cannot serve a defendant by mailing to his former attorney after a case is concluded.

These objections were heard by Judge Bryant Croft on June 4, 1976. He ruled in favor of Attorney Bybee on Points 1 and 4. The overruling of objection Two (2) is not challenged here.

POINT I

THE SIGNING OF A DIVORCE DECREE IN UTAH IS FINAL AS TO PAST DUE SUPPORT PAYMENTS AND, UNTIL OR UNLESS MODIFIED, AS TO FUTURE SUPPORT PAYMENTS.

Under UCA 30-3-5, the court retains continuing jurisdiction to deal with custody and support matters and may make such modifications and alterations as the court deems equitable and necessary.

However, the court on numerous occasions has recognized the finality of past due support payments. See *Openshaw v. Openshaw*, 144 P2d 528; *Myers v. Myers*, 62 U 90, 218 P 123, 30 ALR 74; *Cole v. Cole*, 101 U 355, 122 P2d 201; *Larsen v. Larsen*, 9 U2d 160, 340 P2d 421; *Openshaw v. Openshaw*, 102 U 22, 126 P2d 1068.

*Harmon v. Harmon*, 491 P2d 231, 26 U2d 436, admittedly recognizes the continuing jurisdiction of the court to deal with support matters and the different character of support orders as claimed by appellant in his brief. But the case did not address the question of whether past due support payments were final orders; rather the court's disposition of the case recognized the finality of support orders. In *Harmon*, the ex-wife had brought suit to recover support arrearages due under a divorce decree. The lower court entered judgment for her along with a stay of execution on that judgment so long as the defendant made regular future payments along with some partial payment on the arrearage. The plaintiff's ex-wife objected to that stay. It was in upholding

that stay that the Supreme Court spoke of the different character of support orders and in so doing was recognizing the finality of past due payments (orders).

We submit that the other four cases appellant relies on to support his position that a decree is not final as to the support rights of children also fail to address the question.

Rees v. Archibald, 6 U2d 864, 311 P2d 788, stands for the proposition that a father's responsibility for his child's support is not affected by a divorce decree that does not award support payments.

Bott v. Bott, 20 U2d 329, 437 P2d 684, was a contempt proceeding in which the court held that it retained jurisdiction to modify a divorce decree regarding the distribution of property, a position that is neither attacked by appellee nor supportive of appellant's position.

In Harrison v. Harrison, 22 U2d 180, 450 P2d 456, the question was whether particular modifications made by the lower court were proper. Although the question of the finality of a divorce decree was not addressed, such a position is not inconsistent with the holding of the case.

In Riding v. Riding, 329 P2d 878, 3 U2d 136, the Supreme Court held that a former wife, by stipulation, could not relieve her former husband of child support obligations imposed by a divorce decree.

In none of these cases was the Supreme Court asked to answer the question of whether a divorce decree is final

as to the support rights of children. Each of the cases, including those recognizing the continuing jurisdiction of the court to modify a decree, is consistent with the position that a divorce decree is final as to support rights.

## POINT II

THE ISSUANCE OF A SUBPEONA TO COMPEL ATTENDANCE FOR DEPOSITION PRECEEDINGS WITHOUT FIRST FILING A PLEADING ALLEGING AN ARREARAGE IN SUPPORT PAYMENTS AND ASKING FOR JUDGMENT, EXECUTION, OR CONTEMPT IS NOT APPROPRIATE.

"Rule 26 (b) (1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." [Emphasis added]

"Rule 30 (a) When Deposition may be taken. After commencement of the action, any party may take the testimony of any person . . . . Leave of court . . . must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of thirty days after service . . . ." [Emphasis added]

Thus it is clear that the Supreme Court intended that an action be commenced or be pending in order for deposition proceedings to be properly held. To argue that the commencement of the original divorce proceedings satisfies this requirement completely ignores the finality aspect of a divorce decree. (See Point I regarding finality.)

