1983

Roseann Catt Karren v. State Department of Social Services : Appellant's Brief

IN THE SUPREME COURT

OF THE STATE OF UTAH

ROSEANN CATT KARREN, Plaintiff and Appellant, vs. STATE DEPARTMENT OF SOCIAL SERVICES, Defendant and Respondent.	No. 19215

APPELLANT'S BRIEF

Appeal from the Judgment of the
Third District Court
For Salt Lake County
Honorable J. Dennis Frederick, Judge

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STATEMENT OF THE KIND OF CASE

The case in the lower court was in the nature of a judicial review of an administratively determined child support debt in favor of the defendant, pursuant to the Public Support of Children Act, Chapter 45b of Title 78, Utah Code Annotated, 1953 as amended.

DISPOSITION IN LOWER COURT

The lower court only had to determine if plaintiff was liable at all for past support, since the issue as to the amount of such support had not yet been addressed by the administrative agency. The facts pertinent to the liability issue were not in dispute. Therefore the lower court merely heard argument and ruled the plaintiff was liable, from which ruling the plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the ruling of the lower court, thus barring defendant from claiming any past child support from plaintiff, and for costs and such other relief as the Court may deem proper.

STATEMENT OF FACTS

The marriage of plaintiff and Larry D. Taber was dissolved on or about October 30, 1972, by means of a Judgment of Divorce rendered in the County of Macomb, State of Michigan. A copy of the said Judgment is submitted herewith as Exhibit A. (Plaintiff's Exhibit 1, page 2 of Transcript of Hearing.)

Said Judgment of Divorce provided on page two for the "Custody of Minor Children" and the "Support and Maintenance of Minor Children." Mr. Taber was awarded custody of two children, and plaintiff was awarded custody of the third. Mr. Taber was ordered to pay child support to plaintiff in the sum of $30.00 per week.

Subsequently, Mr. Taber failed to pay plaintiff the child support ordered, so they agreed he could take care of the third child instead of paying any child support. (Page 16 of Transcript of Hearing.)

There was some uncertainty as to whether the Decree had been modified in view of this new arrangement. The Administrative Law Judge indicated that he would not consider a proferred Order Modifying the said Judgment. (Page 18 of Transcript of Hearing.) However, the lower court apparently considered the Order in making its decision. (Page 17 of Transcript of Proceedings.)

A copy of the Order which was probably proferred is submitted herewith as Exhibit B. Said Order was based on stipulation and abated the child support provision until further order

that court.

By March of 1976, Mr. Taber had all three children in Utah. Beginning in that month, and continuing sporadically until March of 1981, defendant helped Mr. Taber in varying degrees to support the three children. (Plaintiff's Exhibit 3 - Transcript of Hearing.)

Defendant found in the administrative proceeding that plaintiff was legally obligated to reimburse defendant to a certain extent for the money paid to help support the three children, and that a hearing should be held to determine to what extent plaintiff should be required to reimburse the defendant. (Defendant's Order.)

Plaintiff filed a Complaint in the lower court for a judicial review of this Order. But the lower court refused to upset the defendant's Order. (Pages 17-18 of Transcript of Proceedings.)

ARGUMENT

Point 1. The Michigan Divorce Decree had res judicata effect on the issue of child support due from plaintiff.

There never has been a court order requiring plaintiff to pay child support. Defendant's procedure, therefore, has been based on statutory provisions applicable in the absence of a court order, specifically section 78-45b-5 of the Utah Code Annotated, 1953 as amended.

The question that arises is how it can be said there is an absence of a court order in the face of the existence of th Michigan Judgment of Divorce.

In making its ruling, the lower court indicated that the full faith and credit given to the Michigan decree was not an issue. (Page 16 of Transcript of Proceedings.) Rather, the support duty of the plaintiff was not res judicata; there was no order regarding the support of plaintiff's children.

The rationale given was that the Michigan order did not specify an amount of support for the two children awarded to the custody of Mr. Taber, and its award of child support regardi the third child would not apply since its custody had been informally changed. (Page 17 of Transcript of Proceedings.)

Inherent in this ruling is the principle that if an issue is not specifically addressed in the order, it is not rendered res judicata by the order. However, such is not the law.