A case should no longer be considered pending once a final decree has been entered and the case closed.  
See UCA, 30-3-7.

"When decree becomes absolute. The decree of divorce shall become absolute at the expiration of three months from the entry thereof . . . ."

It is therefore apparent that three months after entry of a divorce decree, such decree is final, the case is closed, and the action is not longer pending.

The fact that the decree is final does not preclude the re-opening of the case to modify or alter some provision of the decree. This possibility, however, does not change the final character of the divorce decree. Again see Point I.

In order, then, for a deposition to be taken, the inquiring party must take some step to once again cause the action to be commenced or considered pending. This is typically done by issuing an order to show cause, by the institution of contempt proceedings, or by asking for a writ of execution under URCP 69.

That this is the practice in Utah is evident by the numerous Utah cases which exemplify the procedure to be followed when enforcement of a divorce decree is sought. See McKay v. McKay, 370 P2d 358, 13 U2d 187, where the plaintiff sought to collect past due support money awarded for a minor child by bringing an order to show cause proceeding seeking to have her former husband held in contempt; Hall v. Hall, 326 P2d 707, 7 U2d 413, where an action was brought to reduce unpaid support money to judgment; Larsen v. Larsen, 300 P2 596, 5 U2d 224, a suit against a former husband for past due child support payments awarded by a divorce decree; Harris v. Harris, 377 P2d 1007, 14 U2d 96, a proceeding by a divorced wife to have her divorced husband found in contempt

for failure to comply with provisions of the divorce decree and to recover delinquent support money.

See also *Brown v. Brown*, 228 P2d 816, where the contempt procedure was followed; *Wallis v. Wallis*, 342 P2d 103, 9 U2d 237, a proceeding to hold plaintiff's former husband in contempt and for judgment for all arrearages in support since the entry of the divorce decree; *Pluckard v. Anderson*, 333 P2d 1065, 8 U2d 299, which involved supplemental proceedings for unpaid support money.

See further *Smith v. Bray*, 357 P2d 189, 11 U2d 218, an action by a divorced wife against her former husband to obtain delinquent support payments for a minor child; *Atkinson v. Strong*, 490 P2d 729, 26 U2d 405, where a former wife sought judgment for past due support payments and to have her former husband punished for contempt.

In all of these cases, action was taken to again bring the defendant before the court before the question of past due support payments was explored.

In *Shaffield v. Shaffield*, 34 So2d 591, the plaintiff filed a bill to cancel a deed for her former husband's land to his new wife so that said land could be used to pay back alimony and support. In that same bill, plaintiff also asked for discovery, alleging that such "discovery is necessary to enable complainant to reach and subject the same to the satisfaction of said amount due and to become under the decree." Here again it was recognized that automatic discovery is not appropriate when a final decree has closed a divorce case.

Installments of support allowances when due and unpaid become final judgments and may be collected in the same manner as other judgments. Schaffer v. District Court In and For the City and County of Denver, 470 P2d 18, 172 Colo 43; Sproston v. Sproston, 505 P2d 479, 3 Wash App. 218; Beiter v. Beiter, 265 NE2d 324, 24 Ohio App. 149.

Proceedings to enforce an order for the payment of money for the support of minor children are subject to any valid defense against the required payment. Armstrong v. Green, 260 Ala 39, 68 So2d 834; Lear v. Lear, 189 P2d 237, 29 Wash 2d 692.

Shaw v. Pilcher, 341 P2d 949, 9 U2d 222, and McGavin v. McGavin, 494 P2d 283, 27 U2d 200, recognized the propriety of defending against child support orders.

And in Boyle v. Baggs, 350 P2d 622, 10 U2d 203, the court said, "Even though the decree recites the monthly payments to be made, a number of situations may exist where there would be no debt under the decree and which facts would not be shown by an examination of the record . . . As between the parties such circumstances could be shown in any determination of the amount due under the decree."