"A domestic judgment or decree entered in a suit for divorce...bars relitigation of the same cause of action and every material issue which was actually adjudicated, as well as all issues which might have been but were not adjudicated therein." 24 Am Jur 2d Divorce and Separation §497 at 623. (Emphasis added.)

The Michigan order specified the division of custody and allocated child support. Even though the decree did not specifically adjudge plaintiff's duty to pay child support to Mr. Taber, the duty was either inherently adjudicated or certainly might have been adjudicated. Therefore, the issue of her duty of child support was res judicata, and an order regarding her child support obligation was in existence.

This same principle would apply to the Order Modifying Judgment of Divorce as to Child Support (Exhibit B hereto) if that order is considered herein.

The fact that effectively and/or literally the Michigan court placed the entire burden of supporting the children on Mr. Taber should not affect the validity of the order. Utah case law "does not mean that, where the circumstances so justify, the court cannot order either parent to support children and relieve the other." Forbush v. Forbush, 578 P.2d 518, 519 (Utah 1978).

In so allocating child support, the court is not obligated to add "and support from the other party is not ordered." It is sufficient that child support was in issue, and a party was not ordered to pay it.

A similar factual situation existed in the case of Wenham vs. Wenham, 570 P.2d 123 (Utah 1977). Although Mrs.

Mecham pleaded in her complaint for temporary child support, there was no provision made in the decree for any sum expended for the support of the child prior to the date of the decree.

The court did not rule, "Since the decree was silent on the issue of prior support, no order existed." On the contrary, the matter was ruled res judicata.

Likewise, plaintiff's duty of child support has been fixed, it is res judicata, and an order does exist.

As reitereated in Roberts v. Roberts, 592 P.2d 597, 599 (Utah 1979), Mecham "holds the State's right to reimbursement is derivative of the person entitled to support, and is limited to the amount of support fixed by a court. Because the district court assessed no child support payments against defendant until after the effective date of the decree, the State was not entitled to reimbursement for sums expended for the child before the decree." (Emphasis added.)

Point 2. An additional child support obligation should not be imposed upon plaintiff despite a change of circumstances without modification of the Divorce Decree.

Although an order exists and plaintiff's duty of child support is res judicata, plaintiff does not claim she may never be required to provide additional support for her children. Unlike alimony, if plaintiff has not been required to pay child support by the decree of divorce, she may nevertheless at some time be required to shoulder that burden. Compare Hills v. Hills, 638 P.2d 516 (Utah 1981) with Hamilton v. Hamilton, 89 U. 554, 58 P.2d 11 (1936).

However, for that duty to be fixed at a certain amount, the existing court order must be properly modified.

In Mecham vs. Mecham, supra, the court stated:

> The trial court ruled the divorce decree fixed the amount to be paid under defendant's duty of support, and no further proceedings are required or allowed to otherwise change that determination, except a petition to modify the divorce decree because of a change of circumstances.... We agree.
>
> 570 P.2d at 125.

There is nothing to indicate that defendant was not at all times able to follow the procedure set forth in Mecham and petition to modify the divorce decree because of a change of circumstances. However, defendant has continually failed and refused to follow that procedure, preferring instead to pursue the administrative procedures under Chapter 45(b) of Title 78, which procedures were specifically found to be

Point 3. A retroactive increase in the child support obligation of the plaintiff was not lawful.

Not only has defendant attempted to modify the divorce decree through administrative proceedings, but it has sought to do so retroactively.

However the law of this State is that the level of support can only be changed prospectively:

> Thus, while support payments become unalterable debts as they accrue and a periodic installment cannot be changed or modified after the installment has become due, the trial court may exercise its discretion in imposing a duty of support prospectively. Bernard v. Attebury, 629 P.2d 892, 894 (Utah 1981)

So as the time for which the level of support has been set passes, that level becomes fixed for the period of time which has passed. This is true whether the level has been set too high or too low or at nothing at all.

It is true that under exceptional circumstances it may be appropriate for the level of child support payments set by a divorce decree to be increased retroactively. But such circumstances do not exist in this case.

Such circumstances did exist, however, in the case of Rees v. Archibald, 6 U. 2d 264, 311 P.2d 788 (1957).

In that case, there was (1) a decree of divorce that did not mention child support at all, (2) granted on the grounds of desertion by the spouse from whom support was sought, (3) without any indication the divorce court had in personam jurisdiction over that spouse. In addition, the retroactively

increased support payments were to cover (4) an extra [illegible] expense, (5) for hospital and medical expenses, [illegible] suddenly and apparently before the decree could be modified.

In view of these facts, and emphasizing that the original divorce court apparently could not address the issue of child support, the ruling allowed assessment of those medical expenses.

None of those six circumstances existed in the instant matter. The Judgment of Divorce had a separate section entitled Support and Maintenance of Minor Children, not [illegible] child. And the Modification was solely concerned with child support. The issue was fully considered and adjudicated both times with both parties participating in the hearing and/or stipulation.

And the reason for the requested retroactive increase was not for a sudden, short-lived, one-time emergency. The [illegible] continued off and on for several years and nothing would indicate defendant could not have had a hearing for a temporary and/or permanent modification of the child support provision of the divorce decree.

Plaintiff had a right to rely on the fact that the level of her child support obligation was that level set by a binding court order. As time passed, that order and the effect of a judgment as to support [illegible] the [illegible] that had passed had just as much right to rely on the binding nature of that judgment as any other kind of judgment.

If defendant had sought to modify the Judgment of [illegible], plaintiff could have worked to resolve the situation [illegible] most satisfactory manner, perhaps by enforcement of the [illegible] award. But for defendant to ignore that proper procedure for these many years, and to now be entitled to thrust the cost of its unilateral solution upon the plaintiff, is highly prejudicial and contrary to the law of the State of Utah.

CONCLUSION

Although it is true that there is no order in existence requiring plaintiff to pay child support, it is not true that there is no court order setting the level of her child support obligation.

The issue of the level of plaintiff's child support obligation has been adjudicated by a court of competent jurisdiction and she has not been ordered to make support payments.

It is admitted that if circumstances have changed, the order may be modified and she may be ordered to make appropriate support payments. But such a modification cannot be made by defendant in administrative proceedings, nor can such a modification be made to apply retroactively.

Respectfully submitted this 14th day of September, 1983.

LYNN P. HEWARD
Attorney for Plaintiff

MAILING CERTIFICATE

I hereby certify that a true and exact copy of the foregoing Appellant's Brief (two copies) was mailed to Mr. Jeffrey H. Thorpe, 431 South 300 East, Suite 301, Salt Lake City, Utah 84111 on this 14th day of September, 1983, with postage attached thereon.

EXHIBIT A

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

LAWRENCE TABER,

Plaintiff

vs. No. 072-449

ROSEANN TABER,

Defendant

/

JUDGMENT OF DIVORCE

At a session of said Court held in the New Court Building in the City of Mt. Clemens, Michigan, on the 30 day of October, 1972.

PRESENT: HONORABLE _____
Circuit Judge

This cause having come on to be heard upon the Complaint filed therein, taken as confessed by the Defendant, and the proofs having been taken in open Court, from which it satisfactorily appears unto this Court that the material facts charged therein are true and that there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage relationship can be preserved.

On motion of MICHAEL J. CORY , Attorney for Plaintiff;

DIVORCE

IT IS HEREBY ORDERED AND ADJUDGED that this Court, by virtue of the authority herein vested and in pursuance of the statute in such case made and provided, DOTH ORDER AND ADJUDGE that the marriage between this Plaintiff, Lawrence Taber and the said Defendant, Roseann Taber be dissolved and the same is hereby dissolved accordingly.

CUSTODY OF MINOR CHILDREN

IT IS FURTHER ORDERED AND ADJUDGED that the care, custody, control and education of the minor children of the parties, to-wit:

MICHAEL ALLEN TABER Age: 5 yrs. Born: November 20, 1966

DAVID TABER Age: 3 yrs. Born: June 15, 1968

shall be and the same hereby is awarded to the Plaintiff, LAWRENCE TABER, until such time as each child has attained the age of eighteen (18) years or until further Order of the Court.

IT IS FURTHER ORDERED AND ADJUDGED that the care, custody, control and education of the minor child of the parties, to-wit:

KELSEY TABER Age: 5 months Born: August 11, 1971

shall be and the same hereby is awarded to the Defendant, ROSEANN TABER, until such time as the child has attained the age of eighteen (18) years or until further Order of the Court.