Without the party wishing to take a deposition taking some step that would cause a divorce action to be re-opened or re-commenced so that it is once again pending, the defendant party to be deposed would have no opportunity to defend in court.

Appellant relies on Scheffer v. Scheffer, 48 NYS2d 839, 183 Misc. 344, to show the propriety of allowing the use of depositions for determining the financial status of the husband after a decree of divorce has been entered. We do not dispute the propriety of using depositions for such purposes. We argue that if a deposition is to be taken, it can be taken only after a pleading has caused the case to again be pending. In Scheffer this requirement had been met as the wife was bringing a contempt action against her former husband for failure to pay alimony.

We agree with appellant when he says ". . . there must be some tool available to parties to establish what the situation is relative to child support payments." (Appellant's brief p.8. ) We contend, however, that proper procedure must be used when such tools are brought into play.

Appellant speaks of inexpensive methods and the conservation of tax dollars as reasons to shortcut the proper procedures. We submit that such are not sufficient reasons to shortcut and circumvent clear rules, case laws, and due process rights.

### POINT III

THE DEFENDANT IS ENTITLED TO KNOW WHAT FACTS ARE RELEVANT TO A DEPOSITION AND IS DEPRIVED OF DUE PROCESS IF HE IS COMPELLED TO SUBMIT TO A FISHING EXPEDITION BY THE OPPOSITION BEFORE THE COMMENCEMENT OF THE ACTION BY A PLEADING.

Utah Code 30-3-5 provides that a divorce court retains jurisdiction to deal with custody and child support



matters; that proposition is not attacked nor is it relevant to this appeal. What is at issue is the manner in which such matters are commenced. The Utah Code 30-3-1 provides:

"Proceedings in divorce shall be commenced and conducted in the manner provided by law for proceedings in civil cases. . ."

Civil cases are to be commenced under URCP 3 by "(1) by filing a complaint with the court. . . (c) The court shall have jurisdiction from the time of filing the complaint or the service of the summons."

It is axiomatic that civil cases are to be conducted consistently with the tenants of due process.

Merely notifying a defendant that his deposition is to be taken in connection with a divorce case in which a final decree has been entered does not give the defendant notice as to what the subject matter of the inquiry may be. Due process requires that some sort of pleading -- order to show cause, citation, order to enforce judgment, writ of execution-- be filed to delineate the issues.

Support money judgments are based on defaults occurring after entry of the divorce decree from which they are derived and a former husband as alleged judgment debtor in such proceedings is entitled to due process of law, so as to know the claimed facts and can controvert them in court if he elects. *Ditmar v. Ditmar*, 293 P2d 759, 48 Wash 2d 373.

Pleadings are to frame and present the issues to be tried, vis; state, define, and limit the issues that are presented for determination at the trial. *Tate v. Rose* 35 U 229, 99P 1003. *Toone v. J.O. O'Neill Const. Co.* 40U 265, 121 P 1

The due process requirement is again emphasized in URCP 7, which provides in part:

"(1) Motions. An application to the Court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought . . . " (Emphasis added)

One of the inherent equity powers of the court is the enforcement of support orders. These actions are taken by citation, order to show cause, or by contempt proceedings. Herzog v. Bramel, 82 U 216, 23 P2d 345.

To secure any of these actions, the moving party must allege and prove the alleged conditions. Chaffee v. Chaffee, 63 U. 261, 225 P. 76. Rockwood v. Rockwood, 65 U 261, 236 P. 457. Hampton v. Hampton, 86 U. 570, 47 P2d 419.

Modification of a decree is obtained by the filing of a petition and the petition must set forth facts alleging a change of conditions or be dismissed. Jones v. Jones, 104 U. 275, 139 P2d 222. These allegations must set forth the new matter or facts in a verified petition or affidavit in a formal manner and it should be stated therein, in clear and concise terms, just what the applicant complains of and what he desires to prove. Cody v. Cody, 47 U. 456, 154 P. 952, distinguished in 58 U. 228, 198 P. 165.

It is clear from the record that no petition, complaint, order to show cause, contempt citation, or action to enforce judgment, either verified or unverified, formal or informal, has been filed.

Appellant's ex parte motion for order for joinder

of parties is not such a pleading since it fails to comply with the due process notice of requirements of a pleading.

Furthermore, Utah Code Annotated 78-45-9 also recognizes the necessity of an action being commenced when it gives the Attorney General's office responsibility of representing the State Department of Social Services "whenever any court action is commenced" by that department. A motion for joinder may give the Department the right to commence an action, but that motion alone commences nothing.

#### POINT IV

AN ATTORNEY IS DEEMED RELIEVED OF FURTHER REPRESENTATION OF A CLIENT UPON THE ENTRY OF A FINAL DECREE AND SERVICE ON DEFENDANT MAY NOT BE HAD BY MAILING NOTICE TO THE FORMER ATTORNEY.

An attorney is hired to bring an action to judgment only and is deemed relieved of further representation upon the entry of a final decree in the case. Sandall v. Sandall, 57 U 150, 193 P. 1093, 15 ALR 620.

This principal was followed in Schuler v. Dickson, 243 P 377, which, quoting from Sandall, said, "It is always a presumption that an attorney is employed to conduct the litigation to judgment and no further; the relation of attorney and client and the general powers of the attorney cease upon the rendition and entry of the judgment."

It follows, then, that since the authority of the attorney for defendant in a divorce proceeding terminates upon entry of the final divorce decree, subsequent notice to that attorney is without effect upon the defendant.

In the Sandall case, supra, a divorce decree had been rendered in favor of plaintiff who several years later moved to have the decree modified, serving notice of said motion upon the attorney who had represented the defendant in the original divorce action. The Supreme Court held that service should not have been made upon defendant's former attorney and that such service alone was not sufficient to give the court jurisdiction over the defendant.

Attorney Bybee here represented the defendant in the above-entitled case in the original divorce action in 1970 but has not subsequently been employed or retained by his former client in connection with the divorce. The appearance of Attorney Bybee has been a special appearance only to contest service and the attempt on the part of the State Attorney General's office to shortcut procedural due process. The attorney has not been paid for the special appearance nor this appeal and was brought into the case by the Attorney General and placed in a position where he had to respond at great expense or see a former client be denied due process, and it is reasonable that the State be required to pay costs and a reasonable fee of \$1,000.00.

#### CONCLUSION

The welfare recovery division performs an Executive service in stimulating the payment of support. This area was formerly handled by private persons through private counsel. The division is continually expanding government into the private sector on the basis of recouping welfare,

which was the original grant of authority. They now try paternity cases, determine fraud and eligibility for relief, hear and set amounts of support, handle estates, execute liens, and a myriad of judicial functions beyond the scope of legislative authorization. As a part of this expansion, the recovery bureau determined an interview with the allegedly defaulting obligor would produce the best results if conducted with the formality of a deposition. The deposition is then used to support criminal action, induce repayment agreements, seize property, or determine deficiencies from support.

Without affirmative pleadings, the deponent cannot limit the scope of the examination nor even be present if his former attorney is the only one served, and he is, thus, denied due process of law. Also, the judicial retirement fund is dependent upon filing fees, and the state pays none by using closed pleadings to initiate action. Further, the attorney is placed in an untenable position in having to defend without a client or payment for his time or in facing disciplinary proceedings for ignoring the notice of deposition.

The Court should find this action not commenced and quash the taking of Defendant's deposition. They should also rule that a divorce is final and the attorney discharged upon the filing of the decree and award \$1,000.00 costs and attorney's fees to Don L. Bybee.

Respectfully submitted,

DON L. BYBEE  
Attorney at Law

Nann Novinski-Durando  
Associate