SUPPORT AND MAINTENANCE OF MINOR CHILDREN

IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff, LAWRENCE TABER, father of the children identified herein, shall pay to the Defendant, ROSEANN TABER for the support of KELSEY TABER, the sum of $30.00 per week, plus the said child's necessary hospital, medical and dental expenses, commencing as of the date of this Judgment and continuing until said child has attained the age of majority or graduates from High School, whichever is later, or, in exceptional circumstances, until further Order of the Court.

VISITATION OF MINOR CHILDREN

IT IS FURTHER ORDERED AND ADJUDGED that the Defendant, ROSEANN TABER, shall have such reasonable rights of visitation and temporary custody of said MICHAEL ALLEN TABER and DAVID TABER, that the Plaintiff, LAWRENCE TABER, shall have such reasonable rights of visitation and temporary custody of said KELSEY TABER as shall be commensurate with the best interests of the children and the normal parental rights and conveniences of the parties.

PRESERVATION OF ARREARAGES

IT IS FURTHER ORDERED AND ADJUDGED that any and all arrearages shall be and the same are hereby preserved.

RESIDENCE AND DOMICILE

IT IS FURTHER ORDERED AND ADJUDGED that if either of the parties hereto shall change his address at any time while this support schedule is operative, he shall immediately notify the Office of the Macomb County Friend of the Court of such change, it being understood by the Court that at the present time, Plaintiff's address is 822 Stanaberry Ave., Tooele, Utah, and Defendant's address is 2917 East 2965 South, Salt Lake City, Utah.

ALIMONY

IT IS FURTHER ORDERED AND ADJUDGED that the Defendant, ROSEANN TABER, is not entitled to alimony.

INSURANCE

IT IS FURTHER ORDERED AND ADJUDGED that any interest which either of the parties hereto may now have or may heretofore have had in any of the insurance contracts or policies of the other party, shall be and the same are hereby extinguished and that the parties hereto shall, in the future, hold all such insurance free and clear from any right, title or interest which the other party now has or may heretofore have had therein or thereto, by virtue of being the beneficiary, the contingent beneficiary or otherwise.

PROPERTY SETTLEMENT AND PROVISION IN LIEU OF DOWER

IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff, shall pay to the Defendant the sum of One Dollar ($1.00) and upon payment of said sum, the Defendant shall be forever barred from any dower interest in any property which the said Plaintiff now owns or may hereafter acquire.

IT IS FURTHER ORDERED AND ADJUDGED that each of the parties shall retain the personal effects now in their respective possessions.

IT IS FURTHER ORDERED AND ADJUDGED that the household furniture and furnishings now located on the premises at 822 Stanaberry Ave., Tooele, Utah, shall be and they are hereby declared to be the sole and separate property of the Defendant.

STATUTORY SERVICE FEES

IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff, LAWRENCE TABER, shall pay to the Macomb County Friend of the Court the sum of $1.50 per month, payable semi-annually, in advance, on January 2nd and July 2nd while this support account is operative. Initial payment for months preceding next regular due date shall be made forthwith.

EFFECTIVE DATE OF JUDGMENT

IT IS FURTHER ORDERED AND ADJUDGED that this Judgment shall become effective as of the date of its entry.

GEORGE [illegible]

CIRCUIT JUDGE

A True Copy

[illegible]

DEPUTY CLERK

EXHIBIT B

[redacted]

[redacted] COUNTY OF MACOMB

[redacted],

Plaintiff

vs.

No. D72-449

[redacted],

Defendant

ORDER MODIFYING JUDGMENT OF DIVORCE AS TO CHILD SUPPORT

At a session of said Court held in the New Court Building in the City of Mt. Clemens, Michigan, on the 21 day of February, 1973.

FILED
FEB 21 3 20 PM '73
[illegible] MICHIGAN

PRESENT: HONORABLE GEORGE R. DENEWETH, Circuit Judge.

This matter having come on to be heard upon the Stipulation of the Attorney for Plaintiff, and the Defendant herein, and the Court having apprised itself in the premises, now therefore;

IT IS ORDERED that all child support arrearages preserved in a Judgment of Divorce entered October 10, 1972, shall be and the same are hereby cancelled.

IT IS FURTHER ORDERED that the support provision of said Judgment of Divorce ordering Plaintiff to pay $30.00 per week shall be and the same is hereby abated until further order of this Court.

CIRCUIT JUDGE